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NOTE

The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits

Nonprofit corporations are an increasingly important part of the American economy. Although they control a "staggering"¹ amount of wealth, nonprofit corporations have received far less attention from scholars, courts, and legislatures than "for-profit" corporations.² In most states, including North Carolina, an important legal mechanism for discouraging mismanagement on the part of corporate directors and officers—the right to bring a derivative suit—is not given members of nonprofit corporations.³

Under existing law in North Carolina and most other states, a member who suspects that a nonprofit corporation director or officer has breached a duty to the corporation either must prevail on the directors to sue on behalf of the corporation or bring his complaint to the Attorney General's attention.⁴ When the directors are benefitting from the wrongdoing and the Attorney General's office is unresponsive, there is no redress for a wrong to the corporation. This Note examines the basis of derivative suits and analyzes the desirability of recognizing a right for members of nonprofit corporations in North Carolina to bring such suits. It concludes that recognition of such a right would provide a valuable means of supervising the management of many of the state's nonprofit corporations.⁵

A nonprofit corporation by definition is organized for a purpose other than the direct pecuniary gain of its incorporators or members.⁶ Unlike for-profit

1. Henn & Boyd, *Statutory Trends in the Law of Nonprofit Organizations: California, Here We Come!*, 66 CORNELL L. REV. 1103, 1104 n.3 (1981). One commentator has estimated that there are now at least as many nonprofit corporations as "for-profit" corporations in the United States. H. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS* 4 (4th ed. 1980). Nonprofit corporations are increasing in number. See J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 608-09 (1984); H. OLECK, *supra*, at 5-6; Tivnan, *Foundations: A Time for Review*, N.Y. Times, Sept. 9, 1984, § 6 (Magazine), at 135.

2. Henn & Boyd, *supra* note 1, at 1106-07. This Note will refer to general business corporations as "for-profit" corporations to distinguish them from nonprofit corporations. A for-profit corporation is organized for the pecuniary profit of its shareholders, although it may never in fact earn profits. See 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 68 (rev. perm. ed. 1983); H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* § 1, at 2-3 (3d ed. 1983). Conversely, a nonprofit corporation may earn profits, but is forbidden to distribute them to its members. See *infra* notes 6-10 and accompanying text.

3. See H. OLECK, *supra* note 1, at 1149-50; see also Goshien, *Relocation of Publicly Supported Charitable Organizations*, 19 CLEV. ST. L. REV. 316 (1970) (discussing supervision of charitable nonprofit corporations). This Note will refer to those participating in for-profit corporations as "shareholders," while referring to participants in nonprofit corporations as "members."

4. See *infra* notes 74-82 and accompanying text.

5. Legislation amending North Carolina's Nonprofit Corporation Act, N.C. GEN. STAT. §§ 55A-1 to -89.1 (1982), to provide procedures for derivative suits by members and directors has been proposed by the General Statutes Commission and introduced in the General Assembly. H. 939, 1st Sess. (1985).

6. 1 W. FLETCHER, *supra* note 2, § 68. The Model Non-Profit Corporation Act of the Ameri-

corporations, nonprofit corporations cannot distribute profits or net income to their members, officers, or directors⁷ and are prohibited from issuing shares of stock or paying dividends to those who have contributed capital.⁸ All income must be retained and used to advance the purpose of the corporation.⁹ Directors or officers of such a corporation may receive only reasonable compensation for services they render to the corporation.¹⁰ This broad definition allows a wide variety of associations to incorporate as nonprofits, including organizations for charitable or altruistic purposes,¹¹ religious groups, social clubs, and homeowner associations.¹²

Today most states have statutes that deal explicitly with nonprofit corpora-

can Bar Association and American Law Institute defines a nonprofit corporation as "a corporation no part of the income or profit of which is distributable to its members, directors or officers." MODEL NON-PROFIT CORPORATION ACT § 2 (1980), *reprinted in* 1 W. FLETCHER, *supra* note 2, § 2.75 [hereinafter cited as MODEL ACT].

7. MODEL ACT, *supra* note 6, § 2(c); see 1 W. FLETCHER, *supra* note 2, § 68; H. OLECK, *supra* note 1, at 17; Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 501 (1981).

8. 1 W. FLETCHER, *supra* note 2, § 68.

9. *Id.* Many states permit distribution of assets to members upon dissolution. North Carolina's Nonprofit Corporation Act authorizes distribution to members upon dissolution of the corporation if the corporation's charter or by-laws so provide. N.C. GEN. STAT. § 55A-45(4) (1982). Assets received subject to limitations on their use, such as donations for a specific charitable purpose, must upon dissolution be transferred or conveyed to an organization "engaged in activities substantially similar to those of the dissolving corporation." *Id.* § 55A-45(3). This provision is a variation of the equitable doctrine of *cy pres*, which allows a court to order that charitable trust funds be applied in a manner different from—but as close as possible to—the settlor's express directions when accomplishment of the original purpose of the trust has become impossible or impracticable. G.G. BOGERT & G.T. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* § 147 (5th ed. 1973); M. FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT* 31-34, 127-28 (1965); Haskell, *The University as Trustee*, 17 GA. L. REV. 1, 6-8 (1982).

10. 1 W. FLETCHER, *supra* note 2, § 68; Hansmann, *supra* note 7, at 501.

11. A founder can organize a charity either as a charitable trust or a nonprofit corporation. J. DUKEMINIER & S. JOHANSON, *supra* note 1, at 608. Approximately two-thirds of all charities are organized as corporations. *Id.* at 608-09. According to Professor Haskell, the corporate form is preferred more by charities that operate an organization such as a hospital, school, or church than charities that invest money to subsidize charitable undertakings. P. HASKELL, *PREFACE TO THE LAW OF TRUSTS* 77 (1975). The corporate form protects trustees of charitable organizations from the harsh rules of personal liability in contract and tort actions. See *id.* at 130-34; see generally Henn & Pfeifer, *Nonprofit Groups: Factors Influencing Choice of Form*, 11 WAKE FOREST L. REV. 181 (1975) (discussing factors to be weighed by a nonprofit group choosing its form and recommending that most groups give serious consideration to incorporation).

12. H. BALLANTINE, *BALLANTINE ON CORPORATIONS* § 7 (rev. ed. 1946). The Model Non-Profit Corporation Act provides that a nonprofit corporation may be organized:

for any lawful purpose or purposes, including, without being limited to, any one or more of the following purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial or trade association; but labor unions, cooperative organizations, and organizations subject to any of the provisions of the insurance laws of this State may not be organized under this Act.

MODEL ACT, *supra* note 6, § 4.

Schemes for classifying nonprofit corporations can be complex. Hansmann, *supra* note 7, at 502-04, for example, places nonprofit corporations into four categories according to whether the corporation receives most of its income from donations and contributions or from charging for the services it provides and whether the corporation is controlled by its donors or by a centralized group of managers. Cf. CAL. CORP. CODE §§ 5.000-10.841 (West 1977 & Supp. 1985) (California Non-profit Corporation Law divides nonprofit corporations into three categories according to purpose: mutual benefit, religious, or public benefit.).

tions.¹³ Many of these acts are based on the Model Non-Profit Corporation Act of the American Bar Association and American Law Institute.¹⁴ Despite the proliferation of statutes governing nonprofits, the law of nonprofit corporations is considerably less developed than the law of for-profit corporations.¹⁵ This relative lack of development is due in part to the close relationship between charitable nonprofit corporations and charitable trusts.¹⁶ Because of the similarities between charitable trusts and charitable corporations, courts fashioning rules for charitable corporations frequently borrow from the law of trusts when the state has no nonprofit statute or when its statute is silent on the matter at issue.¹⁷

The law pertaining to charitable nonprofits—and with it the law of nonprofit corporations in general—thus evolved into a hybrid of corporate and trust principles.¹⁸ For example, courts have disagreed over the duty of loyalty to which directors of nonprofit corporations should be held. A trustee traditionally is held to a higher loyalty standard than a director of a for-profit corporation.¹⁹ When the conduct of a nonprofit's director is in question, some courts apply a

13. See 1 W. FLETCHER, *supra* note 2, § 2.65 (listing states having such statutes).

14. North Carolina's Nonprofit Corporation Act, N.C. GEN. STAT. §§ 55A-1 to -89.1 (1982) is among the state acts based on the Model Act. R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE 5 n.1 (3d ed. 1983). As of 1983, 37 other states had enacted nonprofit corporation acts based on the Model Act. See 1 W. FLETCHER, *supra* note 2, § 2.65. The Model Non-Profit Corporation Act was approved in 1952 and currently is being revised. H. HENN & J. ALEXANDER, *supra* note 2, § 1, at 3 n.4.

15. See Leshner, *The Non-profit Corporation—A Neglected Stepchild Comes of Age*, 22 BUS. LAW. 951, 951 (1967).

16. Whereas a private trust may be established to benefit one or more individuals, a charitable trust is created to accomplish a "substantial" benefit to a reasonably large portion of the public. G.G. BOGERT & G.T. BOGERT, *supra* note 9, § 54. A charitable trust also must advance one of several judicially recognized charitable purposes, which include the relief of poverty, the advancement of religion, the advancement of health, the advancement of government purposes, and other purposes of benefit to the community. *Shenandoah Valley Nat'l Bank v. Taylor*, 192 Va. 135, 63 S.E.2d 786 (1951); *Haskell*, *supra* note 9, at 3. If the trust serves one of these purposes, it need not benefit directly a large group, because it will benefit indirectly the entire community. Thus, a trust to provide college scholarships to only a few people each year is a valid charitable trust because it advances education and benefits the community as a whole. J. DUKEMINIER & S. JOHANSON, *supra* note 1, at 588.

A charitable nonprofit corporation may be established to serve one of the recognized purposes of a charitable trust. P. HASKELL, *supra* note 11, at 78. A corporation also may be considered "charitable" by the public although it serves a purpose other than those considered charitable under trust law. *Id.*

17. See M. FREMONT-SMITH, *supra* note 9, at 41; Note, *The Charitable Corporation*, 64 HARV. L. REV. 1168, 1168 (1951).

18. According to one court, "the charitable corporation is a relatively new legal entity which does not fit neatly into the established common law categories of corporation and trust." *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974); see Note, *supra* note 17, at 1168. Confusion has been furthered by the decisions of some courts that a charitable corporation holds its assets in trust for the benefit of the community. See cases cited in *Haskell*, *supra* note 9, at 4 n.11. Another source of confusion is the practice of designating directors of charitable corporations as "trustees." See Note, *supra* note 17, at 1168-69.

19. The duty of loyalty applied to trustees precludes self-dealing. G.G. BOGERT & G.T. BOGERT, *supra* note 9, § 543; P. HASKELL, *supra* note 11, at 98-102; Note, *The Fiduciary Duties of Loyalty and Care Associated With the Directors and Trustees of Charitable Organizations*, 64 VA. L. REV. 449, 451-52 (1978). Self-dealing by a director of a for-profit corporation, however, generally is valid if approved by a majority of the shareholders acting with full disclosure, if approved by a disinterested majority of the board of directors upon full disclosure, or if the transaction is fair. H. HENN & J. ALEXANDER, *supra* note 2, at 637-44; Note, *supra*, at 452-53.

trust standard of loyalty²⁰ or another standard stricter than that applicable to a business corporation director.²¹

The rights of members of nonprofit corporations also are somewhat uncertain. The Model Non-Profit Corporation Act defines a "member" as "one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or by-laws."²² The Act also provides that members may be given voting rights, including the right to elect directors.²³ Under the Act a corporation may have no members or may have members with no voting rights; in either case the directors have sole voting power.²⁴ The designation of members with voting rights is particularly convenient when those contributing to the organization are likely to expect a voice in corporate management, as with nonprofit organizations such as social clubs and homeowner associations, which

20. See, e.g., *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 723-24, 49 N.E.2d 220, 223 (1943).

21. See, e.g., *Mountain Top Youth Camp, Inc. v. Lyon*, 20 N.C. App. 694, 202 S.E.2d 498 (1974). In *Lyon* the court held that self-dealing by a charitable corporation's directors or officers is not automatically void. *Id.* at 697, 202 S.E.2d at 500. Although it can be ratified by the corporation, the transaction is void per se when there has been no disclosure, and the directors or officers may not raise a defense of fairness. But see *Fowle Memorial Hosp. Co. v. Nicholson*, 189 N.C. 44, 49, 126 S.E. 94, 97 (1925) (applying for-profit corporation standard to an allegation of self-dealing on part of a director of a nonprofit hospital corporation).

Some of the same uncertainty exists about the standard of care to be applied to nonprofit directors and officers. Under the for-profit corporation standard of care, a director or officer must exercise the care of an ordinarily prudent person under similar circumstances and is given the benefit of the business judgment rule when transactions result in loss to the corporation. *H. HENN & J. ALEXANDER*, *supra* note 2, § 232, at 613, 661-63. A trustee, on the other hand, is held to the standard of care usually expressed as "that of a prudent man dealing with his own property." *G.G. BOGERT & G.T. BOGERT*, *supra* note 9, § 93. The trust standard is stricter in application, and there is no counterpart to the business judgment rule. *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974); Note, *supra* note 19, at 453-54.

Courts have applied the trust standard of care to nonprofit directors. See, e.g., *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 49 N.E.2d 220 (1943). There is authority, however, for applying the same standard of care to nonprofit directors and officers as to for-profit directors and officers. *Stern*, 381 F. Supp. at 1013; *Pasley, Non-Profit Corporations—Accountability of Directors and Officers*, 21 BUS. LAW. 621, 638 (1966). Some commentators have argued that because nonprofit directors often serve without compensation, they should be held to a standard of care even more lenient than that applied to for-profit directors (such as liability only for gross negligence). See *id.* at 622-27; Note, *supra* note 17, at 1174. The Uniform Management of Institutional Funds Act provides that the managers of organizations for educational, religious, or charitable purposes shall be held to the same standard of care as directors of for-profit corporations. UNIF. MANAGEMENT OF INSTITUTIONAL FUNDS ACT § 6, 7A U.L.A. 421 (1978). The Act has been adopted in about half the states, but not in North Carolina. See *id.* § 5, 7A U.L.A. at 405. Although the *Lyon* decision delineates the standard of loyalty for directors and officers of nonprofit corporations in North Carolina, there is no case law in North Carolina addressing the standard of care for nonprofit corporation directors.

22. MODEL ACT, *supra* note 6, § 2(f); see also N.C. GEN. STAT. § 55A-2(7) (1982) (identical definition of "members").

23. MODEL ACT, *supra* note 6, § 2(f); see also N.C. GEN. STAT. §§ 55A-20(c), -32 (1982) (similar provisions).

24. MODEL ACT, *supra* note 6, § 2(f); see *Hansmann, supra* note 7, at 502 (noting that most statutes provide for a self-perpetuating board of directors in the event that a nonprofit corporation gives its members no voting rights or has no members). North Carolina's Nonprofit Corporation Act also provides that the corporation may have no members, or may have members with no voting rights. N.C. GEN. STAT. § 55A-29(a) (1982). If there are no members or they cannot vote, the directors are to be "elected or appointed in the manner and for the terms as provided in the bylaws." *Id.* § 55A-20(c).

are organized for the mutual benefit of their members.²⁵ The designation of members, however, is not limited to mutual benefit nonprofits.²⁶

When members of a nonprofit corporation have a right to elect directors and vote on major corporate matters, they are similar to shareholders. Courts and legislatures, however, have not extended to members one of the principal tools shareholders use to oversee corporate managers—the right to bring a derivative suit against a director or officer.

In a derivative suit, a shareholder sues not on his own rights, but on behalf of the corporation.²⁷ The shareholder is the nominal plaintiff and the corporation is the real party in interest.²⁸ In a for-profit corporation, a shareholder may be unable to prevail on the corporation to sue on its own behalf; the wrongdoers may be in control of the corporation or a majority of the shareholders may be benefitting from the wrongful acts.²⁹ Even if a shareholder could prevail on the majority to elect directors who would sue on the corporation's behalf, such an effort would be expensive and time-consuming for a large, publicly held corporation.³⁰ Recognizing the potential for an unredressed wrong to the corporation, courts of equity historically allowed shareholders to sue on behalf of the corporation.³¹

25. H. BALLANTINE, *supra* note 12, § 7.

26. For example, a charitable nonprofit corporation may designate contributors of a certain amount as "members" or even "life members." A charitable nonprofit corporation is less likely to designate members, however, than a mutual benefit nonprofit corporation simply because donors to a charitable enterprise usually do not expect the right to elect directors and other privileges that generally are incidents of "membership." When a charitable nonprofit designates donors as members, the common-law rules on donor standing govern whether members can sue managers. *See infra* note 114 and cases cited *infra* note 41. *But see* cases cited *infra* note 73.

27. 13 W. FLETCHER, *supra* note 2, § 5939. The derivative cause of action stems from a wrong to the corporation as a whole and must be distinguished from a direct cause of action arising from a wrong to the shareholder. In general, a breach of the membership contract between the shareholder and the corporation gives rise to an individual or direct cause of action whereas a derivative claim arises when there has been a breach of a duty owed to the corporation. H. HENN & J. ALEXANDER, *supra* note 2, § 360, at 1048. This distinction may be difficult to make because performance of the shareholders' membership contract is one aspect of the duty that management owes the corporation. *Id.* § 360, at 1049. Among the claims usually deemed to give rise to direct or individual shareholder actions are suits to compel payment of declared or mandatory dividends, suits to enforce a right to inspect corporate books, suits to enforce the right to vote, and suits to enjoin a threatened wrong before its consummation. *Id.* In contrast, actions to recover damages from a consummated ultra vires act and actions to recover damages from directors or officers for mismanagement of the business, appropriation of corporate funds or corporate opportunities, sale of control, and other breaches of duties owed to the corporation all have been held to give rise to a derivative rather than a direct shareholder action. *Id.* § 360, at 1049-50.

28. 13 W. FLETCHER, *supra* note 2, § 5939.

29. W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 888 (5th ed. 1980); H. HENN & J. ALEXANDER, *supra* note 2, § 358, at 1036 n.1.

30. W. CARY & M. EISENBERG, *supra* note 29, at 886.

31. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970). For an early case recognizing a derivative suit and discussing the rationale behind such a cause of action, see *Hawes v. Oakland*, 104 U.S. 450 (1882). Professor Prunty argues that recognition of the derivative suit followed from the application of two bodies of law to an action by a shareholder: the trust law theory that a director is a trustee for the shareholders and the doctrine of the "corporate entity," which recognizes that the corporation is a separate right-holding entity. Prunty, *The Shareholders' Derivative Suit: Notes on its Derivation*, 32 N.Y.U. L. REV. 980, 986-90 (1957). When only the rights of the corporation are at stake, the shareholder has no individual cause of action and must sue in a derivative or representative capacity. *Id.*

As elaborated in the cases, one precondition for the suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand Thus the dual nature of the stockholder's action: first the plaintiff's right to sue on behalf of the corporation and, second, the merits of the corporation's claim itself.³²

As derivative suits became more common, they proved subject to abuse by plaintiffs who sued not to recover on behalf of the corporation but to extract a lucrative settlement from the corporation.³³ In response courts and legislatures attempted to curb such "strike suits" by limiting the derivative suit.³⁴ The following requirements were added: that the plaintiff be a shareholder at the time of the challenged transaction;³⁵ that the shareholder demand that the directors bring suit on behalf of the corporation unless such a demand would be futile;³⁶ that the shareholder post a security bond for the defendants' litigation expenses;³⁷ and that any recovery, including a settlement, go to the corporation rather than to the individual shareholder.³⁸

The shareholder derivative suit has become a successful technique for discouraging mismanagement and abuse of fiduciary duties.³⁹ It has remained, however, primarily a device for calling managers of for-profit corporations to account; a similar action generally has not been available against a director or officer of a nonprofit corporation. Most nonprofit statutes are silent on whether a member may bring a derivative suit; consequently, the limits on such suits stem primarily from the common law.⁴⁰ When members of charitable nonprofits have attempted to bring derivative suits, some courts have denied them standing by analogy to the rule that only the attorney general can sue to enforce charitable trusts.⁴¹ Courts also have denied standing to members of noncharita-

32. *Ross v. Bernhard*, 396 U.S. 531, 534-35 (1970).

33. W. CARY & M. EISENBERG, *supra* note 29, at 888; H. HENN & J. ALEXANDER, *supra* note 2, § 358, at 1039; see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741-43 (1975) (even a plaintiff with a patently groundless claim may extract a settlement from a corporation since the plaintiff can threaten extensive discovery and disruption of corporate business).

34. H. HENN & J. ALEXANDER, *supra* note 2, § 358, at 1039-40. These limits are unique to the shareholder derivative action. *Id.*

35. This provision prevents a plaintiff from buying a cause of action. W. CARY & M. EISENBERG, *supra* note 29, at 914-17; H. HENN & J. ALEXANDER, *supra* note 2, § 362, at 1048.

36. See W. CARY & M. EISENBERG, *supra* note 29, at 926-27; H. HENN & J. ALEXANDER, *supra* note 2, § 365, at 1069-70.

37. This requirement may be limited to shareholders with holdings below a prescribed minimum. If the plaintiff is unsuccessful, he forfeits the bond. According to Henn and Alexander, the bond requirement saddles an unsuccessful small shareholder with the expenses of both sides of the litigation—"an awesome and rather unique situation." H. HENN & J. ALEXANDER, *supra* note 2, § 372, at 1092.

38. This requirement lessens a plaintiff's motivation to bring a strike suit, but does not lessen the motivation of a plaintiff's attorney, who may be the actual instigator of the suit and may hope that the court will allow him generous fees out of any recovery. See *id.* § 372, at 1093 n.22.

39. W. CARY & M. EISENBERG, *supra* note 29, at 888.

40. See *supra* notes 27-38 and accompanying text.

41. See, e.g., *Lopez v. Medford Community Center*, 384 Mass. 171, 175, 424 N.E.2d 229, 232 (1981) (only attorney general can initiate judicial proceedings to correct abuses in administration of public charities); *Dillaway v. Burton*, 256 Mass. 568, 574, 153 N.E. 13, 16-17 (1926) (member of a charitable corporation is without standing to sue to enjoin alleged unlawful acts of "trustees" of corporation because plaintiff's complaint concerns public interest rather than his private interest as a

ble nonprofit corporations, without distinguishing between the charitable and noncharitable purposes of the two types of corporations.⁴²

During the past twenty years, the New York and California legislatures and the courts of several other states have reversed the common-law ban on derivative suits by members of nonprofit corporations. New York's Not-For-Profit Corporation Law (N-PCL), enacted in 1969, provides that:

An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members or capital certificate holders of record or owners, not of record, of a beneficial interest in the capital certificates of such corporation.⁴³

The N-PCL is designed to parallel New York's Business Corporation Law (BCL).⁴⁴ Accordingly, the nonprofit derivative suit provisions are modeled after the BCL provisions for shareholder derivative suits against directors and officers.⁴⁵ A derivative action under the N-PCL must meet the following requirements: the plaintiffs must have been members at the time the action was brought;⁴⁶ the complaint must allege with particularity the plaintiffs' efforts to secure board action prior to suit;⁴⁷ the action must not be compromised or settled without court approval;⁴⁸ and the court may award expenses to the plaintiffs if the action is successful.⁴⁹

The New York N-PCL, however, differs from the BCL derivative suit pro-

member); *Voelker v. St. Louis Mercantile Library Ass'n*, 359 S.W.2d 689, 694-95 (Mo. 1962) (charitable corporation is subject to the principles applicable to charitable trusts, and because a charitable corporation is organized for benefit of others, its members do not have pecuniary interest analogous to that of shareholders); *Carroll v. City of Beaumont*, 18 S.W.2d 813, 820 (Tex. Civ. App. 1929) (attorney general is the proper party to sue on behalf of a charitable corporation).

The power to enforce a charitable trust, which includes the right to call the trustee to account for any breach of his fiduciary obligations, historically rested with the attorney general as the representative of the public at large. *M. FREMONT-SMITH*, *supra* note 9, at 198. Unlike the beneficiary of a private trust, members of the public have been denied the right to sue to enforce a charitable trust under the rationale that the unlimited grant of this right would expose the trustee to vexatious lawsuits and overburden the courts. *G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES* § 414, at 436 (rev. 2d ed. 1977); *M. FREMONT-SMITH*, *supra* note 9, at 87. For a discussion of the right of a charitable corporation's beneficiaries to bring a derivative suit, see *infra* note 114.

42. *Hansmann*, *supra* note 7, at 606. *Hansmann* notes that some courts group charitable corporations within the single category of "charities" and thus should be willing to apply a different standing rule to noncharitable nonprofits. He notes, however, that "the courts apparently do not pay much attention to the distinction." *Id.*

43. N.Y. NOT-FOR-PROFIT CORP. LAW § 623(a) (McKinney Supp. 1984-85).

44. *Henn & Boyd*, *supra* note 1, at 1114; see Joint Legislative Committee to Study Revision of Corporation Laws xvi, in N.Y. NOT-FOR-PROFIT CORP. LAW (McKinney 1970). The corresponding for-profit corporation statute sections are N.Y. BUS. CORP. LAW §§ 1-2001 (McKinney 1963).

45. N.Y. NOT-FOR-PROFIT CORP. LAW § 623, note on legislative studies and reports (McKinney 1970).

46. *Id.* § 623(b) (McKinney 1970). The corresponding BCL provision is N.Y. BUS. CORP. LAW § 626(b) (McKinney 1963).

47. N.Y. NOT-FOR-PROFIT CORP. LAW § 623(c) (McKinney 1970). The corresponding BCL provision is N.Y. BUS. CORP. LAW § 626(c) (McKinney 1963).

48. N.Y. NOT-FOR-PROFIT CORP. LAW § 623(d) (McKinney 1970). The corresponding BCL provision is N.Y. BUS. CORP. LAW § 626(d) (McKinney 1963).

49. N.Y. NOT-FOR-PROFIT CORP. LAW § 623(e) (McKinney Supp. 1984-85). The corresponding BCL provision is N.Y. BUS. CORP. LAW § 626(e) (McKinney 1963).

visions in three respects. Although section 627 of the BCL requires a shareholder holding less than five percent of any class of outstanding shares to post security for "reasonable expenses" incurred by the defendants,⁵⁰ the N-PCL contains no analogous provision. Instead, the N-PCL states that a member derivative action cannot be brought by fewer than five percent of any class of members.⁵¹ The comments to the N-PCL indicate that the drafters believed the five percent limit was needed in the absence of a security-for-expenses requirement, presumably to reduce the risk of vexatious litigation.⁵² In addition, the N-PCL contains no equivalent to the contemporaneous ownership rule.⁵³ The drafters apparently believed that a membership version of the contemporaneous ownership rule—generally a guard against strike suits⁵⁴—was unnecessary in light of the five percent requirement.⁵⁵

California's Nonprofit Corporation Law (NCL)⁵⁶ divides nonprofit corporations into three types—"mutual benefit," "public benefit," and "religious"⁵⁷—and provides for derivative suits by members of "public benefit" and "mutual benefit" corporations.⁵⁸ The NCL parallels the state's provisions for shareholder derivative suits in many respects. Like the California General Corporation Law (GCL),⁵⁹ the NCL includes a contemporaneous membership rule⁶⁰ and a requirement that the plaintiff allege with particularity his efforts to secure action by the board.⁶¹ The NCL also authorizes the court to grant a defendant's motion requiring the plaintiff to provide up to \$50,000 as security for the defend-

50. N.Y. BUS. CORP. LAW § 627 (McKinney Supp. 1984-85). The plaintiff need not provide security for expenses if the value of his shares exceeds \$50,000. *Id.*

51. N.Y. NOT-FOR-PROFIT CORP. LAW § 623(a) (McKinney Supp. 1984-85).

52. *Id.* § 623, note on legislative studies and reports; Note, *New York's Not-For-Profit Corporation Law*, 47 N.Y.U. L. REV. 761, 787-88 (1972). For a criticism of the five percent limit, see Henn & Boyd, *supra* note 1, at 1124. Professors Henn and Boyd argue that the five percent requirement is "overly burdensome" and "likely to stifle many meritorious actions." *Id.*

53. Section 626(b) of the BCL states that the plaintiff must have been a shareholder "at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law." N.Y. BUS. CORP. LAW § 626(b) (McKinney 1963).

54. See *supra* note 35.

55. The "contemporaneous ownership" provision in paragraph (b) of section 626 of the Bus. Corp. L. has been eliminated in the new law as inappropriate for not-for-profit corporations, since the likelihood is remote that an interest in such corporations would be purchased solely for the purpose of initiating a derivative suit.

N.Y. NOT-FOR-PROFIT CORP. LAW § 623, note on legislative studies and reports (McKinney 1970); see Henn & Boyd, *supra* note 1, at 1123 n.158.

56. CAL. CORP. CODE §§ 5000-10841 (West Supp. 1985). The statute went into effect in 1980. Nonprofit Corporation Law, ch. 567, 1978 Cal. Stat. 1740.

57. CAL. CORP. CODE §§ 5059-5061 (West Supp. 1985). For a discussion of the public policy and first amendment considerations that caused the drafters to distinguish religious corporations, see Hone, *California's New Nonprofit Corporation Law—An Introduction and Conceptual Background*, 13 U.S.F.L. REV. 733 (1979).

58. CAL. CORP. CODE §§ 5710, 7710 (West Supp. 1985). The statute also provides for derivative suits by directors of corporations that have no members. *Id.* §§ 5310(b), 7310(b)(2); see also *infra* note 114 (discussing statutory and judicial recognition of the right of directors to bring a derivative suit).

59. CAL. CORP. CODE §§ 1-2319 (West 1977 & Supp. 1985).

60. *Id.* §§ 5710(b)(1) (public benefit corporations), 7710(b)(1) (mutual benefit corporations). The corresponding provision of the GCL is *id.* § 800(b)(1).

61. *Id.* §§ 5710(b)(2), 7710(b)(2). The corresponding provision of the GCL is *id.* § 800(b)(2).

ant's litigation expenses;⁶² a corresponding provision is contained in the GCL.⁶³ Unlike the GCL, the NCL states that no security shall be required if the action is brought by 100 or more members or by some other "authorized number."⁶⁴

Courts in several jurisdictions also recently have recognized the right of members to bring derivative suits on behalf of nonprofit corporations. In most of the decisions, the courts have reasoned that common-law precedent giving shareholders a derivative suit right conferred such a right on members of nonprofit corporations by implication and that this right continues until the state's legislature, through the corporation laws, expressly denies it. In *Bourne v. Williams*⁶⁵ the Tennessee Court of Appeals held that members of a property owners association organized as a nonprofit corporation had standing to sue the directors for wasting corporate assets for personal gain. The court examined the "well developed" common law that established a shareholder's right to a derivative suit and held that "[i]t has . . . been established as part of the general law of corporations that members of nonprofit corporations have the same rights in this regard as stockholders of corporations for profit."⁶⁶ In response to defendants' argument that the statute recognizing derivative suits referred only to actions on behalf of a "corporation for profit,"⁶⁷ the court noted that other sections of the same chapter used the term "member" and "shareholder" simultaneously.⁶⁸ Thus, the statute "clearly indicate[d] . . . that the drafters had in mind a nonprofit corporation, as well as a corporation for profit."⁶⁹

Similarly, in *Atwell v. Bide-A-Wee Home Association*,⁷⁰ decided by the New York Supreme Court prior to the effective date of the N-PCL, a member of a nonprofit homeowner association was held to have standing to sue the directors.⁷¹ At the time of the decision the derivative suit provisions of the Business Corporation Law referred only to shareholders.⁷² Because some types of corporations were excluded expressly from the Business Corporation Law and nonprofit corporations were not among these, the court reasoned that nonprofits

62. *Id.* §§ 5710(d), 7710(d).

63. *Id.* § 800(d).

64. *Id.* §§ 5710(a), 7710(a). Section 5036 defines "authorized number" to be five percent of the voting power or

[w]here (disregarding any provision for cumulative voting which would otherwise apply), the total number of votes entitled to be cast for a director is 1,000 or more, but less than 5,000 the authorized number shall be 2-1/2 percent of the voting power, but not less than 50.

Where . . . the total number of votes entitled to be cast for a director is 5,000 or more, the authorized number shall be one-twentieth of 1 percent of the voting power, but not less than 125.

Id. § 5036(b)-(c).

65. 633 S.W.2d 469 (Tenn. Ct. App. 1981).

66. *Id.* at 471-72.

67. *Id.* at 472.

68. *Id.*

69. *Id.*

70. 59 Misc. 2d 321, 299 N.Y.S.2d 40 (Sup. Ct. 1969).

71. *Id.* at 324, 299 N.Y.S.2d at 43.

72. *Id.* at 323, 299 N.Y.S.2d at 42.

impliedly were within the statute.⁷³

North Carolina's Nonprofit Corporation Act⁷⁴ makes no provision for derivative suits by members of nonprofit corporations. It does, however, authorize the Attorney General to oversee nonprofit corporations under some circumstances. Section 55A-50 of the Act grants the Attorney General authority to bring an action for involuntary dissolution of the corporation⁷⁵ on several grounds,⁷⁶ including the ground that the corporation has "continued to exceed or abuse the authority conferred upon it by law, to the injury of the public, or of its members, creditors, or debtors"⁷⁷ Section 55A-51 imposes a duty on the Attorney General to bring such an action whenever he has reason to believe

73. *Id.* at 322-23, 299 N.Y.S.2d at 41; *see also* *Wickes v. Belgian Am. Educ. Found.*, 266 F. Supp. 38 (S.D.N.Y. 1967) (neither New York nor Delaware law prohibited plaintiffs, who were members and directors of a charitable nonprofit corporation, from bringing a derivative suit); *Valle v. North Jersey Auto. Club*, 125 N.J. Super. 302, 310 A.2d 518 (Ch. Div. 1973) (the word "shareholder" in the statute recognizing a derivative action included members of nonprofit corporations), *modified*, 74 N.J. 109, 376 A.2d 1192 (1977); *Leeds v. Harrison*, 7 N.J. Super. 558, 570, 72 A.2d 371, 377 (Ch. Div. 1950) (members of a charitable nonprofit corporation had standing to bring a derivative suit because "[t]he same rights and liabilities exist between the trustees of a non-profit corporation and the members as exist between the directors and stockholders of a corporation for profit").

74. N.C. GEN. STAT. §§ 55A-1 to -89.1 (1982). The Act was enacted in 1955 and took effect in 1957. Nonprofit Corporation Act, ch. 1230, 1955 N.C. Sess. Laws 1239. It defines "member" as "one having membership rights in a corporation in accordance with the provisions of its charter or bylaws." N.C. GEN. STAT. § 55A-2(7) (1982). The Act also provides that a nonprofit corporation "may have one or more classes of members or may have no members." *Id.* § 55A-29(a). If a nonprofit corporation does not have members or does not allow members to vote for directors, the directors are to be elected or appointed in the manner and for the terms as provided in the bylaws. *Id.* § 55A-20(c). Prior to the enactment of this Act, nonprofit corporations in North Carolina were governed by the provisions of the General Corporation Act. R. ROBINSON, *supra* note 14, at 5 n.4.

75. An involuntary dissolution is a court-ordered wind-up of the corporation's business affairs that ends the corporation's legal existence. *See* H. HENN & J. ALEXANDER, *supra* note 2, § 280, at 751-55, § 382, at 1148. In North Carolina the Attorney General may bring an action for involuntary dissolution of a for-profit corporation on grounds that it: procured its charter by fraud; refuses to produce books, records, or documents; has abused its authority; or has failed to maintain a registered agent or office. N.C. GEN. STAT. § 55-122 (1982). A shareholder may bring such an action on the following grounds: that the directors are deadlocked; that the shareholders are deadlocked; that the shareholders have actual notice of written agreement allowing dissolution; or that dissolution is "reasonably necessary" to protect the interests of the complaining shareholder. *Id.* § 55-125(a)(1)-(4) (1982 & Cum. Supp. 1983). A creditor also can bring an action for involuntary dissolution in some situations. *See id.* § 55-125(b). *See generally* R. ROBINSON, *supra* note 14, at 425-40 (discussing in detail the grounds and procedures for an involuntary dissolution decree).

76. N.C. GEN. STAT. § 55A-50(1)-(5) (1982). The grounds for involuntary dissolution are:

- (1) The corporation procured its charter through fraud; or
- (2) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law, to the injury of the public, or of its members, creditors, or debtors; or
- (3) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days to appoint and maintain a registered agent in this State, as required by G.S. 55A-11; or
- (4) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change, as required by G.S. 55A-12; or
- (5) The corporation has without justification refused to comply with a final court order for the production of its books, records, or other documents as required to be kept by G.S. 55A-27.

Id.

77. *Id.* § 55A-50(2).

that the case "involves the public interest."⁷⁸ Additionally, the laws governing trusts and trustees⁷⁹ give the Attorney General authority to bring an action in the name of the State against the trustees when "there is reason to believe that the property has been mismanaged through negligence or fraud"⁸⁰ and to administer a charitable trust should the settlor's intent become impossible to fulfill.⁸¹ North Carolina has no express statutory provision for member derivative suits, and North Carolina courts have not yet recognized such a cause of action.⁸²

Under existing North Carolina law, members of a nonprofit corporation who believe management has breached a duty to the corporation have only two options. They cannot sue in their own right if the injury is to the corporation,⁸³ but can use their voting power to remove the wrongdoers from office and then prevail on the corporation to sue the directors or officers to recover damages. Alternatively, members can report their complaint to the Attorney General's office which will investigate and, if warranted, bring an enforcement action.⁸⁴

These options may limit severely members' ability to redress a wrong to the corporation. If a majority of the members are indifferent or are benefitting from the breach of duty, the complaining member may not be able to prevail on the corporation to sue.⁸⁵ Limits on the resources of the Attorney General's office may make it equally unresponsive. Several commentators have argued that state attorneys general lack both the finances and the incentive to oversee effectively nonprofit corporation managers.⁸⁶ In a decision recognizing the right of minority directors to bring derivative suits on behalf of a charitable corporation, the California Supreme Court noted that "[t]he Attorney General may not be in a position to become aware of wrongful conduct or be sufficiently familiar with the

78. *Id.* § 55A-51.

79. *Id.* §§ 36A-1 to -115.

80. *Id.* § 36A-48.

81. *Id.* § 36A-53(a). North Carolina common law also gives the Attorney General authority to enforce charitable trusts. See Sigmund Sternberger Found., Inc. v. Tannenbaum, 273 N.C. 658, 678-79, 161 S.E.2d 116, 131 (1968); see also Edmisten, *The Common Law Powers of the Attorney General of North Carolina*, 9 N.C. CENT. L.J. 1, 24-25 (1977) (discussing the statutory and common-law powers of the Attorney General to oversee charitable trusts). See generally Hansmann, *supra* note 7, at 600 ("Virtually all states authorize the attorney general, either by common law or by statute, to ensure that the managers of charitable organizations fulfill their fiduciary obligations.").

Notably absent from North Carolina law are requirements that nonprofit corporations file periodic disclosures with the Attorney General's office. See M. FREMONT-SMITH, *supra* note 9, at 486.

82. Apparently, no North Carolina appellate court has addressed whether a member has standing to bring a derivative suit.

83. See *supra* note 27.

84. See *supra* notes 75-81 and accompanying text.

85. See *supra* text accompanying notes 29-30.

86. See Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 448-60 (1960); see also M. FREMONT-SMITH, *supra* note 9, at 234 (surveys show that the attention of attorneys general to the affairs of charitable organizations is "minimal" in many states); Hansmann, *supra* note 7, at 601 ("Commonly, little or no staff in the attorney general's office is assigned to look after the affairs of nonprofits, and no effective system of financial reporting by nonprofits exists in any state."); Oleck, *Non-Profit Types, Uses, and Abuses: 1970*, 19 CLEV. ST. L. REV. 207, 235-36 ("State attorneys-general practically shun investigations of nonprofit organizations.").

situation to appreciate its impact."⁸⁷ One commentator who examined attorney general supervision of charitable associations found it to be "irregular and infrequent."⁸⁸

Recognition by statute or judicial decision of a right for North Carolina members of nonprofit corporations to bring derivative suits would provide members a valuable tool for enforcing the duties directors and officers owe the corporation. Such a decision would have the obvious advantage of providing consistency in the state's corporate law; members and shareholders alike would have the right to bring a derivative suit, and management of both types of corporations would be subject to similar oversight mechanisms.

Recognition of member derivative suits in North Carolina would not contradict the state's existing corporation laws. The provisions of the Business Corporation Act⁸⁹ recognizing shareholder derivative suits do not expressly exclude members.⁹⁰ Similarly, although the provision on the applicability of the Business Corporation Act states that the Act applies to "every corporation for profit" and "every corporation not for profit having a capital stock,"⁹¹ the Act does not expressly exclude nonprofit membership corporations.

There also is a common-law basis for member derivative suits in North Carolina. In 1929 the North Carolina Supreme Court applied the corporate statute providing for distribution of assets to shareholders after dissolution of the corporation to nonprofit corporation members, despite the absence of any reference to members in the statute.⁹² The court held that "In the case of nonstock corporations, the members, while not usually denominated stockholders, are in point of principle stockholders, having an interest in the corporate property similar to that of stockholders in an ordinary corporation."⁹³

Furthermore, the history of the shareholder derivative suit in North Carolina supports an interpretation that statutory silence on a remedy against management does not mean that the legislature intended to deny the remedy. North Carolina General Statutes section 55-55, recognizing shareholder derivative actions, was not enacted until 1973.⁹⁴ The common-law right to a shareholder derivative suit, however, already was well established.⁹⁵ In the years between

87. *Holt v. College of Osteopathic Physicians & Surgeons*, 63 Cal. 2d 750, 755, 394 P.2d 932, 935, 40 Cal. Rptr. 244, 247 (1964).

88. *Karst*, *supra* note 86, at 437; *see also City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514, 527-28, 235 A.2d 487, 495 (Ch. Div. 1967) ("The manifold duties of [the attorney general's] office make readily understandable the fact that . . . supervision [by that office] is necessarily sporadic.").

89. N.C. GEN. STAT. §§ 55-1 to -175 (1982).

90. *Id.* § 55-55.

91. *Id.* § 55-3(a).

92. *Smith v. Dicks*, 197 N.C. 355, 148 S.E. 464 (1929). The suit was brought by a member of a social and literary club organized as a nonprofit corporation. The lower court held that when the corporation failed to renew its charter, plaintiff and the other members were vested with an equal, undivided interest in the club's property. *Id.* at 359, 148 S.E. at 466. The supreme court affirmed. *Id.* at 364, 148 S.E.2d at 469.

93. *Id.* at 363, 148 S.E. at 468 (quoting *RULING CASE LAW (Corporations)* § 754 (1920)).

94. Act of May 14, 1973, ch. 469, 1973 N.C. Sess. Laws 547-48.

95. *See, e.g., Coble v. Beall*, 130 N.C. 533, 41 S.E. 793 (1902) (recognizing a shareholder's right to bring a derivative suit, subject to the "one prerequisite" that the plaintiff show in his complaint

the enactment of the first state corporation law in 1852⁹⁶ and the enactment of section 55-55 in 1973, the courts apparently did not consider the statutory silence on derivative suits as evidence of legislative intent to bar such suits.⁹⁷

A potential drawback to recognition of member derivative suits is that such a provision may encourage strike suits against nonprofit directors and officers. Unlike directors of for-profit corporations, nonprofit directors usually work on a part-time basis without financial compensation.⁹⁸ If serving on a nonprofit corporation's board subjects the director to the expense and inconvenience of defending spurious lawsuits, there may be few volunteers. Likewise, a nonprofit corporation's officers, who are allowed reasonable compensation,⁹⁹ may not wish to serve if one of the incidents of employment is a significant risk of being named a defendant in a vexatious lawsuit.

To minimize a nonprofit director's or officer's exposure to vexatious litigation, the right of members to bring derivative suits should be limited in much the same way that shareholder derivative suits are limited. The California and New York statutes include in their provisions for member derivative suits most of the limits applied to shareholder derivative suits.¹⁰⁰ In North Carolina, the right to a shareholder derivative suit under section 55-55 is limited by the following: a contemporaneous ownership rule;¹⁰¹ a requirement that the plaintiff allege a demand on the directors;¹⁰² a requirement that any compromise or settlement have court approval;¹⁰³ and a provision that the court may require the plaintiff to pay defendant's attorney's fees if the court finds that the action was brought without "reasonable cause."¹⁰⁴ The last provision reverses the common-law reluctance to grant such relief, even when the defendant was successful, unless the defense in some way benefitted the corporation.¹⁰⁵

The North Carolina Nonprofit Corporation Act also provides that a director or officer of a nonprofit corporation is entitled to indemnification for defending an action alleging dereliction of a duty if his defense is successful.¹⁰⁶ Even if a director or officer has been found liable for breach of a duty to the corporation, the court may award indemnification if it finds that "such person has acted hon-

that he made a demand on the directors to bring the action and that they refused to do so); see also R. ROBINSON, *supra* note 14, at 213 (comparing North Carolina case law on derivative suits with that of other states).

96. R. ROBINSON, *supra* note 14, at 1. The North Carolina legislature first enacted a statute permitting organization of private corporations without a legislative charter in 1795, but the first statute authorizing the organization of corporations for a wide range of business purposes was not enacted until 1852. *Id.*

97. See, e.g., *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961) ("[W]here . . . an officer of a corporation so utilizes his authority as to benefit himself to the detriment of the corporation, a right of action accrues to the corporation.").

98. H. OLECK, *supra* note 1, at 612.

99. See *supra* text accompanying note 10.

100. See *supra* notes 46-55 and accompanying text; notes 60-64 and accompanying text.

101. N.C. GEN. STAT. § 55-55(a) (1982).

102. *Id.* § 55-55(b).

103. *Id.* § 55-55(c).

104. *Id.* § 55-55(e).

105. H. HENN & J. ALEXANDER, *supra* note 2, § 378, at 1115-16.

106. N.C. GEN. STAT. § 55A-17.3(a)(1) (1982).

estly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief."¹⁰⁷ This provision, if interpreted broadly for member derivative suits, could reduce greatly the financial risks that strike suits pose for nonprofit directors. That a nonprofit director works without compensation and on a part-time basis should be a relevant "circumstance" for determining whether his conduct was "reasonable." If these existing limits on shareholder derivative suits and provisions for indemnification of nonprofit directors and officers are extended to member derivative suits, the risk of strike suits probably will not discourage individuals from serving as nonprofit officers or directors.¹⁰⁸

Another objection to the recognition of member derivative suits is that members lack sufficient interest in the corporation to sue on its behalf. A shareholder's pecuniary interest in the corporation is part of the basis of his right to bring a derivative suit; when the corporation will not sue on a valid claim, the shareholder's equity interest is imperiled and thus he is entitled to sue derivatively.¹⁰⁹ Although a member may have no equity interest in a nonprofit corporation, he usually has a significant pecuniary interest in the organization. Membership often is conditioned on the payment of dues.¹¹⁰ Furthermore, in the case of a homeowner association the decisions of the directors and officers may affect the value of each member's property.

A member does not expect the same return on his money as an investor in shares of stock, but he expects that his money will be used in the manner represented to him when he became a member. Apart from a concern over vexatious litigation, there is no compelling reason why this pecuniary interest should be insufficient to justify a derivative suit by a member. Of course, because section 55A-29(a) of the Act allows nonprofit incorporators to define membership as they choose,¹¹¹ the corporation might have members with no financial stake. Should the prospect of derivative litigation by such members trouble the incorporators, they could frame the bylaws or charter to condition membership on some form of financial contribution or to have no members at all.¹¹²

107. *Id.* § 55A-17.3(a)(2). The Act also provides that a nonprofit corporation may expand the statutory indemnification provisions in its bylaws or charter. *See id.* § 55A-17.1(a); R. ROBINSON, *supra* note 14, at 238 n.27.

108. *See supra* note 33. The Nonprofit Corporation Act also expressly gives nonprofit corporations power "to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation . . ." N.C. GEN. STAT. § 55A-17.1(c) (1982).

109. *See supra* note 32 and accompanying text.

110. *See Henn & Pfeifer, supra* note 11, at 185 n.10; Pasley, *Organization and Operation of Non-Profit Corporations—Some General Considerations*, 19 CLEV. ST. L. REV. 239, 248 (1970); *see also* Lopez v. Medford Community Center, Inc., 384 Mass. 171, 173 & n.5, 174, 424 N.E.2d 229, 231 & n.5, 232 (1982) (trial court's findings of fact included charter provision that membership in defendant charitable corporation was conditioned on payment of annual dues).

111. N.C. GEN. STAT. § 55A-29(a) (1982).

112. To discourage nonprofit corporations from choosing not to have members solely because of the possibility of a derivative suit, the proposed amendment to the North Carolina Nonprofit Corporation Act would recognize derivative actions by directors as well as members. *See supra* note 5. *See* Minutes of Nonprofit Corporation Act Drafting Committee of the North Carolina General Statutes Commission (Sept. 20, 1984). *See generally infra* note 114 (discussing statutory recognition in other jurisdictions of derivative suits by directors).

As noted earlier, a charitable corporation may designate as "members" donors with no voice in

The existing provisions for supervision of nonprofit corporations in North Carolina are inadequate. Commentators and those state courts and legislatures that have considered the issue have concluded that supervision by the attorney general's office is likely to be sporadic and ineffective.¹¹³ When a nonprofit corporation has been wronged but a member cannot prevail on the directors to sue on behalf of the corporation, the member may be without recourse. To correct this problem, the North Carolina legislature or the state courts should recognize the right of members of nonprofit corporations to bring a derivative suit on behalf of the corporation.¹¹⁴ Such a provision would be consistent with North

the affairs of the corporation. To avoid the prospect of derivative suits by such honorary members, a statute recognizing member derivative suits also could provide that a "member" must be given some voice in the corporation's affairs, such as the right to elect directors or vote on changes in the charter and bylaws. The California Nonprofit Corporation Law limits members in this fashion. CAL. CORP. CODE § 5056 (West Supp. 1985). Such a provision would require a charitable corporation to bestow a title other than "member" on donors it wanted to recognize but not give a voice in the operation of the corporation.

113. See *supra* notes 86-88 and accompanying text.

114. A court or legislature recognizing a right for members to bring a derivative suit should consider other means of improving the supervision of nonprofit corporations as well. In the New York and California statutes, the provision for member derivative suits was accompanied by expanded powers for the attorney general's office. CAL. CORP. CODE § 5250 (West Supp. 1985); N.Y. NOT-FOR-PROFIT CORP. LAW § 720 (McKinney 1970 & Supp. 1983). Another option is to give directors a right to bring a derivative suit. The California Nonprofit Corporation Law authorizes directors to bring derivative suits if the corporation has no members. CAL. CORP. CODE §§ 5059-5061 (West Supp. 1985). In New York, where the Business Corporation Law authorizes derivative suits by directors of for-profit corporations, N.Y. BUS. CORP. LAW § 720(b) (McKinney 1963 & Supp. 1984), it has been held that the director or officer must have held his corporate office at the time the derivative suit was commenced, a requirement analogous to the contemporaneous ownership limitation on shareholder derivative suits. *Alan v. Landau-Alan Gallery, Inc.*, 66 Misc. 2d 350, 320 N.Y.S.2d 853 (1971); see 13 W. FLETCHER, *supra* note 2, at § 5972. For a pre-1980 California decision recognizing the right of directors of a nonprofit corporation to bring derivative suits, see *Holt v. College of Osteopathic Physicians & Surgeons*, 63 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

The donors or beneficiaries of a charitable nonprofit corporation also could be given standing. Hansmann, *supra* note 7, at 607-09, argues that a charitable corporation's donors and beneficiaries are more likely than any other parties to take an interest in the corporation's affairs and thus may be proper parties to bring suit. There is some historical basis for giving donors standing; founding donors of a charitable trust were given a right of "visitation" over the trust, including the right to inspect the trustees' actions and correct abuses. See *M. FREMONT-SMITH*, *supra* note 9, at 206; Hansmann, *supra* note 7, at 607-09. This right, however, has fallen into disfavor and donors today commonly are denied standing to sue. Hansmann, *supra* note 7, at 607; see also *Shields v. Harris*, 190 N.C. 520, 130 S.E. 189 (1925) (heirs of the settlor of a charitable trust do not have standing to sue for enforcement of the trust). The rationale for this denial usually is either that the donor's legal interest ends once he makes the gift to the corporation or that potential suits by charitable donors would expose charitable corporation managers to a risk of excessive liability. Hansmann, *supra* note 7, at 607-09; Karst, *supra* note 86, at 447.

Under trust law, beneficiaries of a charitable trust generally were denied standing to sue unless they could show a "special interest" in the benefits of the trust, beyond the benefit conferred on the public at large. *M. FREMONT-SMITH*, *supra* note 9, at 86-87; see also *supra* note 41 (discussing denial of a public right to enforce a charitable trust). The same principle has been applied to deny standing to beneficiaries of a charitable corporation who could not show a "special interest." *City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514, 527, 235 A.2d 487, 495 (Ch. Div. 1967).

Recent decisions in some states have expanded the right of beneficiaries of a charitable trust or corporation to bring a derivative suit or to sue to enforce the trust. See, e.g., *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries*, 367 F. Supp. 536 (D.D.C. 1973) (patients of a hospital organized as a charitable corporation have standing to sue the management); *Jones v. Grant*, 344 So. 2d 1210 (Ala. 1977) (students, staff, and faculty of a college operated as a charitable trust have standing to sue the trustees). A recent decision by the North Carolina Supreme Court on beneficiary standing is *Kania v. Chatham*, 297 N.C. 290, 254 S.E.2d 528 (1979). In *Kania*

Carolina case law recognizing the similarities between members and shareholders. The threat of strike suits could be reduced by limiting members' suits as shareholder derivative suits are limited in the existing Business Corporation Act and by enforcing indemnification provisions of the nonprofit act. Finally, because the right of shareholders to bring a derivative suit against business corporation managers is well established in North Carolina, a statute giving members a right to bring such an action would provide consistency in the state's corporation law and would fulfill members' expectations.

BRENDA BOYKIN

a nominee for a college scholarship sued the trustees of the charitable trust that provided the scholarship program. The court held that plaintiff lacked standing to bring the suit because mere nomination for a scholarship did not give him a "special interest." *Id.* at 292, 254 S.E.2d at 530. In the absence of such an interest, the court held, the proper party to sue for enforcement of a charitable trust is the attorney general. *Id.* at 292-93, 254 S.E.2d at 530.

As with donors, one reason frequently given for denying standing to beneficiaries is a fear of exposing trustees or directors to excessive liability. This fear may be unfounded. Hansmann notes that a Wisconsin statute adopted in 1945 permitted any 10 or more donors or beneficiaries of a charitable trust to bring a suit to enforce the trust. The statute later was replaced, but there are no reported cases in which donors or beneficiaries brought such a suit. Hansmann, *supra* note 7, at 609-10.

***Allen v. Wright*: Standing Beyond the Bounds of Article III**

Sections 501(a) and 501(c)(3) of the Internal Revenue Code (Code) mandate that racially discriminatory schools be denied both tax-exempt status and eligibility for tax-deductible contributions under section 170 of the Code.¹ To implement these Code sections the Internal Revenue Service (IRS) has issued guidelines for determining whether a private school seeking tax-exempt status is racially discriminatory.² These guidelines, however, have proved ineffective—

1. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2032 (1983); Rev. Rul. 71-447, 1971-2 C.B. 230.

I.R.C. § 501(a) (1982) provides: "An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle"

I.R.C. § 501(c)(3) (1982) provides: "The following organizations are referred to in subsection (a): . . . Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, . . . and which does not participate in, or intervene in . . . any political campaign"

I.R.C. § 170(a)(1) (1982) provides: "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year."

I.R.C. § 170(c)(2) (1982) defines a "charitable contribution" as "a contribution or gift to or for the use of . . . a corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual; and which is not disqualified for tax exemption under section 501(c)(3)"

The IRS ruled in 1971 that §§ 501(a) and 501(c)(3) required it to deny tax-exempt status to racially discriminatory schools. Rev. Rul. 71-447, 1971-2 C.B. 230. Until 1965 the IRS had granted tax exemptions to all educational institutions that satisfied the requirements enumerated in § 501(c)(3) without regard to whether the institution was racially discriminatory. From 1965 to 1967 it imposed a freeze on applications for tax-exempt status from racially discriminatory schools. From 1967 to 1970 the IRS approved applications for tax-exempt status from racially discriminatory schools unless it appeared that such schools were so connected with the state that their actions would be considered discriminatory state action and, therefore, unconstitutional. *Green v. Kennedy*, 309 F. Supp. 1127, 1130 (D.D.C.), *appeal dismissed sub nom.* *Cannon v. Green*, 398 U.S. 956 (1970).

In 1970 the IRS announced that it no longer legally could justify granting tax-exempt status to racially discriminatory schools. IRS News Release (July 10, 1970), *reprinted in* [1970] 7 *STAND. FED. TAX REP. (CCH)* ¶ 6790. The reasoning behind this policy change was revealed in a 1971 revenue ruling. The IRS had determined that section 501(c)(3)'s requirement that an exempt organization be "organized and operated exclusively for religious, charitable, . . . or educational purposes" was intended to reflect the common-law notion of charity. Rev. Rul. 71-447, 1971-2 C.B. 230. This determination led the IRS to conclude that this section was designed to benefit only those organizations that operated as common-law charities. Common-law charities were subject to the restriction that their activities be consistent with public policy. Because the operation of a racially discriminatory private school violated the federal public policy against discrimination in education, the IRS ruled that such schools failed to qualify for tax exemptions and that donations to such schools were not tax deductible. *Id.* The IRS borrowed the reasoning of the United States District Court for the District of Columbia in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* *Coit v. Green*, 404 U.S. 997 (1971), in making this ruling. See *infra* notes 13-19 and accompanying text.

2. Rev. Proc. 72-54, 1972-2 C.B. 834. The 1972 guidelines were modeled after a permanent injunction issued by a three-judge panel of the United States District Court for the District of Columbia in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* *Coit v. Green*, 404 U.S. 997 (1971).

The injunction issued in *Green* enjoined and restrained the IRS from approving applications for tax-exempt status for private schools in Mississippi unless the school had publicized its policy of racial nondiscrimination in a manner reasonably effective in bringing the policy to the attention of minority groups; referred to its policy of nondiscrimination in its brochures, catalogues, and other advertisements; and certified that it had made no statements or taken any actions qualifying its

even schools that have been adjudged discriminatory have been able to satisfy the guidelines and maintain their tax-exempt status.³ In 1977 parents of black schoolchildren filed suit to compel the IRS to adopt more stringent guidelines.⁴ Their case reached the Supreme Court as *Allen v. Wright*,⁵ but the Court declined to reach the merits of the case; the Court held that neither of the two injuries alleged by plaintiffs was sufficient to give them standing to challenge the

policy of nondiscrimination. The school also must have provided the IRS with data on the racial composition of its student body, applicants for admission, and faculty and administrative staff; on the amount of scholarship and loan funds awarded and the racial composition of students who received such awards; and on whether any of its incorporators, founders, board members, or donors of land or buildings were organizations or members of organizations that had as a goal the maintenance of segregation in school education. *Id.* at 1179-80. The injunction defined a policy of racial nondiscrimination as meaning that the school "admitt[ed] the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school" and did not discriminate on the basis of race "in the administration of educational policies, applications for admission, . . . scholarship and loan programs, and athletic and extra-curricular programs." *Id.* at 1179. Surprisingly, the injunction did not expressly require the IRS to determine that a school actually had implemented a policy of racial nondiscrimination before granting the school tax-exempt status. For a discussion of the facts of *Green*, see *infra* notes 15-22 and accompanying text.

The first set of guidelines appeared in 1972. See Rev. Proc. 72-54, 1972-2 C.B. 834. These guidelines were replaced by slightly stricter guidelines in 1975. See Rev. Proc. 75-50, 1975-2 C.B. 587. The 1975 guidelines generally require that schools adopt and publicize their adoption of a policy of nondiscrimination. This policy must be included in the school's charter and made known to the community served by the school. Schools are required to provide the IRS with a statistical breakdown by race of their faculty, student body, administrative staff, and scholarship and loan recipients. They also must state whether any of their incorporators, founders, board members, or donors of land or buildings had or have as an objective the maintenance of segregated education. Schools also must keep documents verifying their compliance with the guidelines and annually certify their compliance under penalty of perjury.

3. In statements before the Subcommittee on Oversight of the House Committee on Ways and Means, Jerome Kurtz, Commissioner of Internal Revenue, stated:

[T]he Service's procedures [are] ineffective in identifying schools which in actual operation discriminate against minority students

A clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory. This position is indefensible.

Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 5 (1979) [hereinafter cited as *Hearings*]. The IRS attempted to revise its guidelines in 1978. See 43 Fed. Reg. 37,296 (1978) (proposed Aug. 21, 1978). After evaluating public response to the proposed revisions, the IRS released a new set of guidelines that were to take effect on January 1, 1980. These guidelines established that a school which was formed or substantially expanded during public school desegregation and had an insignificant minority enrollment would be classified "reviewable" and rebuttably presumed discriminatory if the IRS determined that its creation or expansion was related in-fact to the desegregation of public schools in the area. Such schools were to be provided an opportunity to explain their low minority enrollment and to document their efforts to recruit minority students before being characterized as racially discriminatory. See 44 Fed. Reg. 9451 (1979) (proposed Feb. 12, 1979); see generally *Hearings*, *supra*, at 5 (statement of Jerome Kurtz, Commissioner of the Internal Revenue Service) (explaining what proposed guidelines would require and how they would be implemented). Congress blocked the implementation of these guidelines, however, by amending the Treasury Appropriations Bill to withhold funds for their enforcement until October 1980. See Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, §§ 103, 615, 93 Stat. 559, 562, 577 (1979); *Allen v. Wright*, 104 S. Ct. 3315, 3323 n.16 (1984). Similar spending restrictions, including a restriction on use of funds to enforce court orders entered after August 1978, continued in effect until January 1, 1984. *Id.*

4. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), *rev'd sub nom. Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 104 S. Ct. 3315 (1984).

5. 104 S. Ct. 3315 (1984).

IRS guidelines.⁶

This Note reviews the Supreme Court's discussion of standing in *Wright*⁷ and analyzes the Court's application of its standing test to the facts of *Wright*.⁸ The Note criticizes the Court's overly stringent application of the causation element of its standing test.⁹ It concludes that the Court's decision unduly impairs access to the courts by victims of unlawful government conduct and leaves the government free to lend substantial support to racially discriminatory institutions.¹⁰

The IRS guidelines challenged by the *Wright* plaintiffs were adopted in 1975 to effectuate an IRS ruling that a school applying for tax-exempt status must demonstrate that it admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.¹¹ This ruling was made in 1971 following the IRS's announcement in 1970 that it could "no longer legally justify" its former policy permitting racially discriminatory schools to be granted tax-exempt status.¹² The 1970 policy change was made after the United States District Court for the District of Columbia in *Green v. Kennedy*¹³ preliminarily enjoined the IRS from continuing to grant tax-exempt status to racially discriminatory schools in Mississippi.¹⁴

The district court decided the merits of *Green* in 1971.¹⁵ Plaintiffs in *Green*

6. *Id.* at 3326. For a description of the challenged guidelines, see *supra* note 3. The Court concluded that the first injury alleged was not judicially cognizable and that the second failed because it was not "fairly traceable" to the IRS's grant of tax-exempt status to racially discriminatory private schools. See *infra* text accompanying note 33.

7. See *infra* notes 32-43 and accompanying text.

8. See *infra* notes 70-79 and accompanying text.

9. See *infra* notes 80-98 and accompanying text.

10. See *infra* notes 115-117 and accompanying text.

11. Rev. Rul. 71-447, 1971-2 C.B. 230; *Wright*, 104 S. Ct. at 3319.

12. IRS News Release (July 10, 1970), reprinted in [1970] 7 STAND. FED. TAX REP. (CCH) ¶ 6790; see *supra* note 1 (explaining basis of IRS policy change).

13. 309 F. Supp. 1127 (D.D.C.), appeal dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970).

14. The *Green* court issued its preliminary injunction on January 12, 1970. *Id.* The IRS announced its new policy on July 10, 1970. IRS News Release (July 10, 1970), reprinted in [1970] 7 STAND. FED. TAX REP. (CCH) ¶ 6790.

15. The district court rejected the argument that the IRS's reversal of its pre-1970 policy in the course of the litigation rendered the case moot for lack of a "case or controversy." A defendant, the court stated, does not render a case moot merely by "promising to conform to plaintiff's wishes." *Green v. Connally*, 330 F. Supp. 1150, 1170 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). The court foresaw the danger that in the absence of a court order the IRS might change its policy again. Critics of the decision, however, have charged that the district court ignored article III's "case or controversy" requirement. See McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions For Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 458-59 (1984).

The validity of the district court's concern was confirmed in 1982 when the IRS again reversed its position and announced that it would "no longer revoke or deny tax-exempt status for . . . organizations on grounds that they [do not] conform with . . . fundamental public policies." *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearings on S. 2024 Before the Senate Finance Comm.*, 97th Cong., 2d Sess. 13 (1982). Not surprisingly, this reversal

were parents of black schoolchildren who sought to enjoin the IRS from granting tax-exempt status to racially discriminatory private schools in Mississippi. They alleged that the IRS's pre-1970 policy was unconstitutional and contrary to statute.¹⁶ In light of the federal policy against racial segregation in schools, the court held that the Code's provisions could not be construed in a manner that would give racially discriminatory schools the same tax benefits given to charitable organizations.¹⁷

The court made it clear that any contrary interpretation of the Code would "raise serious constitutional questions": "If the [IRS] had not adopted its July, 1970, interpretation, and if this court had acquiesced in the pre-1970 interpretation, we would in all likelihood have been required by the Constitution to enter a decree ordering the Service to cease violating plaintiffs' constitutional rights."¹⁸ The court issued a permanent injunction allowing the IRS to grant tax-exempt status to private schools in Mississippi only if the school had publicized its adoption of a policy of nondiscrimination and had provided the IRS with sufficient information to determine whether the school actually had established such a policy.¹⁹ The Supreme Court summarily affirmed the district court's opinion.²⁰ Plaintiffs in *Green* reopened the case in 1976 alleging that the IRS was failing to comply with the court's injunction.²¹ *Wright* was filed shortly thereafter; the United States District Court for the District of Columbia consoli-

came about during the pendency of *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983), in which plaintiff university asserted a right to tax-exempt status despite its religiously mandated racially discriminatory policies. Again, the IRS argued that its reversal made the case moot and urged dismissal. The Supreme Court, however, declined to vacate the case as moot. *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982). William Coleman, Jr., was invited to present arguments in favor of the IRS's former position to preserve the adversarial nature of the case. *Id.* McCoy and Devins also have criticized the Court's refusal to hold *Bob Jones* moot. McCoy & Devins, *supra*, at 464.

The flip-flops in IRS policy during the pendency of *Green* and *Bob Jones* illustrate the danger of allowing cases to be rendered moot based on administrative changes of position on issues not governed by express statutory language or judicial decisions. The viewpoint advocated by McCoy and Devins would allow the IRS to escape litigation of an issue *ad infinitum* simply by announcing a policy change each time it is faced with hostile litigation.

Ten days after the announcement that the IRS no longer would deny tax-exempt status to racially discriminatory private schools, the Reagan Administration proposed legislation that expressly would have denied tax-exempt status to racially discriminatory schools. S. 2024, 97th Cong., 2d Sess. (1982), reprinted in [1982] 10 STAND. FED. TAX REP. (CCH) ¶ 6155. Congress responded to the proposed bill by asserting that current Code provisions already prohibited the granting of such exemptions. S. Con. Res. 59, 97th Cong., 2d Sess. (1982). The Supreme Court settled the disagreement by holding in *Bob Jones* that current statutes did require the IRS to deny tax-exempt status to racially discriminatory schools. *Bob Jones*, 103 S. Ct. at 2030-31.

16. Plaintiffs alleged that granting tax-exempt status to racially discriminatory schools violated §§ 501 and 170 of the Code, *Green v. Connally*, 330 F. Supp. 1150, 1156 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971), and the due process clause of the fifth amendment. *Green v. Kennedy*, 309 F. Supp. 1127, 1136 (D.D.C.), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

17. *Green v. Connally*, 330 F. Supp. 1150, 1163 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

18. *Id.* at 1171.

19. *Id.* at 1179-80; see *supra* note 2.

20. Coit v. Green, 404 U.S. 997 (1971).

21. See *Wright v. Regan*, 656 F.2d 820, 825 (D.C. Cir. 1981), *rev'd sub nom.* Allen v. Wright, 104 S. Ct. 3315 (1984).

dated the two actions in April 1977.²²

Plaintiffs in *Wright* were black parents whose children attended public school in desegregating school systems. The parents sought an injunction prohibiting the IRS from granting tax-exempt status to racially discriminatory private schools and requiring the IRS to adopt more rigid guidelines for determining whether a school was racially discriminatory. They alleged that IRS guidelines permitted schools to acquire tax-exempt status "merely on the basis of adopting and certifying—but not implementing—a policy of nondiscrimination," and thus did not comply with section 501(c)(3)'s requirement that racially discriminatory schools be denied tax-exempt status.²³ The essence of plaintiffs' complaint was that the grant of federal tax exemptions to such schools unconstitutionally supported racially segregated educational institutions by fostering and encouraging the "organization, operation and expansion" of racially segregated schools for "white children avoiding attendance in desegregating public school districts."²⁴

The district court dismissed the case in November 1979 on the grounds that the *Wright* plaintiffs lacked standing and had presented a nonjusticiable issue.²⁵ The *Green* plaintiffs' action survived, however, because the court ruled that they had standing to litigate their rights under the injunction.²⁶

The United States Court of Appeals for the District of Columbia Circuit reversed the dismissal of *Wright*.²⁷ The court of appeals relied on the Supreme Court's summary affirmance of *Green* and the Supreme Court's decisions in *Gilmore v. City of Montgomery*²⁸ and *Norwood v. Harrison*²⁹ in holding that the *Wright* plaintiffs had standing. The court categorized *Simon v. Eastern Kentucky Welfare Rights Organization*,³⁰ a Supreme Court decision that weighed against granting standing, as part of a "divergent" line of precedent that was the "wrong frame" for the *Wright* case.³¹

The Supreme Court rejected the analysis of the court of appeals. Applying a three-pronged constitutional test of standing,³² the Court concluded that

22. *See id.*

23. *Wright*, 104 S. Ct. at 3321 (quoting appellants' brief).

24. *Id.* at 3322.

25. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), *rev'd sub nom.* *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom.* *Allen v. Wright*, 104 S. Ct. 3315 (1984).

26. *Wright v. Regan*, 656 F.2d 820, 822 (D.C. Cir. 1981), *rev'd sub nom.* *Allen v. Wright*, 104 S. Ct. 3315 (1984). The *Green* plaintiffs ultimately were successful in getting most of the relief they requested. *See id.*

27. *Id.* at 838.

28. 417 U.S. 556 (1974).

29. 413 U.S. 455 (1973).

30. 426 U.S. 26 (1976). For a discussion of the facts of *Simon*, see *infra* text accompanying notes 59-61.

31. *Wright v. Regan*, 656 F.2d 820, 828-29 (D.C. Cir. 1981), *rev'd sub nom.* *Allen v. Wright*, 104 S. Ct. 3315 (1984). The court of appeals also held that the issues raised in *Wright* were justiciable. *Id.* at 838.

32. *See infra* text accompanying note 33. Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2. The Supreme Court's standing test is intended to determine whether the issue before the Court is being presented in the context of a case or controversy. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 80

plaintiffs had failed to allege an injury that gave them standing to challenge the IRS guidelines. The Court's standing test required that (1) the injury suffered by plaintiffs be "distinct and palpable," (2) that the injury be "fairly traceable" to the challenged conduct, and (3) that relief from the injury be "likely" to result from a favorable decision.³³ The first prong requires that the injury suffered by the plaintiff be judicially cognizable. The second and third prongs form the causation element of the standing inquiry—they are not satisfied unless the plaintiff's injury was caused by the defendant's conduct. Thus these three prongs ensure the existence of a genuine case or controversy.³⁴

As read by the Court, the complaint in *Wright* described two injuries resulting from the IRS's allegedly unlawful conduct: "First, . . . [plaintiffs] are harmed by the mere fact of Government financial aid to discriminatory private schools. Second, . . . the federal tax exemptions to racially discriminatory private schools in their communities impair their ability to have their public schools desegregated."³⁵ The Court held that the first injury was not judicially cognizable. Interpreted as "a claim . . . to have the Government avoid the violation of law,"³⁶ the first injury asserted a right that the Court refused to recognize as a basis for standing. The Court stated that the "'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, can not alone satisfy the requirements of Article III without draining those requirements of meaning.'" ³⁷

The Court also interpreted the first injury as presenting a claim of stigmatization resulting from racial discrimination. Although the Court recognized this type of injury as sufficient to confer standing, it concluded that stigmatic injury conferred standing only on persons who alleged that they personally had been denied equal treatment. The Court believed that to allow this type of injury to confer standing on persons who did not allege a personal denial of equal treatment would "transform the federal court into ' . . . a vehicle for the vindication of . . . concerned bystanders'" and would extend standing to all members of the racial group against which the government allegedly was discriminating.³⁸

(1978). Thus, the doctrine of standing focuses on whether a party has a sufficient stake in the outcome of a controversy to pursue judicial resolution. *Id.* § 3-17, at 79. It has been suggested that the Constitution's requirement of a case or controversy is not a requirement that a party have a personal stake in the controversy. See Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

33. *Wright*, 104 S. Ct. at 3325.

34. See L. TRIBE, *supra* note 32, § 3-21, at 96-97.

35. *Wright*, 104 S. Ct. at 3326.

36. *Id.*

37. *Id.* at 3327 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982)).

38. *Id.* (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)).

Generally, private litigants do not have standing to assert the rights of others. For example, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Sierra Club was denied standing to assert the rights of third parties who used Mineral King Valley. The Club would have had to allege that its members visited and recreated in the valley to have standing. This third-party rule, however, is a "'rule of practice'" rather than a "'principle ordained by the Constitution'"; the Court has recognized exceptions to the rule in a few situations. L. TRIBE, *supra* note 32, § 3-26, at 103 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). For example, the Court has allowed persons who them-

Blacks in one state would have standing to challenge the tax-exempt status of schools in other states: a result that article III does not permit.

The Court characterized plaintiffs' second injury as "not only judicially cognizable," but also "one of the most serious injuries recognized in our legal system."³⁹ The diminished ability of plaintiffs' children to receive an education in a racially integrated school was a distinct and palpable injury that satisfied the first prong of the Court's standing test. This injury, however, did not satisfy the Court's causation requirement. The Court stated that the line of causation between this injury and the IRS's grant of tax exemptions to racially discriminatory schools was too attenuated to form a basis for standing; it characterized plaintiffs' injury as "highly indirect" and "result[ing] from the independent action of some third party not before the court."⁴⁰ The required line of causation would be present only if plaintiffs had alleged that "there were enough racially discriminatory private schools receiving tax exemptions in [their] communities for withdrawal of [tax-exempt status] to make an appreciable difference in public-school integration."⁴¹ Concerned about this injury's redressability—the likelihood that a favorable decision would provide relief—the Court noted that it was "entirely speculative" whether withdrawal of tax exemptions from racially discriminatory schools would affect public school integration.⁴²

The Court underscored its conclusion that the line of causation drawn was insufficient by applying the doctrine of separation of powers to its analysis of article III requirements. In the Court's view the proper role of the federal courts does not include deciding claims such as the one brought in *Wright*: "The Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize [plaintiffs'] standing . . . without running afoul of that structural principle."⁴³

Justices Brennan and Stevens filed dissenting opinions.⁴⁴ Justice Brennan criticized the Court's use of generalizations about separation of powers to cloud the standing issue and to avoid recognizing of the true nature of the injuries alleged. He did not discuss the Court's refusal to find standing as to the first injury, but attacked the Court's conclusion that granting tax benefits to racially discriminatory private schools did not detrimentally affect the integration of public schools. Justice Brennan noted that "[c]ommonsense alone would recog-

selfes have suffered an injury to litigate the rights of third-parties when it would be difficult or impossible for those persons to assert their own rights. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972). It also has recognized an exception when a special relationship existed between the plaintiff and the third-party whose rights the plaintiff sought to assert. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). See generally L. TRIBE, *supra* note 32, §§ 3-26 to -27, at 103-12 (discussing the Court's willingness to grant certain parties surrogate standing).

39. *Wright*, 104 S. Ct. at 3328.

40. *Id.*

41. *Id.* at 3328.

42. *Id.* at 3328-29.

43. *Id.* at 3330 (quoting U.S. CONST. art. II, § 3).

44. *Wright* was a five-to-three decision. Justice O'Connor wrote the opinion for the majority. Justice Blackmun joined in Justice Stevens' dissent, and Justice Brennan filed a separate dissent. Justice Marshall took no part in the decision of the case.

nize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools."⁴⁵

Justice Stevens criticized both the Court's causation analysis and its invocation of separation of powers doctrine to bolster its holding. He viewed the issue as whether plaintiffs had alleged that the government was "subsidiz[ing] the exodus of white children from schools that would otherwise be racially integrated."⁴⁶ He concluded that as a matter of "elementary economics," the cash grants given to racially discriminatory schools by way of tax exemptions and tax-deductible contributions made those schools more affordable and therefore more popular.⁴⁷ Justice Stevens further contended that the Court's separation of powers argument had no relevance to the issue of standing. He acknowledged that *Wright* raised legitimate concerns of justiciability and usurpation of executive discretion, but believed that the Court had only confused the issue of standing by failing to address those concerns directly.

The standing test applied by the Court in *Wright* is the product of a series of decisions in the 1970s. These decisions first liberalized standing requirements by replacing the legal-interest test with an injury-in-fact test, but later retreated from this liberalization by tightening the causation requirement.⁴⁸ In *Association of Data Processing Service Organizations, Inc. v. Camp*,⁴⁹ the Court rejected its former legal-interest test⁵⁰ in favor of a two-pronged standing test. To have standing under the new test a plaintiff was required to demonstrate injury-in-fact and an interest to be protected that fell within the zone of interests safeguarded by the statutory or constitutional provision under which he sought relief. Under this liberal test persons living in an apartment complex had standing to challenge the landlord's exclusion of nonwhites as an infringement of their right to interracial association;⁵¹ students who camped and hiked in the Washington, D.C., metropolitan area had standing to challenge the approval of an increase in railroad freight charges for recyclable goods as an injury to their right to enjoy the environment;⁵² and persons who camped in national parks might have had standing to challenge the commercial development of those parks as an infringement of their right to enjoy the environment.⁵³

As early as 1973, however, the Court signaled a retreat from these liberal holdings by placing new emphasis on causation and strengthening the line of

45. *Id.* at 3337 (Brennan, J., dissenting).

46. *Id.* at 3342 (Stevens, J., dissenting).

47. *Id.* at 3344 (Stevens, J., dissenting).

48. See Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 Ky. L.J. 185, 186-92 (1980-81).

49. 397 U.S. 150 (1970).

50. The legal-interest test requires a plaintiff to demonstrate injury to a legally protected interest to gain standing. *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137 (1938).

51. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

52. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

53. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Although plaintiffs in *Sierra Club* were denied standing because the Club failed to allege that its members used the valley threatened by development, the Court stated in dicta that such an allegation would have been sufficient basis for standing.

causation required by article III.⁵⁴ In *Linda R.S. v. Richard D.*⁵⁵ the Court held that the mother of an illegitimate child did not have standing to challenge Texas court decisions that construed a child support statute as applying only to married parents. The Court reasoned that although a favorable ruling might allow the State to prosecute the child's father for failure to pay support, it would not ensure that the mother would receive support payments.⁵⁶ Therefore, Linda R.S.'s injury was not redressable.

The causation test was developed further by the Court in *Warth v. Seldin*.⁵⁷ Plaintiffs in *Warth* were denied standing to challenge exclusionary zoning ordinances that prevented the construction of low-cost housing and thus prevented plaintiffs from finding suitable housing. The Court denied standing because of its uncertainty that the relief desired would result from a favorable decision. Altering the zoning rules, the Court stated, would not guarantee plaintiffs access to housing.⁵⁸

The requirement that the plaintiff's injury be "fairly traceable" to the defendant's conduct became part of the Court's standing analysis in *Simon v. Eastern Kentucky Welfare Rights Organization*.⁵⁹ Plaintiffs in *Simon* were indigents who had been denied nonemergency medical care at hospitals that enjoyed tax-exempt status. The hospitals enjoyed this privilege because they were designated "charitable" under revised IRS guidelines.⁶⁰ The challenged guidelines granted hospitals charitable status even if they restricted admissions to paying patients so long as the hospital offered full-time emergency treatment to anyone in need of emergency care. Plaintiffs argued that the new guidelines injured them by encouraging hospitals to deny treatment to indigents. The Court held that plaintiffs' inability to receive medical care could not fairly be traced to the IRS's revision of its guidelines because there was no evidence that the decision to deny admission to indigents would have been different if the IRS had denied the hospitals' charitable status. The Court believed it "purely speculative" that a change in IRS guidelines would result in the admission of indigents.⁶¹ As in *Linda R.S.* and *Warth*, relief of the *Simon* plaintiffs' injury would depend in part on the response of third parties to a favorable Court ruling; therefore, the causation requirement was not satisfied.

The causation requirement, though harsh, has not presented an absolute

54. For an excellent article on the development of the causation requirement, see Nichol, *supra* note 48.

55. 410 U.S. 614 (1973).

56. *Linda R.S.* has been cited by Professor Tribe to illustrate a potential double standard in the causation requirement. Professor Tribe notes that if the father of Linda R.S.'s child had brought an action for a declaratory judgment, he would have had standing to challenge the statute. The basis for his standing would have been the assumption that criminal sanctions change behavior—the very assumption rejected by the Court in denying standing to Linda R.S. Professor Tribe concludes that this result is "palpably unfair." L. TRIBE, *supra* note 32, § 3-21, at 93.

57. 422 U.S. 490 (1975).

58. *Id.* at 505-07.

59. 426 U.S. 26 (1976).

60. Prior guidelines did not consider hospitals charitable unless they provided as much care to indigents as their financial resources allowed. *Id.* at 42.

61. *Id.*

bar to plaintiffs who suffer an indirect injury. For example, in *Duke Power Co. v. Carolina Environmental Study Group*⁶² citizens alleging an injury to their environment resulting from the operation of nuclear power plants were held to have standing to challenge the constitutionality of the Price-Anderson Act.⁶³ The holding was based on evidence demonstrating that but for the Act, construction of the nuclear facilities in plaintiffs' neighborhoods would not be completed.⁶⁴ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁶⁵ plaintiff company was allowed standing to attack an exclusionary zoning scheme because it could identify a specific project it intended to construct once the scheme was removed. This allegation gave the complaint the "essential dimension of specificity" the Court had found missing in *Warth*.⁶⁶

There are also a number of cases in which the causation requirement has been abbreviated or ignored. In *Gladstone, Realtors v. Village of Bellwood*⁶⁷ the village and some of its residents claimed that their right to the benefits of living in an integrated society was being infringed by the racial steering practices of certain real estate brokers. The Court upheld plaintiffs' claim without requiring plaintiffs to show with specificity that the changing composition of their neighborhood was the result of defendants' steering practices or that the composition of the neighborhood would remain integrated if defendants ceased their steering practices.

Standing requirements were not discussed in *Norwood v. Harrison*,⁶⁸ in which the Court held that the parents of school children were entitled to an injunction prohibiting the State of Mississippi from providing free textbooks to students attending racially discriminatory private schools. The issue whether the parents had suffered a distinct injury, fairly traceable to the state's conduct and redressable by the Court, was not addressed. Similarly, the Court made no mention of article III standing requirements when it summarily affirmed the grant of an injunction against the IRS in *Green v. Coit*.⁶⁹

The Court's inconsistent application of its article III standing test, specifically the causation element of the test, has led to criticism that the Court employs standing analysis in an "unprincipled" effort to "screen from [its] docket claims which [it] substantively disfavors."⁷⁰ The Court's analysis in *Wright* lends support to this criticism.⁷¹

The Court's conclusion in *Wright* that government support of racially dis-

62. 438 U.S. 59 (1978).

63. 42 U.S.C. § 2210 (1982). The Price-Anderson Act limits the liability of a nuclear power company in the event of a nuclear accident. *Id.*

64. *Duke Power*, 438 U.S. at 74-77.

65. 429 U.S. 252 (1978).

66. *Id.* at 263 (quoting *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221 (1974)).

67. 441 U.S. 91 (1979).

68. 413 U.S. 455 (1973).

69. 404 U.S. 997 (1971), *aff'g mem.* *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

70. L. TRIBE, *supra* note 32, § 3-21, at 93.

71. See *Wright*, 104 S. Ct. at 3341 (Brennan, J., dissenting); see also *McCoy & Devins, supra* note 15, at 467 ("[I]f the Supreme Court . . . holds that the plaintiffs in *Wright* are without standing, it will be guilty of the ultimate irony.").

criminary private schools does not infringe on the rights of the blacks in the neighborhoods where those schools exist ignores the constitutional right of blacks to freedom from government supported segregation and its consequences. In the Court's estimation plaintiffs' first injury⁷² alleged a general harm shared by all blacks when the government discriminates on the basis of race. The Court refused to recognize this stigmatic injury as a basis for standing because all members of the racial group allegedly being discriminated against could claim this type of injury. The Court also feared that such an injury could be made the basis for third-party standing.⁷³ This analysis reveals the Court's unwillingness to read plaintiffs' complaint carefully. As Justice Brennan noted, "the complaint . . . limits the claim of stigmatic injury from illegal government action to black children attending public schools in districts that are currently desegregating yet contain discriminatory private schools benefitting from illegal tax exemptions."⁷⁴

There can be little doubt that when a government-supported racially discriminatory private school exists beside an integrated public school in a neighborhood undergoing desegregation, black school children continue to carry the badge of inferiority that burdened them under a dual school system. The existence of this badge and its impact on black youngsters were recognized by the Court in *Brown v. Board of Education*.⁷⁵ In *Brown* the Court stated: "A sense of inferiority affects the motivation of a child to learn" and "may affect [the child's] heart and mind in a way unlikely ever to be undone."⁷⁶ "Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children"⁷⁷ The Court thus recognized in *Brown* not only the right of black children to equal protection, but also their right to be free of the consequences of government-supported discrimination in education. The infringement of this right is at least as distinct, palpable, and personal an injury as the aesthetic injury suffered by campers when the beauty of

72. The first injury alleged by plaintiffs was harm resulting from unconstitutional government financial aid to racially discriminatory private schools. See *supra* text accompanying note 35.

73. For criticism of racial denigration as a basis for standing, see McCoy & Devins, *supra* note 15, at 447-53.

74. *Wright*, 104 S. Ct. at 3335 (Brennan, J., dissenting). Justice Brennan stated: "Thus, the Court's 'parade of horrors' concerning black plaintiffs from Hawaii challenging tax exemptions granted to schools in Maine, is completely irrelevant for purposes of Article III standing in this action. Indeed, even if relevant, that criticism would go to the scope of the class certified" *Id.* at 3335 n.3 (Brennan, J., dissenting).

The Court also expressed concern that recognizing a stigmatic injury as a basis for standing would confer standing nationwide on all members of the minority group against which the government allegedly was discriminating. The Court, however, has not always been troubled by the number of plaintiffs who may qualify to bring a particular cause of action. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the Court specifically noted that the plaintiffs could not be deprived of standing simply because everyone who used the "scenic resources of the country" could assert the same injury. *Id.* at 687-88. The Court stated: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." *Id.* at 688.

75. 347 U.S. 483 (1954).

76. *Id.* at 494.

77. *Id.*

the places where they camp is diminished.⁷⁸

The Court did not reject completely the validity of this injury, but it held that such an injury could confer standing only on persons who allege a personal denial of equal treatment. Each of the cases cited by the Court as support for this conclusion, however, involved plaintiffs whose complaints sought to compel defendants to afford equal protection to parties not before the Court.⁷⁹ This situation did not exist in *Wright* because plaintiffs alleged a direct injury to themselves, not a denial of the rights of others.

The complaint in *Wright* posed a unique question: Can government be held accountable for perpetuating the injuries suffered by blacks when the government endorses their treatment as second class citizens? The Court held in *Wright* that the government is accountable only for those injuries caused by its own denial of equal treatment and not for the injuries caused when it facilitates discrimination by private organizations. This holding unfairly and unreasonably limits the class of "distinct and palpable" injuries the Court is willing to redress.

The Court's refusal to grant standing on the basis of the second injury⁸⁰ alleged in *Wright* is unjustifiable. The Court in *Wright* applied the causation element of its standing test far more strenuously than article III demands and consequently left meritorious plaintiffs without relief. It ruled that the second injury failed to satisfy the causation element of its standing test because plaintiffs' complete relief would be dependent on the response of third parties to the Court's ruling. This decision insulates the government from liability for having indirectly supported third parties in the commission of acts that the government cannot lawfully support directly.⁸¹ Although the Court recognized that interference with the racial balance of public schools infringes on the right of children in

78. These were the facts in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). The Court recognized in *SCRAP* that this injury was a sufficient basis for standing. *Id.* at 686-87. For further discussion of the facts in *SCRAP*, see *infra* text accompanying notes 91-92.

79. The Court cited *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *O'Shea v. Littleton*, 414 U.S. 488 (1974); and *Rizzo v. Goode*, 423 U.S. 362 (1976). In *Moose Lodge* the Court held that a black plaintiff who had not sought and did not intend to seek membership in the lodge did not have standing to challenge the constitutionality of the lodge's discriminatory membership policies, even though he had alleged that the lodge's actions constituted "state action" under 42 U.S.C. § 1983 (1982). Plaintiff had not alleged any injury to himself resulting from the lodge's membership policies and thus was attempting to assert the right of other blacks to be equally considered for membership. *Moose Lodge*, 407 U.S. at 165-71.

In *O'Shea* plaintiffs sought to challenge the discriminatory administration of criminal justice in Cairo, Illinois. Although plaintiffs purported to represent a class that included persons who had suffered discriminatory treatment, none of the named plaintiffs alleged that they had suffered or were threatened with such treatment. Therefore, they failed to allege any injury to themselves resulting from the county's discriminatory practices. *O'Shea*, 414 U.S. at 494-95.

Plaintiffs in *Rizzo* sought injunctive relief for violations of the civil rights of Philadelphia citizens by city policemen. The Court determined that plaintiffs had failed to present a case or controversy because the threat of any future injury to plaintiffs was too remote. Therefore, the Court held that plaintiffs lacked a stake in the outcome sufficient to confer standing. *Rizzo*, 423 U.S. at 372-73.

80. The second injury alleged by plaintiffs was that the federal tax exemptions to racially discriminatory private schools in their communities impaired their children's ability to attend desegregated public schools. See *supra* text accompanying note 35.

81. Other authors have noted that the Court's application of the causation requirement has had the effect of insulating the government from liability for contributing to the injury of plaintiffs. See L. TRIBE, *supra* note 32, § 3-21, at 96-97; Nichol, *supra* note 48, at 223.

public schools to receive an education in an integrated environment, it concluded that the causal relationship between infringement of this right and government support of racially discriminatory schools was "attenuated at best."⁸² Plaintiffs alleged that the tax exemptions given to racially discriminatory private schools "foster[ed] and encourage[d] the organization, operation, and expansion" of racially discriminatory schools and interfered with the desegregation of public schools,⁸³ but the Court found their pleading defective because it failed to allege that "there were *enough* racially discriminatory private schools receiving tax exemptions in [plaintiffs'] communities for withdrawal of those exemptions to make an *appreciable* difference in public-school integration."⁸⁴ Under this reasoning plaintiffs were required to allege not only that the government's conduct interfered with public school desegregation, but also that eliminating the conduct would have a major impact on public school integration.

To require this type of specificity in pleading revives past notions of fact pleading and forces plaintiffs to prove their cases on the merits to survive motions to dismiss.⁸⁵ Requiring plaintiffs to show more than a line of causation such that a favorable decision would "contribute in a significant manner to remedying or preventing the injury alleged" goes beyond the article III causation requirement.⁸⁶ Article III requires only that the courts avoid rendering gratuitous judgments by ensuring that plaintiffs allege an injury that is "fairly" or reasonably traceable to the defendant's conduct and that the court's ruling is "likely" to result in relief.⁸⁷ Plaintiffs' allegation in *Wright* that tax exemptions facilitated the activities of racially discriminatory private schools and thereby diminished the ability of their children to receive an education in an integrated school satisfied this requirement.

The government grants tax exemptions for the very purpose of promoting the activities of the institutions that are exempted.⁸⁸ The exemptions make it

82. *Wright*, 104 S. Ct. at 3328.

83. *Id.* at 3322.

84. *Id.* at 3328 (emphasis added). Surprisingly, the Court failed to recognize the importance of tax-exempt status to the financial viability of many private schools. Although tax-exempt income status is of little benefit to a school that earns little or no profit, eligibility for tax deductible contributions is a valuable asset. Because charitable contributions are deductible from taxable income, they cost less than contributions to other organizations. For example, a person in a 35% tax bracket can make a \$100 contribution with only a \$65 loss in disposable income. See Feldstein, *The Income Tax and Charitable Contributions: Part I—Aggregate and Distributional Effects*, 28 NAT'L TAX J. 81, 81 (1975).

85. Justice Brennan has noted that the Court may be creating a doctrine which includes constitutionally mandated fact pleading. See *Simon*, 426 U.S. at 55 n.6 (Brennan, J., concurring in the result) ("[B]y requiring that 'this line of causation' . . . be precisely and intricately elaborated in the complaint, the Court continues its recent policy of 'reverting to the form of fact pleading long abjured in the federal courts.'" (quoting *Warth*, 422 U.S. at 528)). One commentator also has expressed alarm at this possible development. See Nichol, *supra* note 48, at 195; cf. L. TRIBE, *supra* note 32, § 3-21, at 96-97 (criticizing the specificity of pleading the Court said would be required to satisfy standing in *Warth*).

86. Nichol, *supra* note 48, at 226.

87. See *supra* notes 33-34 and accompanying text.

88. Tax exemptions and charitable deductions are means of federal assistance and are constitutionally equivalent to direct financial aid. "They serve ends . . . similar in nature to those served . . . by direct government expenditures . . ." Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV.

less expensive for the institution to operate and allow donors to contribute larger sums by making their contributions tax deductible.⁸⁹ By making the activity of these schools less expensive, the government makes them more affordable. Basic economic theory demonstrates that if an activity is more affordable more people will engage in it.⁹⁰ To the extent that tax exemptions allow racially discriminatory private schools to charge less tuition or provide better services, the government's unlawful activity aids in increasing the enrollments of such schools and diminishes the opportunity for children to attend integrated public schools.

This line of causation, though rejected by the Court, hardly seems less direct or more attenuated than that accepted by the Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁹¹ In *SCRAP* plaintiffs alleged that an increase in freight charges for recyclable waste would result in an increased use of raw materials, the natural resources for which might come from the Washington, D.C., area. They alleged that this increased use would diminish their ability to enjoy the environment in which they camped and hiked. The Court accepted these allegations as a sufficient basis for standing. Although the government argued that the Court should limit standing to those who were "significantly" affected by the challenged conduct, the Court refused stating: "[E]ven if we could begin to define what such a test would mean, we think it fundamentally misconceived. . . . 'The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle. . . .'"⁹² This "fundamentally misconceived" standard, however, is precisely the test adopted by the Court in *Wright*.

The Court suggested that plaintiffs' injury was not redressable because it was "purely speculative" whether withdrawal of tax exemptions would affect public school integration and because redressing plaintiffs' injury would require violation of separation of powers doctrine. Although plaintiffs probably could not have offered evidence as to the exact number of white students who would return to the public schools once the tax exemptions were removed, it does not follow that the relief they sought was unlikely to flow from a favorable decision.⁹³ Plaintiffs sought relief for their children's diminished opportunity to re-

L. REV. 352, 354 (1970); see *Allen v. Wright*, 104 U.S. at 3343 (Stevens, J., dissenting) ("The purpose of [tax exemptions], like the purpose of any subsidy, is to promote the activity subsidized; the statutes 'seek to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits.'" (quoting *Bob Jones*, 103 S. Ct. at 2026 n.10)); *McCoy & Devins*, *supra* note 15, at 454-55 & n.71.

89. See *supra* note 84.

90. See *Wright*, 104 S. Ct. at 3344-45 (Stevens, J., dissenting).

91. 412 U.S. 669 (1973).

92. *Id.* at 689 n.14 (quoting Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

93. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), Justice Brennan posed in his concurrence what he thought was a purely rhetorical question:

We may properly wonder where the Court, armed with its "fatally speculative pleadings" tool will strike next . . . Will minority schoolchildren now have to plead and show that in the absence of illegal governmental "encouragement" of private segregated schools, such schools would not "elect to forgo" their favorable tax treatment, and that this will "result in the availability" to complainants of an integrated educational system?

Simon, 426 U.S. at 63 (Brennan, J., concurring). Justice Brennan mistakenly believed that the

ceive an education in an integrated school. If tax exemptions for racially discriminatory private schools had been withdrawn, three factors could have been expected to lead to an increase in the enrollment of white students in public schools. First, fewer racially discriminatory schools would have been established because the absence of the tax exemptions would have made it more difficult for such schools to solicit necessary contributions from corporations and individuals.⁹⁴ Second, schools then in existence, particularly those with little or no endowment, would have been more likely to cease operations.⁹⁵ As one study has demonstrated, educational institutions are quite vulnerable to loss of income resulting from the increased cost of donations when tax incentives to contributors are withdrawn.⁹⁶ Last, fewer white students would have been able to afford the cost of discriminatory schools as the loss of contributions and the tax on revenues made attendance more expensive. These factors, which are based on elementary economic theory, make it unlikely that the withdrawal of tax exemptions could have failed to have an impact on public school integration.

The separation-of-powers analysis applied by the Court also fails to support the Court's conclusion that the article III standing requirements were not satisfied. The idea of separation of powers traditionally is relevant to the justiciability of issues raised by the plaintiff, not to the plaintiff's standing to bring an action.⁹⁷ The Court feared that allowing standing in *Wright* to challenge administrative guidelines "would pave the way generally for suits challenging . . . the particular programs agencies establish to carry out their legal obligations."⁹⁸ This fear, however, focuses on whether the Court should grant the relief requested, not on whether the plaintiff has presented a case or controversy under article III.

The Court's concern with avoiding undue interference with the executive's discretion in enforcing the laws was appropriate because the administrative procedures of a government agency were challenged. This concern, however, has no relevance to a discussion of standing. Further, as Justice Stevens observed, the discretion given the executive "does not apply when suit is brought 'to en-

Court's summary affirmance of *Coit v. Green*, 404 U.S. 997 (1971), had answered this question. *Simon*, 426 U.S. at 63 n.11. Although mistaken as to how the Court would answer his question, Justice Brennan demonstrated some skill in predicting what issues the Court would confront in the future.

94. Martin Feldstein has conducted a study which concludes that gifts to educational institutions are quite sensitive to the cost of giving. He predicts that an elimination of the charitable deduction would reduce donations to educational institutions by at least 50%. Feldstein, *The Income Tax and Charitable Contributions: Part II—The Impact on Religious, Educational and Other Organizations*, 28 NAT'L TAX J. 209, 224 (1975).

95. See Note, *Bob Jones University v. United States: Paying the Price of Prejudice—Loss of Tax Exempt Status*, 35 MERCER L. REV. 937, 958 (1984); see also *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (1969) (per curiam) (private schools formed in response to public school desegregation operate on the "thinnest financial basis").

96. See *supra* note 94.

97. See *Wright*, 104 S. Ct. at 3345-46 (Stevens, J., dissenting). "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." *Flast v. Cohen*, 392 U.S. 83, 100 (1968).

98. *Wright*, 104 S. Ct. at 3329.

force specific legal obligations whose violation works a direct harm.'"⁹⁹

The Court's analysis in support of its conclusion that *Norwood v. Harrison*¹⁰⁰ and *Coit v. Green*¹⁰¹ are distinguishable from *Wright* adds to the confusion and harshness of its opinion and gives rise to further criticism. In *Norwood* parents of schoolchildren successfully challenged Mississippi's provision of free textbooks to students attending racially discriminatory schools. Because standing was not specifically discussed in *Norwood*, the Court in *Wright* relied on a footnote in *Gilmore v. City of Montgomery*¹⁰² to explain the basis for standing in *Norwood*: "The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered."¹⁰³ The Court inferred from this footnote that plaintiffs in *Norwood* had acquired a right to have the State steer clear of supporting a dual educational system through a school desegregation decree and concluded that *Wright* was distinguishable as its plaintiffs had not acquired any such injunctive rights.¹⁰⁴

Mississippi's support of racially discriminatory schools by supplying them free textbooks is analogous to the federal government's support of such schools through tax exemptions. It hardly seems possible that the "concrete injury" suffered by plaintiffs in *Norwood* differed significantly from the injury suffered by plaintiffs in *Wright*. Despite the assertion by the Court that the rights of the plaintiffs in *Norwood* were derived from a judicial decree, the *Norwood* opinion makes it clear that plaintiffs' right to relief was derived from the Constitution: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."¹⁰⁵

The Court struggled even more in differentiating standing in *Green* from standing in *Wright*. First, the Court stated that since *Green* was "merely a summary affirmance" of a lower court holding that did not include a ruling on the issue of standing, its affirmance "lack[ed] the precedential weight of a case involving a truly adversary controversy."¹⁰⁶ Second, the Court stated that *Green* was distinguishable from *Wright* on its facts because *Green* concerned only Mississippi's public schools and evidence from an earlier Mississippi case had made it clear that tax support to racially discriminatory schools was having a significant impact on public school desegregation.¹⁰⁷ Last, the Court asserted that the "history of school desegregation in Mississippi at the time of the [*Green*] litigation, the nature of the IRS conduct challenged at the outset of the litigation, and

99. *Id.* at 3347 (Stevens, J., dissenting) (quoting from the majority opinion, *id.* at 3330).

100. 413 U.S. 455 (1973).

101. 404 U.S. 997 (1971).

102. 417 U.S. 556 (1974).

103. *Id.* at 570-71 n.10; *Wright*, 104 S. Ct. at 3331.

104. *Wright*, 104 S. Ct. at 3331.

105. *Norwood*, 413 U.S. at 467.

106. *Wright*, 104 S. Ct. at 3332.

107. The case referred to was *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389 (S.D. Miss. 1969) (per curiam), in which plaintiffs successfully challenged Mississippi's grant of tuition tax credits to parents who sent their children to racially discriminatory private schools.

the District Court's particular findings, . . . amply distinguish[ed]" *Green* from *Wright*.¹⁰⁸

Justice Brennan's dissent raised the obvious question to this line of reasoning: How do these factors, specified by the Court as distinguishing *Green* from *Wright*, bear on the issue of standing? Although *Wright* was a nationwide class action and *Green* was limited to Mississippi, this distinction fails to show how the injury suffered by plaintiffs in *Wright* was less distinct and palpable, less traceable to the defendants' unlawful conduct, or less likely to be redressed by a favorable decision than the injury suffered by plaintiffs in *Green*. The scope of a class action is not relevant to the issue of standing.¹⁰⁹ If a history of reluctance to desegregate public schools is relevant at all to the issue of standing, it "weighs in favor of allowing [plaintiffs in *Wright*] to maintain their . . . lawsuit",¹¹⁰ plaintiffs alleged that the IRS guidelines they challenged contributed to the "substantial continuation of the onerous history of school segregation in the affected school districts."¹¹¹

That IRS policy at the time of the *Wright* litigation differed from IRS policy at the time of the *Green* litigation also fails to provide a basis for distinguishing the two cases on the issue of standing.¹¹² Plaintiffs in *Wright* alleged that IRS policy was "so ineffective as to be the functional equivalent" of the government's policy at the time of *Green*.¹¹³ The Court's use of the finding of the district court in *Green* that tax exemptions were important to racially discriminatory schools as a factor in denying standing to similarly situated plaintiffs who had never had the opportunity to present such evidence to the court made a "mockery of the standing inquiry."¹¹⁴ The *Green* court's factual findings strengthen the allegations made by plaintiffs in *Wright* and support a finding that plaintiffs had standing. As Justice Brennan noted, the Court's discussion of the distinctions between *Wright* and *Green* "stretches the imagination beyond its breaking point."¹¹⁵

The most serious consequence of the Court's decision in *Wright*, however, is that it sterilizes the Court's decision in *Bob Jones University v. United States*.¹¹⁶ In *Bob Jones* the Supreme Court determined that sections 501(c)(3) and 170 of the Code prohibit the IRS from granting tax-exempt status to racially discriminatory schools and from allowing donations to such schools to be considered tax deductible. *Wright* illustrates that the IRS may escape challenge

108. *Wright*, 104 S. Ct. at 3332-33.

109. *See id.* at 3340 n.9 (Brennan, J., dissenting).

110. *Id.*

111. *Id.* at 3341 n.9 (Brennan, J., dissenting).

112. IRS policy at the time of the *Green* litigation granted tax-exempt status to racially discriminatory schools. IRS policy at the time of the *Wright* litigation purported to deny tax-exempt status to such schools. *See supra* note 1.

113. *Wright*, 104 S. Ct. at 3340 n.9 (Brennan, J., dissenting).

114. *Id.*

115. *Id.*

116. 103 S. Ct. 2017 (1983). For an analysis and criticism of the Court's failure to reach the constitutional issues raised in *Bob Jones*, see Note, *Religious Schools, Public Policy, and the Constitution: Bob Jones University v. United States*, 62 N.C.L. REV. 1051 (1984).

on grounds that it is violating these provisions by merely giving lip service to the *Bob Jones* ruling; if the IRS did grant tax-exempt status to Bob Jones University or some other racially discriminatory school, no plaintiff would have standing under the Court's holding in *Wright* to challenge the IRS's conduct. The Court in essence has left the government free to accomplish indirectly what it is forbidden to do directly.¹¹⁷

The Court in *Wright* used causation doctrine as a hammer to knock the teeth out of *Bob Jones* and shatter the value of *Norwood* and *Green* as precedent on the issue of standing. Standing doctrine remains shrouded in confusion and controversy; any court desiring to do so will be able to use the doctrine as its vehicle for avoiding decisions on the merits of cases in which government conduct is challenged. Although the Court purported to distinguish *Wright* from similar cases in which the Court has recognized the standing of the parties, the Court in fact imposed a harsher test of standing in *Wright* than it previously had imposed. The causation standard applied by the Court in *Wright* exceeds the scope of the article III requirements and unduly impairs access to the courts by victims of unlawful government conduct. The Court's opinion "'slam[s] the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits'"¹¹⁸ and leaves the government free to lend substantial support to racially discriminatory institutions.

TERESA WYNN ROSEBOROUGH

117. If the government desired to avoid the constitutional requirement that schools be integrated, providing support to racially discriminatory private schools certainly would be among its chosen methods. The Court's holding in *Wright* condones this conduct.

118. *Wright*, 104 S. Ct. at 3333 (Brennan, J., dissenting) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) (quoting *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in the result and dissenting))).

Sedima, S.P.R.L. v. Imrex Co.: The Requirement of Prior Criminal Convictions in Private RICO Actions*

In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ for the purpose of providing new and more effective methods of combatting organized crime in the United States.² In addition to criminal penalties,³ RICO provided new civil remedies,⁴ including a private cause of action under which persons injured in their business or property by a violation of the Act could recover treble damages.⁵

* Shortly before publication of this Note, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit by a 5-4 vote. *Sedima, S.P.R.L. v. Imrex Co.*, 53 U.S.L.W. 5034 (July 1, 1985), *rev'g* 741 F.2d 482 (2d Cir. 1984).

1. 18 U.S.C. §§ 1961-1968 (1982).

2. According to the Congressional Statement of Findings and Purpose, the purpose of RICO was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923.

3. See 18 U.S.C. § 1963 (1982).

4. See *id.* § 1964. In addition to the private cause of action for treble damages discussed *infra* note 5, § 1964 authorizes the federal district courts to issue injunctions, orders for divestiture of any interest in any enterprise under the Act, and orders for the dissolution or reorganization of any enterprise under the Act.

5. 18 U.S.C. § 1964(c) (1982) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

The prohibited activities for which treble damages may be awarded under § 1964 are set forth in § 1962, which provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The conduct prohibited by § 1962 encompasses a wide range of activities because of the broad manner in which the key term "racketeering activity" is defined. Under 18 U.S.C. § 1961(1) (1982), racketeering activity includes (1) "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year"; (2) activities indictable under a number of federal statutes, including the mail fraud and wire fraud statutes; (3) activities indictable under two federal statutes dealing with restrictions on payments and loans to labor organizations; and (4) offenses involving bankruptcy or securities fraud or dealings in narcotics or other dangerous drugs. The requirement of a "pattern of racketeering activity" is satisfied by a showing of two acts of racketeering activity occurring within a 10-year period. *Id.* § 1961(5).

The availability of treble damages to plaintiffs injured by violations of RICO has led to an explosion of private RICO litigation in recent years.⁶ In response to this dramatic increase, some courts have imposed restrictions on the scope of civil RICO in an attempt to limit claims for which treble damages may be awarded. The courts that have attempted to limit private RICO claims have done so by requiring that civil RICO defendants have some connection with organized crime,⁷ that civil RICO plaintiffs suffer a commercial or competitive injury,⁸ or that civil RICO plaintiffs suffer a "racketeering injury."⁹

6. Few civil actions for treble damages were brought under § 1964(c) during the first decade of RICO's existence. As of 1979, only two private RICO cases had been reported. Sylvester, *Civil RICO's New Punch*, Nat'l L.J., Feb. 7, 1983, at 1, col. 1. As recognition has grown of the advantages RICO offers plaintiffs, however, the number of private RICO suits has increased dramatically. As of early 1983, over 100 cases had been reported concerning private RICO actions. *Id.*

The private RICO cause of action offers plaintiffs a number of advantages in addition to the recovery of treble damages. RICO's liberal discovery, broad venue, and nationwide service of process provisions favor private plaintiffs. Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities"*, 18 GA. L. REV. 43, 46 (1983). Moreover, the threat of treble damages and the possible stigma of the "racketeer" label are potent weapons in obtaining large settlements of private RICO claims. *Id.*

7. See, e.g., *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 642-44 (C.D. Cal. 1983); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

In confining the scope of civil RICO to those defendants having some connection to organized crime, the cases noted above relied on congressional statements indicating that RICO was intended to be a weapon against organized crime. See *supra* note 2 and accompanying text. The Act itself, however, contains no requirement that a defendant be affiliated with organized crime. Indeed, Congress specifically rejected attempts to limit RICO's applicability to organized crime because of concerns that such a limitation might impair the effectiveness of the Act and create unconstitutional status-based offenses. See Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1107-09 (1982). An overwhelming majority of courts has rejected the view that a civil RICO defendant must be connected with organized crime. See, e.g., *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 105 S. Ct. 118 (1984); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); *Bennett v. Berg*, 685 F.2d 1053, 1063-64 (8th Cir. 1982), *aff'd in part on reh'g en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); *Morosani v. First Nat'l Bank*, 581 F. Supp. 945, 953-54 (N.D. Ga. 1984); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1468 (N.D.N.Y. 1984); *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1425-26 (D. Or. 1984); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1318 (N.D. Ill. 1983); *B.F. Hirsch, Inc. v. Enright Ref. Co.*, 577 F. Supp. 339, 347-48 (D.N.J. 1983); *Dakis v. Chapman*, 574 F. Supp. 757, 761 (N.D. Cal. 1983); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 269 (W.D. Okla. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 850-51 (E.D. Va. 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 681-82 (N.D. Ga. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 719 (D.D.C. 1983); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667, 669-70 (W.D. Mich. 1983); *Ralston v. Capper*, 569 F. Supp. 1575, 1579 (E.D. Mich. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1239-40 (S.D.N.Y. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 490-93 (E.D. Pa. 1983); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352 (E.D. Pa. 1983); *Windsor Assocs., Inc. v. Greenfield*, 564 F. Supp. 273, 276-78 (D. Md. 1983); *Hunt Int'l Resources Corp. v. Binstein*, 559 F. Supp. 601, 602 (N.D. Tex. 1982); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49 (N.D. Cal. 1982); *D'Iorio v. Adonizio*, 554 F. Supp. 222, 230-31 (M.D. Pa. 1982); *Meineke Discount Muffler Shops, Inc. v. Noto*, 548 F. Supp. 352, 354 (E.D.N.Y. 1982); *Gunther v. Dinger*, 547 F. Supp. 25, 27 (S.D.N.Y. 1982); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247-48 (S.D.N.Y. 1981); *Engl v. Berg*, 511 F. Supp. 1146, 1154-55 (E.D. Pa. 1981); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 646-47 (N.D. Ill. 1980); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979).

8. See *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980). The requirement of a commercial or competitive injury in civil RICO cases, however, has been rejected by the vast majority of courts that have considered this issue. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*,

In *Sedima, S.P.R.L. v. Imrex Co.*¹⁰ the United States Court of Appeals for the Second Circuit imposed an entirely new restriction on the scope of civil RICO in treble damage actions. The court held that a private RICO action may not be brought against a defendant who has not previously been convicted of a RICO violation or of the predicate offenses that form the basis of the alleged racketeering activity.¹¹ This Note examines the implications of the requirement

741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd in part on reh'g en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); Kimmel v. Peterson, 565 F. Supp. 476 (E.D. Pa. 1983); Gitterman v. Vitoulis, 564 F. Supp. 46 (S.D.N.Y. 1982); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47 (N.D. Cal. 1982); USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807 (W.D. Ky.), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982); Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982); Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206 (E.D. Mich. 1981); Hellenic Lines Ltd. v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981).

9. See 18 U.S.C. §§ 1961(1), 1962, 1964(c) (1982); see, e.g., Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Nov. 13, 1984) (No. 84-657); *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350 (S.D.N.Y. 1984); Willamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415 (D. Or. 1984); Hudson v. LaRouche, 579 F. Supp. 623 (S.D.N.Y. 1983); County of Cook v. Midcon Corp., 574 F. Supp. 902 (N.D. Ill. 1983); Dakis v. Chapman, 574 F. Supp. 757 (N.D. Cal. 1983); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255 (W.D. Okla. 1983); Richardson v. Shearson/American Express Co., 573 F. Supp. 133 (S.D.N.Y. 1983); King v. Lasher, 572 F. Supp. 1377 (S.D.N.Y. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983); Friedlander v. Nims, 571 F. Supp. 1188 (N.D. Ga. 1983), *appeal dismissed*, 747 F.2d 1467 (11th Cir. 1984); Guerrero v. Katzen, 571 F. Supp. 714 (D.D.C. 1983); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983); Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); Johnsen v. Rogers, 551 F. Supp. 281 (C.D. Cal. 1982); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002 (C.D. Cal. 1982); Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206 (E.D. Mich. 1981).

Based primarily on the rationale discussed *infra* note 11, the decisions noted above have held that a civil RICO plaintiff must prove a racketeering injury distinct from the injury caused by the defendant's predicate acts. A number of courts, however, have rejected the racketeering injury requirement, holding that injury from the defendant's predicate acts alone is sufficient to sustain a private RICO claim. See, e.g., Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984); Laterza v. American Broadcasting Co., 581 F. Supp. 408 (S.D.N.Y. 1984); Yancoski v. E.F. Hutton & Co., 581 F. Supp. 88 (E.D. Pa. 1983); Swanson v. Wabash, Inc., 577 F. Supp. 1308 (N.D. Ill. 1983); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234 (E.D. Pa. 1983); Ralston v. Capper, 569 F. Supp. 1575 (E.D. Mich. 1983); Mauriber v. Shearson/American Express, Inc. 567 F. Supp. 1231 (S.D.N.Y. 1983); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146 (D.N.J. 1983), *aff'd in part and rev'd in part on other grounds*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47 (N.D. Cal. 1982).

10. 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

11. *Id.* at 503. In addition to the requirement of a prior criminal conviction, the court also adopted the requirement of a racketeering injury in private RICO actions. *Id.* at 495; see also *supra* note 9 (cases requiring that civil RICO plaintiffs suffer a "racketeering injury"). The court based its analysis on the language of 18 U.S.C. § 1964(c) (1982), which states that to recover treble damages, a civil RICO plaintiff must prove injury to his business or property "by reason of a violation of section 1962." (emphasis added). Noting that "RICO was intended not simply to provide additional remedies for already compensable injuries" but rather as a method of fighting organized crime, the court held that "[t]he 'by reason of' language [in the statute] requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by [the] predicate acts" *Sedima*, 741 F.2d at 494.

The court further supported its position by analogizing the "by reason of" language in RICO to identical language in the Clayton Act, 15 U.S.C. § 15(a) (1982), from which the RICO language was drawn. *Sedima*, 741 F.2d at 494. Observing that antitrust plaintiffs must allege and prove an "anti-

of a prior criminal conviction in private RICO suits and concludes that such a requirement is both unsupported by statutory or judicial authority and contrary to the policy considerations upon which RICO is based.

In 1979 Sedima, S.P.R.L. and Imrex Co. entered into a joint venture to supply electronic component parts to a NATO subcontractor in Belgium.¹² Under the joint venture agreement, Sedima secured orders for the parts, and Imrex obtained the parts and shipped them to Europe. Sedima sued alleging that Imrex had wrongfully received and retained money belonging to the joint venture by falsely overstating the purchase prices, shipping costs, and finance charges of the parts purchased for the joint venture. Sedima asserted several claims, including a private RICO claim based on the predicate acts of mail fraud¹³ and wire fraud¹⁴ and on an alleged RICO conspiracy under section 1962(d).¹⁵

The United States District Court for the Eastern District of New York dismissed the RICO counts.¹⁶ The lower court relied on previous RICO decisions requiring a showing of competitive or commercial injury¹⁷ or a showing of a "racketeering injury"¹⁸ and held that a civil RICO plaintiff must allege something more or different than injury resulting from the predicate acts alone.¹⁹ Because it determined that Sedima had alleged no injury other than that caused by the predicate acts of mail fraud and wire fraud, the district court dismissed

trust injury' " or an "injury of the type the antitrust laws were intended to prevent," *id.* at 494-95 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)), the court concluded by analogy that "the 'by reason of' language in section 1964(c) is intended to limit standing to those injured by a 'racketeering injury,' by an injury of the type RICO was designed to prevent." *Id.* at 495. Based on this analysis, the court held that civil RICO plaintiffs must "show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Id.* at 496.

The United States Court of Appeals for the Second Circuit reiterated its position with respect to the racketeering injury requirement in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Nov. 13, 1984) (No. 84-657), decided the day after *Sedima*. The *Rhoades* panel elaborated on *Sedima's* analysis and attempted to provide some examples of situations that might constitute racketeering injuries. *Id.* at 517. Judge Cardamone, who wrote strong dissents in *Sedima* and *Rhoades*, joined with the majority in *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984), decided the day after *Rhoades*. The *Furman* panel acknowledged the stare decisis effect of *Sedima* and *Rhoades* but expressed disagreement with those decisions and reaffirmed the views expressed in Judge Cardamone's dissents. *Id.* at 525. By agreement of the court, the *Sedima*, *Rhoades*, and *Furman* opinions were published in the order in which they were completed, after the court's denial of en banc consideration of all three cases. *Id.*

12. *Sedima*, 741 F.2d at 484.

13. 18 U.S.C. § 1341 (1982).

14. *Id.* § 1343.

15. *Sedima*, 741 F.2d at 485. *Sedima* sought treble damages and attorney's fees under 18 U.S.C. § 1964(c) (1982); see *supra* note 5 (text of § 1964(c)). *Sedima* also alleged breach of contract, breach of fiduciary duty, unjust enrichment, breach of the joint venture agreement, conversion, breach of a constructive trust, and a claim based on quasi-contract. *Sedima*, 741 F.2d at 484.

16. *Sedima, S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

17. See *supra* note 8 and accompanying text.

18. See *supra* note 9 and accompanying text.

19. *Sedima, S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963, 965 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

Sedima's RICO claims.²⁰

The court of appeals agreed in part with the district court's analysis, holding that a civil RICO plaintiff must allege a "racketeering injury" to maintain a suit for treble damages.²¹ In addition, the court held that "a prior criminal conviction is a prerequisite to a civil RICO action."²² Because Imrex had been convicted neither of a RICO violation nor of the predicate offenses on which Sedima's RICO allegations were based, the court held that the RICO claims against Imrex must be dismissed.²³

The court began its discussion of the prerequisites for civil RICO suits by disposing of possible impediments to its analysis of the private RICO claim. First, the court discounted the relevance of the statute's legislative history to private RICO actions, noting that section 1964(c) was introduced so late in the legislative process that nearly all congressional discussion concerning the statute was inapplicable to treble damage actions.²⁴ Second, the court refused to apply the "plain meaning rule"²⁵ of statutory construction to section 1964(c) on the

20. *Id.*

21. *Sedima*, 741 F.2d at 494-95; see *supra* note 11 (summary of court's analysis).

22. *Sedima*, 741 F.2d at 496.

23. *Id.* at 503-04. The district court did not address whether a prior criminal conviction against the defendant is required in private RICO actions.

24. *Id.* at 489. RICO originated in the Senate in 1969 as title IX of Senate Bill 30. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). Although Senate Bill 30 contained most of the provisions of § 1964, it did not include the treble damage remedy set forth in § 1964(c). Thus, according to the *Sedima* court, "any comments in the Senate Report . . . pertaining to RICO's civil remedies do not pertain to the scope, impact, or purpose of the private treble damage remedy . . ." *Sedima*, 741 F.2d at 489.

The House of Representatives proposed the addition of § 1964(c) to Senate Bill 30. As the court noted, § 1964(c) received little discussion, either in committee or on the House floor. *Id.* at 489-92. In addition, the House Report, which did little more than paraphrase the provisions of § 1964(c), shed little light on Congress' intent with respect to the private RICO cause of action. See H.R. REP. NO. 1549, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007, 4010 & 4034. The Senate accepted the House's addition of § 1964(c) without requesting a conference.

After its review of RICO's legislative history, the court observed:

The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it.

Sedima, 741 F.2d at 492.

For more extensive discussions of RICO's legislative history, see Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980); 1 CORNELL INST. ON ORGANIZED CRIME, MATERIALS ON RICO 58-105 (1980-1981).

25. The plain meaning rule "preclude[s] the use of extrinsic evidence to determine the meaning of a statute, the language of which seem[s] clear on its face." *Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 494 (9th Cir.), cert. denied, 439 U.S. 954 (1978). The Supreme Court, however, has refused to apply the plain meaning rule mechanically, holding that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 10 (1976) (quoting *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940)). More recently, the Supreme Court stated:

"The starting point in every case involving construction of a statute is the language itself."

ground that such an analysis would provide "little or no guidance as to the handling of the very real ambiguities . . . surrounding the complex statutory scheme providing for the private civil remedy."²⁶ Last, the court distinguished previous decisions rejecting the requirement of a prior criminal conviction in private RICO suits, holding that they did not control disposition of the issues raised in the *Sedima* case.²⁷

Having cleared the way for its analysis of the private RICO claim, the court examined the language of the statute, scrutinizing in particular certain terms which suggested that Congress intended to require prior criminal convictions in civil RICO suits. For example, the court considered the meaning of the word "violation" in the context of section 1964(c)'s requirement that civil RICO plaintiffs show injury "by reason of a violation of section 1962." Although acknowledging that other interpretations were possible, the court concluded that Congress' use of the word "violation" indicated an intent to require prior criminal convictions in private RICO suits.²⁸

Because civil RICO plaintiffs must prove that they have been injured by a pattern of racketeering activity under section 1962, the court also examined the meanings of several terms set forth in the definition of "racketeering activity." Under section 1961(1) racketeering activity is defined to include acts "chargeable" under state law, acts "indictable" under federal law, and "offenses" under

But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

Watt v. Alaska, 451 U.S. 259, 265-66 (1981) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928)).

26. *Sedima*, 741 F.2d at 494. In *United States v. Turkette*, 452 U.S. 576 (1981), a criminal RICO case, the Supreme Court disapproved of the lower court's departure from the language of the statute, relying on the plain meaning of RICO to construe the term "enterprise" as used in the statute. The *Sedima* court distinguished this use of the plain meaning rule in the criminal RICO context from the possible use of the rule in construing the "very real ambiguities" of § 1964(c). *Sedima*, 741 F.2d at 494; see also *infra* notes 57-60 and accompanying text (discussing *Turkette's* construction of the term "enterprise").

27. *Sedima*, 741 F.2d at 496-98. The principal cases that the court discussed were *United States v. Cappelletto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), and *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982). See *infra* notes 47-54 and accompanying text (discussion of these and other cases rejecting the requirement of a prior criminal conviction in private RICO suits).

28. The court based its analysis of the word "violation" on a comparison of § 1964(c) with the parallel language of the Clayton Act, on which § 1964(c) was modelled. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a) (1982). By contrast, § 1964(c) states that "[a]ny person injured in his business or property by reason of a violation of section 1962" may bring suit for treble damages, attorney's fees, and costs. According to the court,

The difference [in the language of the statutes] is instructive. It is possible to argue that "violation" is simply a shorthand way of saying "by reason of anything forbidden," and one could suppose that [the change in the language of the statute was made] in a desire merely to eschew surplusage. But this interpretation does not seem as compelling as one which suggests that the change was made with a specific intent in mind—to require that conviction at least of the predicate acts be had before a civil suit may be brought by a private person.

Sedima, 741 F.2d at 498-99.

the securities, bankruptcy, and dangerous drug laws.²⁹ In the court's view, the terms "chargeable," "indictable," and "offense" "speak along criminal rather than civil lines"³⁰ and add force to the argument that Congress intended to require prior criminal convictions in civil RICO actions.³¹

The court, however, did not rest its decision solely on interpretation of the statutory language. Rather, it held that "[t]he structure of RICO as a whole leads one to the narrower interpretation requiring criminal convictions by a more direct route."³² The court premised this argument on the proposition that "RICO liability simply does not exist without criminal conduct,"³³ since the purpose of the Act was "to provide new penalties and remedies to combat conduct which explicitly has already been found criminal."³⁴ In the court's view, RICO's purpose of combatting activity already found to be criminal would be frustrated in civil actions in which no prior criminal conviction was required, because a civil action would be inadequate to determine whether specific conduct already was criminal.³⁵ In addition, the court noted that in the absence of

29. See *supra* note 5.

30. *Sedima*, 741 F.2d at 499.

31. The court used the example of a civil action for securities fraud to illustrate this point. In such a civil case, the court reasoned, a defendant could not be said to have committed an "offense," conviction of which would require criminal scienter and proof beyond a reasonable doubt. Because such a result would be anomalous in a civil action for securities fraud, the court found it "hard to believe that in adopting civil RICO Congress intended to permit proof of 'willful' violations by only a preponderance of the evidence." *Id.*

With respect to the use of the terms "chargeable" and "indictable," the court found it conceivable that Congress intended no requirement of prior informations or indictments in civil RICO actions, since the predicate acts constituting the racketeering activity need only be "chargeable" or "indictable." According to the court, however,

a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts the power to determine whether an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts—proved by a preponderance of the evidence only—and say that these facts make out acts which are "indictable" or "chargeable." . . . In the case of indictments that is the purpose of grand juries. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." Surely, being declared a "racketeer" or being held responsible for being one is being held to "answer for" an "infamous crime." Whatever else one may think of grand juries or the process by which they pursue their deliberations, they may stand as a bulwark between the individual and the government. Under the interpretation given RICO by those courts which do not require criminal convictions of the predicate acts before the bringing of a civil action, every private plaintiff becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor.

Id. at 500.

32. *Id.*

33. *Id.* at 501.

34. *Id.* at 500. In support of this proposition, the court relied on a statement in an article coauthored by Professor G. Robert Blakey, chief counsel of the Senate subcommittee that proposed RICO and an advocate of broad construction of the statute. In discussing the congressional mandate that RICO be liberally construed, the authors observed that "RICO did not draw a line between criminal and innocent conduct. Instead, RICO authorized the imposition of different civil or criminal remedies on conduct already criminal, when performed in a specified fashion." Blakey & Gettings, *supra* note 24, at 1032. Elsewhere in the article, the authors noted that "RICO is not a criminal statute; it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of 'racketeering activity' that violates an independent criminal statute." *Id.* at 1021 n.71.

35. *Sedima*, 741 F.2d at 501. This view is analogous to the court's argument based on the

prior criminal convictions, civil RICO actions would raise problems with respect to the standard of proof to be applied³⁶ and the congressional mandate that RICO be liberally construed.³⁷ The court concluded that a private RICO action may not be maintained against a defendant who has not previously been convicted of a RICO violation or of the predicate offenses forming the basis of the alleged racketeering activity.³⁸

Judge Cardamone filed a strong dissent in *Sedima*. He disagreed with the majority's assumption that civil RICO defendants are entitled to the expertise and procedural safeguards of the criminal system because RICO is an inherently criminal statute.³⁹ He also objected to the majority's attempt to distinguish contrary case law⁴⁰ and the majority's interpretation of the terms "indictable," "chargeable," and "violation."⁴¹ In Judge Cardamone's view, the majority's requirement of prior criminal convictions in private RICO suits effectively deprived racketeering victims of the remedy that Congress intended them to have.

Regardless of whether a defendant is a member of an organized crime family and no matter how lawless his pattern of racketeering activity may be, if he escapes conviction—through acquittal, a beneficial plea,

meanings of the terms "chargeable" and "indictable." See *supra* note 31. Both arguments rely on the premise that some binding and explicit determination of the criminality of a RICO defendant's conduct must be made before such a defendant may be held civilly liable for his racketeering activity. This requirement creates problems in private RICO actions, since courts in civil cases cannot make binding and explicit determinations of the criminality of particular conduct. The court's consideration of this conflict between the requirements of the civil and criminal systems led it to "conclude that had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c)." *Sedima*, 741 F.2d at 501.

36. *Sedima*, 741 F.2d at 501-02. The court's burden of proof argument is based on the premise that the operation of RICO is limited to punishment of criminal conduct; under this view, the conduct of a RICO defendant first must be found criminal to fall within the ambit of the statute. Given this premise, the court reasoned that in the absence of a prior criminal conviction, a civil RICO plaintiff must prove his case beyond a reasonable doubt. Because there was no evidence that Congress intended such a scheme of proof in civil RICO actions, the court concluded that "Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit." *Id.* at 502.

37. *Id.* at 502-03. Congress directed that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. According to the court, if civil RICO claims were allowed in the absence of a prior criminal conviction, this clause mandating liberal construction would conflict with the due process requirement that criminal statutes be strictly construed. In the court's view, liberal construction of the statute in civil actions not based on prior criminal convictions would deprive RICO defendants of their due process right to have the criminality of their conduct determined under strict construction of the applicable statutes. The court opined that "had Congress considered the [liberal construction] problem, it would have intended criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action." *Sedima*, 741 F.2d at 502.

38. In the words of the court, "To bring a private civil action [under RICO], there must be a 'violation,' that is, criminal convictions on the underlying predicate offenses. Of course, a conviction under RICO itself will do, a fortiori." *Sedima*, 741 F.2d at 503.

39. *Id.* at 506-08 (Cardamone, J., dissenting). Judge Cardamone rejected the view that private RICO actions are criminal or quasi-criminal under applicable Supreme Court precedents. See *infra* notes 75-83 and accompanying text. Thus, in his view, civil RICO defendants are not entitled to the same protections afforded defendants in criminal or quasi-criminal proceedings. Judge Cardamone argued that even if private RICO actions are viewed as criminal or quasi-criminal, such a finding should not mandate the requirement of a prior criminal conviction, since any necessary procedural safeguards could be afforded a defendant in the civil proceeding.

40. *Sedima*, 741 F.2d at 504-05 (Cardamone, J., dissenting).

41. *Id.* at 505-06, 508 (Cardamone, J., dissenting).

or a decision not to prosecute—then the remedy granted the victim of these activities is lost.⁴²

The *Sedima* requirement of prior criminal convictions in private RICO actions marks an entirely new direction in civil RICO jurisprudence. The prior conviction requirement does not appear in the statute,⁴³ and the legislative history contains no indication that Congress intended to impose such a requirement.⁴⁴ Moreover, every case prior to *Sedima* that had considered the issue had held that no prior criminal conviction is required in private RICO suits.⁴⁵

As the majority observed,⁴⁶ few of the cases rejecting the prior conviction requirement have supported their position with extensive analysis. *United States v. Cappetto*,⁴⁷ which the *Sedima* court distinguished, frequently has been cited to support the proposition that prior criminal convictions are not required in private RICO actions.⁴⁸ Although *Cappetto* did not deal specifically with this issue,⁴⁹ its recognition of the independence of RICO's civil remedies from its criminal penalties⁵⁰ led many courts to reject the prior conviction requirement.

42. *Id.* at 508 (Cardamone, J., dissenting).

43. See *supra* note 5.

44. This is hardly surprising given the dearth of legislative history relating to § 1964(c). See *supra* note 24 and accompanying text.

45. See, e.g., *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255 (W.D. Okla. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476 (E.D. Pa. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983); *Kaushal v. State Bank of India*, 556 F. Supp. 576 (N.D. Ill. 1983); *Lode v. Leonardo*, 557 F. Supp. 675 (N.D. Ill. 1982); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982); *Glusband v. Benjamin*, 530 F. Supp. 240 (S.D.N.Y. 1981); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645 (N.D. Ill. 1980); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311 (N.D. Ill. 1979); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278 (D. Del. 1978).

Although the majority stated that courts had split on whether prior criminal convictions are necessary in private RICO actions, *Sedima*, 741 F.2d at 493, no case before *Sedima* had held that prior convictions are required. Two of the cases the majority cited in support of its proposition merely noted in dicta that prior criminal convictions might be required. See *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1137-38 n.12 (D. Mass. 1982) ("While it is difficult for us to conclude that Congress, in using the words 'indictable' and 'punishable' contemplated that civil liability could result without involvement of the criminal process, other courts have done so."); *Kleiner v. First Nat'l Bank*, 526 F. Supp. 1019, 1022 n.2 (N.D. Ga. 1981) ("It may well be that entitlement to the civil remedy of section 1964 should be conditioned upon a criminal conviction or at least an indictment. However, the Court need not reach this issue here.").

46. *Sedima*, 741 F.2d at 497.

47. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

48. Many of the cases cited *supra* note 45 relied on *Cappetto* in rejecting the prior conviction requirement.

49. *Cappetto* involved a civil action brought by the government under § 1964 for injunctive relief and divestiture. Although it did not discuss the necessity of prior criminal convictions in civil RICO actions, the *Cappetto* court rejected the contention that § 1964 actions are essentially criminal proceedings that entitle defendants to the constitutional rights afforded in criminal cases. The *Sedima* majority distinguished *Cappetto* on the ground that it dealt solely with governmental actions and thus had no bearing on private RICO suits for treble damages. *Sedima*, 741 F.2d at 496-97.

50. The *Cappetto* court stated that

acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.

Cappetto, 502 F.2d at 1357.

For example, in *USACO Coal Co. v. Carbomin Energy, Inc.*⁵¹ the United States Court of Appeals for the Sixth Circuit relied on *Cappetto* in determining that Congress did not intend to limit liability under section 1964(c) to defendants previously convicted of criminal charges.⁵² In *Bunker Ramo Corp. v. United Business Forms, Inc.*⁵³ the United States Court of Appeals for the Seventh Circuit cited both *Cappetto* and *USACO Coal Co.* in rejecting arguments for the prior conviction requirement strikingly similar to those successfully advanced in *Sedima*.⁵⁴

Judge Cardamone in his dissent in *Sedima* suggested that there was an "obviously simple explanation for [these courts'] resounding rejection of any prior conviction requirement—it does not appear in the statute."⁵⁵ Judge Cardamone's point is well taken given that RICO contains no explicit requirement of prior criminal convictions in treble damage actions. It is a familiar axiom that "[t]he starting point in every case involving construction of a statute is the language itself."⁵⁶ It is likely that the courts that rejected the prior con-

51. 689 F.2d 94 (6th Cir. 1982).

52. The court stated:

We find nothing in the plain language of RICO to suggest that civil liability under § 1964(c) is limited only to those already convicted or charged with criminal racketeering activity. Section 1964(c) states that an action for damages may be maintained by any person injured in his business or property by reason of a violation of § 1962. . . . Section 1962 merely describes acts that are "unlawful" under RICO. Section 1963 provides that violations of § 1962 are criminal, just as § 1964(c) provides that violations of § 1962 create a private right of action for damages. If Congress had intended to limit liability under § 1964(c) only to those convicted of or charged with RICO crimes, it would have done so within § 1964(c) by referring to § 1963 or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963. We believe this literal reading of RICO is consistent with the approach of *United States v. Turkette* . . . and the Supreme Court's recognition in that case that Congress intended that RICO be liberally construed to effectuate its remedial purposes.

Id. at 95 n.1. The *Sedima* court labelled this argument "misguided," observing that "[i]f Congress had referred to section 1963 in section 1964(c), the result would have been not only to require criminal convictions for the predicate acts before bringing a civil suit, but to require a conviction under RICO." *Sedima*, 741 F.2d at 497-98. In the court's view, "people injured by 'racketeering activity' [i.e., predicate acts] may sue . . . whether or not the government has brought an action under RICO to punish that activity. As to whether that racketeering activity itself must already have been proven criminal . . . the reference to section 1962 in section 1964(c) provides no indication." *Id.* at 498.

53. 713 F.2d 1272 (7th Cir. 1983).

54. The *Bunker Ramo* court noted:

Defendants argue that "violation" as used in section 1962 must mean "conviction." Defendants point out that the treble damages provision of RICO differs from section 4 of the Clayton Act which provides treble damages for injury to business or property "by reason of anything forbidden in the antitrust laws." According to defendants, this difference in language indicates that a criminal conviction under 18 U.S.C. § 1963 for violating section 1962 is an essential element for civil liability under section 1964(c). Defendants also argue that section 1962 is a criminal statute and Congress did not intend a charge of criminal conduct to be adjudicated in a civil proceeding.

Id. at 1287. The court rejected these arguments, holding that "section 1964(c) creates a private right of action for parties injured by conduct that violates section 1962 without any requirement of a prior criminal conviction for that conduct." *Id.*

55. *Sedima*, 741 F.2d at 505 (Cardamone, J., dissenting).

56. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

viction requirement with little discussion simply concluded that the plain language of RICO fully disposed of the issue and obviated the need for further inquiry.

The Supreme Court adopted substantially this approach to construing RICO in *United States v. Turkette*.⁵⁷ *Turkette*, a criminal RICO case, involved the question whether the term "enterprise" as used in RICO⁵⁸ included both legitimate and illegitimate enterprises. In construing the provisions of RICO, the Supreme Court began its inquiry with the language of the statute, stating: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" ⁵⁹ The Court held that the language of RICO alone controlled interpretation of the term "enterprise," which must be construed to include both legitimate and illegitimate enterprises in the absence of any explicit definitional limitation on the face of the statute.⁶⁰

If the *Sedima* court had followed the *Turkette* analysis, it would have concluded that no prior criminal conviction is required in private RICO actions, since such a requirement does not appear on the face of the statute.⁶¹ The court, however, expressly declined to follow *Turkette* on the ground that section 1964(c) presented ambiguities that could not be resolved by resort to the plain meaning of the statutory language.⁶² Because there was no legislative history to indicate Congress' intent with respect to the prior conviction requirement,⁶³ the court supplied its own interpretation of the statute based on its opinion as to what Congress would have intended had it considered the need for prior convictions in private RICO actions.

The court relied in part upon interpretation of the statutory terms "viola-

57. 452 U.S. 576 (1981).

58. Under 18 U.S.C. § 1961(4) (1982), an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

59. *Turkette*, 452 U.S. at 580 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

60. The Court observed:

On its face, the definition [of "enterprise" under § 1961(4)] appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.

Id. at 580-81.

61. Some of the courts rejecting the prior-conviction requirement in § 1964(c) actions have relied on the Supreme Court's reasoning in *Turkette*. See, e.g., *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (construction of RICO rejecting the prior-conviction requirement is consistent with *Turkette*'s approach); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982); *Glusband v. Benjamin*, 530 F. Supp. 240 (S.D.N.Y. 1981).

62. *Sedima*, 741 F.2d at 494, 503.

63. See *supra* note 24 and accompanying text. Under the *Turkette* analysis, see *supra* text accompanying note 59, the *Sedima* court had to rely on asserted ambiguities in the statute to reject the plain meaning rule of statutory construction, since there was no clearly expressed legislative intent contrary to the language of the statute.

tion," "chargeable," "indictable," and "offense" to support its finding that prior convictions are required in private RICO suits. In the court's view, Congress' use of these words in the statute evinced an intent to require prior convictions in actions brought under section 1964(c).⁶⁴

The court's analysis on this point is not persuasive. For example, contrary to the court's suggestion,⁶⁵ the term "violation" does not necessarily connote criminal activity. In its ordinary usage, "violation" means an infringement or breach of law.⁶⁶ All infringements or breaches of the law do not, of course, result in criminal liability or conviction. Because the definition of "violation" is not synonymous with "conviction," most courts have rejected the argument that section 1964(c)'s reference to a "violation" of section 1962 requires prior convictions in private RICO suits.⁶⁷

The court's interpretation of the terms "chargeable" and "indictable" as used in section 1961 is similarly misguided. The court argued that, in the RICO context, these words must be interpreted to require the actual issuance of an indictment or information by a criminal court prior to any civil RICO proceedings, since courts in civil actions ordinarily do not determine whether particular conduct is "chargeable" or "indictable" in the absence of a previous information or indictment.⁶⁸ As Judge Cardamone observed, however, an indictable or chargeable act generally is defined not as an act "for which an indictment or information has been returned or filed,"⁶⁹ but rather as an act for which a defendant may be indicted or charged.⁷⁰ Because "indictable" and "chargeable" connote only the possibility of an indictment or information, the use of these terms in RICO provides no support for the argument that Congress intended to make criminal proceedings a prerequisite to the maintenance of a section 1964(c) action.⁷¹

64. *Sedima*, 741 F.2d at 498-500.

65. See *supra* note 28 and accompanying text.

66. See BLACK'S LAW DICTIONARY 1408 (5th ed. 1979).

67. See, e.g., *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983) (rejecting the argument "that 'violation' as used in section 1962 must mean 'conviction'"); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 579 n.9 (N.D. Ill. 1983) (noting that the term "violation" must be understood in a civil context and that private RICO plaintiffs need allege only a prima facie violation of § 1962); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980) (holding that "violation is not tantamount to conviction" under § 1964(c)).

68. See *supra* note 31 and accompanying text.

69. *Sedima*, 741 F.2d at 505. (Cardamone, J., dissenting).

70. "Indictable" means "[s]ubject to being indicted." BLACK'S LAW DICTIONARY 695 (5th ed. 1979). BLACK'S LAW DICTIONARY defines "chargeable" only in its civil sense, "as applicable to the imposition of a duty or burden." *Id.* at 211.

71. Even if the majority's arguments with respect to the terms "chargeable" and "indictable" were accepted, they would not support the requirement of prior criminal convictions in private RICO suits. Assuming *arguendo* that "chargeable" and "indictable" may be redefined to require the issuance of an information or indictment, an information or indictment cannot be equated with conviction of the alleged offense; "information" and "indictment" are not synonymous with "conviction," which the court found to be a prerequisite to a § 1964(c) action.

The court may be on firmer ground with respect to its analysis of the word "offense" as used in § 1961(1). See *supra* note 31. An offense is defined as:

A felony or misdemeanor; a breach of the criminal laws. The word "offense," while sometimes used in various senses, generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, and punishable under the criminal laws, though

As previously discussed, the majority's decision to require prior convictions in private RICO actions also was based on the view that RICO is an entirely criminal statute designed to punish conduct that already has been found criminal.⁷² Because civil proceedings could neither determine the criminality of particular conduct⁷³ nor provide the procedural safeguards required in criminal actions,⁷⁴ the court concluded that prior convictions are required to ensure that private RICO defendants receive the benefits and protections of the criminal system.

Judge Cardamone rejected the fundamental premise of the majority's analysis, stating that RICO "does not require civil courts to determine that the RICO predicate acts are in fact criminal acts. All that need be determined is that they are acts which, if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions."⁷⁵ The statute itself contains no prior conviction requirement, no requirement that a civil RICO defendant's conduct be "already criminal," and no requirement that the civil courts determine the criminality of a defendant's conduct. In short, the majority's reasoning in support of the prior conviction requirement is based not upon the provisions of the statute, but rather upon its own implicit assumption that RICO, including its civil provisions, is an inherently criminal statute enacted for the sole purpose of combatting explicitly criminal activity.

The court's erroneous view of civil RICO as an inherently criminal statute results from its focusing upon the nature of the predicate activity rather than the effect and sanctions of section 1964(c) itself. The acts of racketeering set forth in section 1961(1) are crimes when proved by the government in a criminal proceeding. In such a criminal proceeding, a defendant accused of committing any of the section 1961(1) racketeering acts would be entitled to the procedural safeguards traditionally guaranteed in criminal actions. This fact is immaterial in section 1964(c) suits, however, because civil RICO actions do not subject defendants to criminal prosecution. Even though a civil RICO defendant's conduct might be found criminal in a criminal proceeding, such conduct can give rise to no criminal liability in a civil RICO action. Because there is no risk of criminal liability in civil RICO actions, there is no need for criminal procedural

it may also include the violation of a criminal statute for which the remedy is merely a civil suit to recover the penalty.

BLACK'S LAW DICTIONARY 975 (5th ed. 1979). Thus, it is arguable that the reference in § 1961(1) to "offenses" under the securities, bankruptcy, and dangerous drug laws indicates a need for prior criminal adjudication to determine whether a defendant's alleged conduct is actually an "offense," i.e., a felony or a misdemeanor. Even if this result is correct, however, it would not affect the disposition of *Sedima*, since defendants in *Sedima* were not alleged to have committed any "offenses" under the securities, bankruptcy, or dangerous drug laws.

72. *Sedima*, 741 F.2d at 500.

73. See *supra* note 35 and accompanying text.

74. The procedural safeguards that the court discussed were the criminal standard of proof and the requirement of strict construction of criminal statutes. See *supra* notes 36-37 and accompanying text. In the court's view, the absence of such procedural safeguards in civil litigation could result in a denial of due process to civil RICO defendants against whom no prior criminal conviction had been obtained. *Sedima*, 741 F.2d at 502.

75. *Sedima*, 741 F.2d at 505 (Cardamone, J., dissenting).

safeguards and no reason to require that a defendant's conduct be pronounced criminal by a court qualified to make such a determination.

It is clear from the foregoing analysis that the nature of a defendant's predicate activity is not dispositive of the question whether a suit under section 1964(c) is an inherently criminal action that triggers the need for traditional criminal safeguards. If private RICO actions are to be viewed as inherently criminal, this conclusion must be based upon the provisions of section 1964(c) itself and not upon the nature of the underlying predicate offenses.

It is true, of course, that "Congress may not, by labeling a proceeding civil, foreclose inquiry into the true nature of the proceeding."⁷⁶ To ensure that defendants receive the procedural safeguards and protections to which they are entitled, courts may look beyond Congress' denomination of a statute as civil to determine whether it is in fact criminal in nature.⁷⁷ If such a statute is found to be essentially criminal, a defendant in a suit under the statute will be entitled to the procedural safeguards required in criminal proceedings, including sixth amendment rights, a criminal standard of proof, and protections against self-incrimination and double jeopardy.⁷⁸

The classification of particular penalties as either civil or criminal depends upon construction of the applicable statute.⁷⁹ In *United States v. Ward*⁸⁰ the Supreme Court developed a two-part test for determining whether statutory penalties are essentially civil or criminal.⁸¹

First, we have set out to determine whether Congress, in establishing

76. Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970*, 18 U.S.C. § 1964 (1970), 53 TEX. L. REV. 1055, 1059 (1975) (citing *Boyd v. United States*, 116 U.S. 616 (1886)).

77. Ostensibly civil statutes also may be found quasi-criminal in some circumstances. See *United States v. Ward*, 448 U.S. 242 (1980); *Boyd v. United States*, 116 U.S. 616 (1886). As commentators have observed, the criteria for a finding of quasi-criminality are "(1) the triggering of the statute by 'the commission of offenses against the law,' (2) the nature of the penalty; and (3) the purpose of the penalty." Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 708 (1982) (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)). A determination of quasi-criminality entitles a defendant to the fifth amendment protection against self-incrimination but does not "trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions." *Ward*, 448 U.S. at 253.

With respect to the *Sedima* decision, it is unnecessary to analyze § 1964(c) under the criteria set forth above. As previously noted, the prior conviction requirement was based on the court's view that civil RICO suits are inherently criminal actions which require that a defendant be afforded criminal procedural safeguards. The court did not suggest that prior criminal convictions would be required upon a finding of mere quasi-criminality in civil RICO actions. Moreover, the procedural safeguards to which the court found civil RICO defendants to be entitled—the criminal standard of proof and the requirement of strict statutory construction—would not be available upon a finding of quasi-criminality, since defendants in quasi-criminal actions are entitled only to protection against self-incrimination. See *Ward*, 448 U.S. at 253-54.

78. See *Ward*, 448 U.S. at 248.

79. *Id.*

80. 448 U.S. 242 (1980).

81. In addition to actions deemed criminal under the two-part *Ward* test discussed *infra* notes 82-83 and accompanying text, the Supreme Court has held that criminal procedural safeguards may be required in some civil actions involving injury to a defendant's reputation. In *In re Gault*, 387 U.S. 1 (1967), for example, the Court held that the possible loss of liberty and injury to reputation resulting from an adjudication of delinquency entitled the juvenile against whom the proceeding was

the penalizing mechanism, indicated either expressly or impliedly a preference for [either the civil or criminal] label. . . . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.⁸²

In determining whether a statute's purpose or effect is sufficiently punitive to negate its intended civil nature, the Court has stated that it is helpful to consider the "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character."⁸³

Application of the *Ward* test to section 1964(c) demonstrates that RICO's provision for treble damages is not a criminal penalty entitling private RICO defendants to the procedural safeguards of the criminal system. Under the first part of the test, it is clear that Congress expressed a preference for the "civil" label in private RICO actions by placing section 1964(c) within the section of the statute entitled "civil remedies."⁸⁴ In addition, private RICO actions must be

brought to certain procedural safeguards, including the privilege against self-incrimination, the right to confront witnesses, and the right to counsel.

Although the Court in *Gault* relied in part upon the possible stigma that might result from an adjudication of delinquency, its primary reason for requiring criminal procedural safeguards in the ostensibly civil proceeding was the juvenile's potential loss of liberty. As one commentator has noted, the requirement of criminal procedural safeguards generally does not extend to actions that threaten injury to reputation but do not involve a potential loss of liberty. Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 213-15 (1975). Thus, defendants in § 1964(c) actions, who may suffer injury to reputation and the stigma of being labelled a racketeer, probably would not be entitled to criminal procedural safeguards under the *Gault* analysis, since § 1964(c) actions involve no potential loss of liberty. The potential "loss of liberty, together with the more compelling policy reasons for protecting a juvenile's reputation than for protecting that of a racketeer, sufficiently distinguishes *Gault* from a section 1964 case to rule out a claim of damaged reputation as a sufficient basis for a claim of . . . constitutional protection under section 1964." *Id.* at 214-15; cf. *Paul v. Davis*, 424 U.S. 693, 712 (1976) (injury to reputation, even when inflicted by officer of state, does not, by itself, constitute deprivation of liberty or property so as to invoke due process safeguards guaranteed by fourteenth amendment).

82. *Ward*, 448 U.S. at 248-49; see also *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1106 (1984) (applying *Ward* test).

83. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Under *Mendoza-Martinez*, the tests for determining whether a statute is punitive or regulatory are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned

Id. at 168-69. The Court noted in *Mendoza-Martinez* that all of the above factors are relevant in determining whether a statute is punitive or regulatory, and they "may often point in differing directions." *Id.* at 169. The Court has used the *Mendoza-Martinez* factors in applying the two-part *Ward* test but has noted that these factors are neither exhaustive nor dispositive. See *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1106 (1984); *Ward*, 448 U.S. at 249.

84. The Court held in *Ward* that Congress' denomination of a sanction imposed under the Federal Water Pollution Control Act as a civil penalty left "no doubt that Congress intended to allow imposition of [the penalty] without regard to the procedural protections and restrictions available in criminal prosecutions." *Ward*, 448 U.S. at 249. The Court found that the "civil" label took on added significance in view of its juxtaposition with the criminal penalties set forth in the immediately preceding section. *Id.* A similar juxtaposition is present in RICO, in which § 1964 is immediately preceded by § 1963, which sets forth criminal penalties for RICO violations.

regarded as civil under the second part of the *Ward* test because neither the purpose nor the effect of section 1964(c) is so punitive as to negate Congress' intention that its remedies be civil. As stated by Congress, the purpose of RICO is remedial,⁸⁵ its aim being to eliminate organized crime in the United States.⁸⁶ Section 1964(c) serves the additional remedial purpose of compensating victims of racketeering activity. Moreover, the sanctions imposed on defendants in private RICO actions are not sufficiently punitive to require that section 1964(c) be regarded as criminal. Civil RICO defendants are not subject to restraint or incarceration, but rather to payment of treble damages upon a finding of liability. Although such treble damages arguably may be regarded as partially punitive and may serve a traditional aim of punishment by deterring racketeering activity,⁸⁷ they also serve the important purpose of compensating persons who have been injured as a result of racketeering activity. Finally, as the Supreme Court has indicated, the fact that conduct subject to civil liability also may be punished as a crime does not, of itself, convert a civil remedy into a criminal sanction.⁸⁸

Whether RICO's civil provisions are essentially criminal has not been widely discussed. Most authorities that have addressed this question have con-

85. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

86. See *supra* note 2. The fact that a statute's purpose is to eliminate crime does not prevent it from being remedial. In *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984), for example, the Court considered whether a firearms forfeiture provision first promulgated under the Omnibus Crime Control and Safe Streets Act of 1968 and later made part of the Gun Control Act of 1968 was essentially civil or criminal. Applying the *Ward* test, the Court determined that the forfeiture provision was essentially civil, observing that "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive." *Id.* at 1106.

87. Courts have split on whether multiple damages are punitive or remedial. See, e.g., *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) (holding treble damages under antitrust laws basically remedial, notwithstanding their punitive and deterrent effect); *Adler v. Northern Hotel Co.*, 175 F.2d 619 (7th Cir. 1949) (holding treble damages under Housing and Rent Act remedial); *Bowles v. Farmers Nat'l Bank*, 147 F.2d 425 (6th Cir. 1945) (if sum exacted is greatly disproportionate to actual loss, it constitutes penalty rather than damages); *Sullivan v. Associated Billposters & Distribs. of United States & Canada*, 6 F.2d 1000, 1009 (2d Cir. 1925) ("If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury."); *Wahba v. H & N Prescription Center, Inc.*, 539 F. Supp. 352 (E.D.N.Y. 1982) (observing that treble damages and punitive damages share common functions in that both are penalties imposed to punish offenders and deter future offenses); *Aretz v. United States*, 456 F. Supp. 397, 408 (S.D. Ga. 1978) ("The fact that damages are accumulated or enhanced does not in itself render them penal."), *aff'd*, 604 F.2d 417 (5th Cir. 1979), *aff'd on reh'g en banc*, 660 F.2d 531 (5th Cir. 1981); *United States v. Countryside Farms, Inc.*, 428 F. Supp. 1150 (D. Utah 1977) (treble damages are punishment but not criminal punishment); *Porter v. Household Fin. Corp.*, 385 F. Supp. 336, 341 (S.D. Ohio 1974) ("[A] liability is not penal merely because greater than 'actual' damages are imposed."); *Erie Basin Metal Prods., Inc. v. United States*, 150 F. Supp. 561 (Ct. Cl. 1957) ("[T]he fact that a statute grants the right of assessment of treble damages does not make an action on the statute a penal one . . ."); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506 (D. Colo. 1952) (treble damages under antitrust laws not penal, but compensatory and remedial); see also *Vold, Are Threefold Damages Under the Anti-trust Act Penal or Compensatory?*, 28 Ky. L.J. 117 (1940) (most courts hold treble damages under antitrust laws remedial rather than penal).

In this regard, it should be noted that Congress has provided for multiple damages in other kinds of civil actions, such as suits brought under the antitrust laws, 15 U.S.C. § 15 (1982), the false claims statute, 31 U.S.C. § 3729 (1982), and the odometer requirements statute, 15 U.S.C. § 1989 (1982).

88. See, e.g., *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1107 (1984); *Ward*, 448 U.S. at 250.

sidered the criminality issue in the context of civil RICO proceedings brought by the government for injunctive relief, divestiture, or dissolution under section 1964(a) or (b).⁸⁹ These authorities have concluded that civil RICO actions instituted by the government are not criminal proceedings that entitle a defendant to the procedural safeguards afforded by the criminal system.⁹⁰

The court in *Sedima* declined to follow the reasoning of these authorities, observing that a determination that civil RICO actions brought by the government are not criminal does not resolve the question whether purely private RICO actions are criminal.⁹¹ This observation is misguided, however, since the rationale the court rejected applies with even greater force to RICO suits instituted by private plaintiffs. For purposes of determining whether RICO's civil provisions are inherently criminal, there is no analytic difference between private and governmental actions under section 1964; both private and governmental actions involve penalties for conduct that also might be punished as a crime.⁹² There is even less reason to afford defendants criminal procedural safeguards in private RICO actions than in governmental actions because private actions do not involve the government as a party. As Judge Cardamone observed, defendants in purely private actions ordinarily are not entitled to greater protection than defendants in actions to which the government is a party.⁹³

Because private RICO actions are neither inherently criminal nor subject to the procedural requirements of the criminal system, there is no basis for the court's position that prior criminal convictions must be required to ensure that defendants have the benefit of the criminal standard of proof⁹⁴ and strict statutory construction.⁹⁵ In actions such as private RICO suits, which are not inher-

89. *But see* *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. 273 (D. Md. 1983) (rejecting argument that private RICO action was essentially criminal proceeding). In *Greenfeld*, defendants in a private RICO action attacked the constitutionality of § 1964(c), arguing that the statute was inherently criminal and did not provide the constitutional protections required in criminal proceedings, including the privilege against self-incrimination and the right to indictment by a grand jury. Relying on *United States v. Cappelto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), discussed *supra* notes 47-50 and accompanying text, the court rejected this argument on the ground that a civil proceeding is not rendered criminal by the fact that the prohibited activity also is punishable as a crime. *Greenfeld*, 564 F. Supp. at 281. The court further observed that the defendants' argument could be asserted against any statute that provides for both civil and criminal enforcement, including the undoubtedly constitutional antitrust laws. *Id.*

90. *See* *United States v. Cappelto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); Note, *supra* note 76; Comment, *supra* note 81. *But cf.* *Strafer, Massumi & Skolnick, supra* note 77, at 708-09 (suggesting that § 1964 might be found quasi-criminal in some circumstances).

91. The court in *Sedima* found the *Cappelto* reasoning inapplicable to § 1964(c) actions, since *Cappelto* involved a civil RICO action brought by the government. *Sedima*, 741 F.2d at 496-97.

92. Thus, the requirement in *Sedima* of prior criminal convictions in civil RICO suits would appear to apply to governmental as well as private actions, even though the *Sedima* holding was restricted to private RICO suits. *See id.* at 503.

93. *Id.* at 504-05 (Cardamone, J., dissenting). In this regard, it is interesting to note that the Supreme Court decisions considering the criminality or punitive nature of ostensibly civil statutes generally have involved actions to which the government was a party. *See, e.g.,* *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984); *United States v. Ward*, 448 U.S. 242 (1980); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Helvering v. Mitchell*, 303 U.S. 391 (1938).

94. *See supra* note 36 and accompanying text.

95. *See supra* note 37 and accompanying text.

ently criminal, neither proof beyond a reasonable doubt⁹⁶ nor strict construction of the applicable statutes⁹⁷ is required.⁹⁸

The requirement in *Sedima* of prior criminal convictions in private RICO actions marks a significant and erroneous departure from established precedent. Initially, the court erred by failing to follow the Supreme Court's criteria for construction of RICO set forth in *United States v. Turkette*. If the court had followed the *Turkette* analysis, it would have been unable to insert into RICO a restriction on treble damage actions that has no support either in the statute or its legislative history. Instead, however, the court created "ambiguities" in the statute, which it then resolved by redefining key statutory terms and holding that civil RICO actions are inherently criminal proceedings that entitle defendants to criminal procedural safeguards.

The questionable reasoning in *Sedima*, however, is not as disturbing as its result. By requiring prior criminal convictions in private RICO actions, the decision strikes a serious blow against private persons who are injured by racketeering activity. Under the rule of *Sedima*, the right of private plaintiffs to bring actions under section 1964(c) depends upon the success of the criminal justice system in securing convictions against potential civil RICO defendants. In view of the possibility of plea bargains and decisions not to prosecute, as well as the high standard of proof required in criminal proceedings, the prior conviction requirement may present an insurmountable obstacle to many private plaintiffs with legitimate claims for racketeering injuries.

In enacting RICO, Congress explicitly indicated that the statute was designed to serve broad remedial purposes. By severely restricting the scope of section 1964(c), the court's prior conviction requirement violates Congress' intent and frustrates the purposes for which the statute was enacted. Indeed, in the words of the court itself, the requirement of prior criminal convictions in private RICO actions "make[s] a hash"⁹⁹ of the congressional mandate that RICO be liberally construed to effectuate its remedial purposes.

JANE WYLIE SAUNDERS

96. See *Helvering v. Mitchell*, 303 U.S. 391 (1938) (government need not prove its case beyond a reasonable doubt in civil proceedings); *United States v. Regan*, 232 U.S. 37 (1914) (proof beyond a reasonable doubt required only in criminal cases).

97. See *Haig v. Agee*, 453 U.S. 280 (1981) (in cases that do not involve criminal prosecutions, strict statutory construction not required); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 375 (1973) (not "every section of an act establishing a broad regulatory scheme must be construed as a 'penal' provision . . . merely because two sections of the Act provide for civil and criminal penalties"); see also *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) ("[R]emedial statutes should be liberally construed."); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[R]emedial legislation should be construed broadly to effectuate its purposes.").

98. As Judge Cardamone observed, even if criminal procedural safeguards were found to be required in private RICO actions, such a finding would not necessitate the requirement of a prior conviction, since any necessary protection could be afforded a defendant in the civil action itself. *Sedima*, 741 F.2d at 506 (Cardamone, J., dissenting).

99. *Id.* at 502.

Tice v. Department of Transportation: A Declining Role for the Attorney General?

In North Carolina, as in most states, the rights and powers inherent in the Office of the Attorney General have been established and defined by the common law and by constitutional and statutory provisions.¹ One of the powers widely held to vest in the Office is the prerogative to manage and control litigation involving state and public interests.² In *Tice v. Department of Transportation*³ the North Carolina Court of Appeals announced an exception to this general principle, holding void a consent judgment entered into by an assistant attorney general. In *Tice* an assistant attorney general had represented defendant Department of Transportation (DOT) and had failed to obtain the agency's agreement to the consent judgment. Although the court left undisturbed the Attorney General's power to manage litigation when bringing an action or prosecuting an appeal in the State's name, the court concluded that an attorney general acting in a representative capacity on behalf of a state agency or department is bound by the traditional rules governing the attorney-client relationship and may not concede the client's substantive rights without the client's approval.⁴

This Note analyzes the *Tice* decision to determine whether the court's ruling is consistent with constitutional, statutory, and common-law delineations of the powers vested in the attorney general. The court in *Tice* focused attention on the appropriateness of separating the roles of chief law officer and representative counsel⁵ and, in the latter role, reduced the attorney general's customary responsibility to serve as protector of the interests of the state and public. This Note concludes that *Tice* is consistent with constitutional, statutory, and common-law concepts of the power of the attorney general. Because the court failed to restrict its holding, however, the possibility remains that further limitations on the Attorney General's powers may be imposed.

In *Tice* plaintiff sought to establish title to a parcel of land connecting a

1. See generally COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL (1980) (concise overview of the historical development of the office of attorney general and the specific common-law powers vested in the offices of attorneys general) [hereinafter cited as COMMON LAW POWERS]; COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL (1977) (focusing primarily on present-day powers, but also including a history of the development of the office of attorney general) [hereinafter cited as POWERS, DUTIES AND OPERATIONS]; Edmisten, *The Common Law Powers of the Attorney General of North Carolina*, 9 N.C. CENT. L.J. 1 (1977) (examining the development of the Office of Attorney General in North Carolina).

2. See COMMON LAW POWERS, *supra* note 1, at 68; POWERS, DUTIES AND OPERATIONS, *supra* note 1, at 194.

3. 67 N.C. App. 48, 312 S.E.2d 241 (1984).

4. *Id.* at 57, 312 S.E.2d at 246.

5. Edmisten, *supra* note 1, at 10, 18 (distinguishing the roles of chief law officer and counsel to state agencies and departments).

state road to the waters of Tulls Creek Bay in northeastern North Carolina.⁶ Defendant DOT also claimed an interest in the land. After protracted negotiations,⁷ the Assistant Attorney General representing the DOT⁸ entered into a consent agreement with plaintiff, setting the boundaries of the state road and enjoining plaintiff from interfering with use of the road. Defendant DOT filed a motion to set aside the agreement, asserting that the stipulations on which it was based were untrue and that the Assistant Attorney General lacked authority to enter into the consent agreement without the DOT's approval.⁹

The court of appeals invalidated the agreement, basing its holding on the legislative delegation to the DOT of exclusive authority for decisions affecting the state highway system.¹⁰ Judge Whichard, writing for a unanimous panel, reasoned that the attorney general's common-law power to control litigation reaches its limit when exercise of that authority would usurp the exclusive authority expressly granted to a state department by the legislature.¹¹ *Tice*, therefore, stands for the proposition that the powers inherent in the attorney general are less extensive when the attorney general is engaged as counsel to a state agency or department than when he brings an action or prosecutes an appeal on behalf of the state itself.

The Office of the North Carolina Attorney General was created in the state constitution. Article III, section 7(1) of the North Carolina Constitution provides for the quadrennial election of the attorney general,¹² and section 7(2) states that the attorney general's duties "shall be prescribed by law."¹³ Article 6 of the Executive Organization Act of 1971 further provides that "[t]he Attorney General shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State."¹⁴

The body of law that defines the duties and related powers vested in the constitutionally created Office of Attorney General is derived from statutory

6. Plaintiff also sought injunctive relief to prohibit defendant DOT from trespassing on her property. *Tice*, 67 N.C. App. at 49, 312 S.E.2d at 242.

7. Negotiations between the Assistant Attorney General and plaintiff lasted for almost two years, during which time the Assistant Attorney General maintained regular contact with officials of defendant. Plaintiff Appellant's Brief at 12-13.

8. The Assistant Attorney General represented defendant DOT pursuant to N.C. GEN. STAT. § 114-4.2 (1983), which states:

The Attorney General is authorized to appoint from among his staff such assistant attorneys general and such other staff attorneys as he shall deem advisable to provide all legal assistance for the State highway functions of the Department of Transportation, and such assistant attorneys general and other attorneys shall also perform such additional duties as may be assigned to them by the Attorney General, and shall otherwise be subject to all provisions of the statutes relating to assistant attorneys general and other staff attorneys.

9. Defendant also alleged that the stipulations upon which the consent judgment was based were executed by the Assistant Attorney General "by mistake and inadvertence under a misapprehension of the true facts." *Tice*, 67 N.C. App. at 50, 312 S.E.2d at 242.

10. See *infra* note 40 and accompanying text.

11. *Tice*, 67 N.C. App. at 54, 312 S.E.2d at 245; see also *infra* note 42 and accompanying text (attorney general may not concede state agency's substantive rights without agency's consent).

12. N.C. CONST. art. III, § 7(1).

13. N.C. CONST. art. III, § 7(2).

14. N.C. GEN. STAT. § 143A-49.1 (1983).

provisions¹⁵ and the common law. The statutory provisions, although extensive, do not expressly enumerate the powers inherent in the attorney general. The attorney general's common-law powers, specifically the authority to initiate, conduct, and maintain legal actions, have developed throughout the evolution of the Office.¹⁶ There is some authority for the proposition that the North Carolina Attorney General retains the common-law powers of the Office,¹⁷ but the state's courts never have ruled expressly on the extent of these powers.¹⁸ The North Carolina General Assembly has provided that when the common law is not antithetical to the state's elemental system of government, it shall be applicable.¹⁹ Because of the lack of North Carolina cases dealing with the common-law powers of the attorney general, it is necessary to look to other jurisdictions for an understanding of the development of these powers.

The office of attorney general had its nascence in the *attornatus regis* of thirteenth and fourteenth century England.²⁰ The *attornatus regis* served as the sovereign's primary legal representative, with considerable power subject to limitation only by the King. The office was carried over to colonial America, where it eventually became the office of attorney general. All fifty states have an office of attorney general created either by constitution or statute.²¹ The specific powers and duties vested in the office vary greatly among the states. Although some states restrict the attorney general's common-law powers by express statutory or constitutional language,²² the large majority of states have chosen to recognize the existence of these powers.²³

The most far reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf.²⁴ As the state's chief legal officer, "the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest. . . . [H]e may abandon, discontinue,

15. *Id.* § 114-2.

16. See COMMON LAW POWERS, *supra* note 1, at 68; POWERS, DUTIES AND OPERATIONS, *supra* note 1, at 194.

17. See, e.g., Sigmund Sternberger Found., Inc. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968) (common-law power to protect beneficiaries of charitable trusts); State v. Thompson, 10 N.C. (3 Hawks) 613 (1825) (common-law power to enter a nolle prosequi); *In re* Southern Bell Tel. & Tel., 30 N.C. App. 585, 227 S.E.2d 645 (1976) (common-law investigatory powers).

18. Edmisten, *supra* note 1, at 2.

19. N.C. GEN. STAT. § 4-1 (1981).

20. For a more detailed description of the development of the Office of Attorney General from its origins in England through the colonial period, see COMMON LAW POWERS, *supra* note 1, at 9-14; POWERS, DUTIES AND OPERATIONS *supra* note 1, at 17-22.

21. See POWERS, DUTIES AND OPERATIONS *supra* note 1, at 30-31.

22. See, e.g., Island-Gentry Joint Venture v. State, 57 Hawaii 259, 554 P.2d 761 (1976) (attorney general has exclusive authority to control all phases of civil litigation in which state has an interest, unless authority has been expressly or impliedly granted to another department); State *ex rel.* Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973) (common-law duties and powers inhere in attorney general absent express statutory or constitutional restrictions).

23. See COMMON LAW POWERS *supra* note 1, at 25-27 (identifying 35 states in which the attorney general is recognized as having common-law powers).

24. Edmisten, *supra* note 1, at 10.

dismiss or compromise it."²⁵ In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a suit when he determines that continued litigation would be adverse to the public interest.²⁶

Most courts have given the attorney general "a broad discretion . . . in determining what matters may, or may not be, of interest to the people generally."²⁷ The investment of such discretion is based on the premise that the attorney general should act on behalf of the public interest, or as the "people's attorney."²⁸ In an early North Carolina Supreme Court decision, the court refused to interfere with the attorney general's use of his discretionary power to enter a nolle prosequi on grounds that the authority had not been used "oppressively."²⁹ Other courts have left undisturbed the use of the power to control litigation as long as the attorney general's actions are not arbitrary, capricious, or in bad faith.³⁰

Like the North Carolina Court of Appeals, the courts of several other jurisdictions have recognized limitations on the attorney general's powers when "authority . . . has been expressly or impliedly granted to another department or agency."³¹ An attorney general's authority may be restricted explicitly by the statutes governing the office, or it may be impliedly limited by legislative assignment of certain powers to another state governmental body. Thus, the constitutional and statutory framework underlying a legislature's delegation of powers must be read in its entirety to determine the extent of the attorney general's authority.

The court in *Tice* expressly acknowledged the attorney general's common-

25. *State v. Finch*, 128 Kan. 665, 671, 280 P. 910, 912 (1929).

26. *Secretary of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 326 N.E.2d 334 (1975); *Lyle v. Luna*, 65 N.M. 429, 338 P.2d 1060 (1959); *Tice*, 67 N.C. App. at 51, 312 S.E.2d at 243; *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); *Cooley v. South Carolina Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445 (1943) (per curiam). *But cf. Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960) (attorney general has no power to initiate and pursue claims in the public interest except in a few instances in which power is conferred specifically by statute).

27. *Mundy v. McDonald*, 216 Mich. 444, 450, 185 N.W. 877, 880 (1921).

The breadth of the modern attorney general's discretion resembles that of his common-law counterpart. In reviewing the historical development of the Office of Attorney General, the United States Court of Appeals for the Fifth Circuit stated:

As chief legal representative to the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion. . . . Transportation of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch could only broaden this area of the attorney general's discretion.

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir.), cert. denied, 425 U.S. 930 (1976).

28. *Edmisten*, *supra* note 1, at 36.

29. *State v. Thompson*, 10 N.C. (3 Hawks) 613, 614 (1825).

30. *See, e.g., Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977) (discretionary power not to be used in arbitrary or capricious manner); *Cooley v. South Carolina Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445 (1943) (Attorney General found to have acted in good faith).

31. *Island-Gentry Joint Venture v. State*, 57 Hawaii 259, 265, 554 P.2d 761, 765-66 (1976); *see supra* note 22 and accompanying text.

law power to control litigation when acting on behalf of the state.³² The court, however, refused to extend this authority to situations in which the attorney general acts in a representative capacity on behalf of a state agency or department. The court reached its holding after reviewing the statutory powers of both the attorney general and the affected agency.

North Carolina General Statutes section 147-17 provides the statutory basis for the attorney general's representation of state agencies and departments.³³ The attorney general is afforded the exclusive power of representation: "No department, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor."³⁴ The governor is authorized to hire other counsel on behalf of an agency or department "[w]henver the Attorney General shall advise [him] that it is impracticable for [the Attorney General] to render legal services to [the] State agency."³⁵ One commentator has suggested that "the courts would probably construe this statute as exclusive and would not permit appointment or employment of counsel other than the Attorney General by state agencies in situations not specified by North Carolina General Statutes [section] 147-17."³⁶ These statutory provisions indicate that the general assembly intended to limit state agencies' use of outside counsel and that, absent unusual circumstances, the attorney general is to be their sole legal representative. Although neither the general assembly nor the courts have identified explicitly those circumstances under which it would be "impracticable" for the attorney general to provide legal services to an agency or department,³⁷ it is arguable that *Tice* presents such a fact setting. When the attorney general believes that a compromise or consent agreement is in the best interest of the state and the public and when such an agreement would concede the agency's best interest, gubernatorial appointment of outside counsel on behalf of the affected agency would be consistent with North Carolina General Statutes section 147-17.³⁸

The North Carolina General Assembly has created a complex framework

32. *Tice*, 67 N.C. App. at 51, 312 S.E.2d at 243.

33. N.C. GEN. STAT. § 147-17 (1983).

34. *Id.* § 147-17(a).

35. *Id.* § 147-17(b).

36. Edmisten, *supra* note 1, at 21.

37. For a general discussion of the role of the Attorney General as counsel for state agencies and departments, see Edmisten, *supra* note 1, at 18-21. Edmisten states that "North Carolina has not produced significant judicial statements on the common law authority of the Attorney General to represent state agencies to the exclusion of other counsel." *Id.* at 20 (emphasis added).

38. See, e.g., *Clerk of Superior Court v. Treasurer and Receiver Gen.*, 386 Mass. 517, 437 N.E.2d 158 (1982) (special counsel appointed when Attorney General determined that further litigation of case was not in the public's interest); *Teleco, Inc. v. Corporation Comm'n of Oklahoma*, 649 P.2d 772 (Okla. 1982) (special counsel appointed when Attorney General was personally disqualified because of prior membership on defendant commission).

The court in *Tice* expressed concern that vesting power in the Attorney General to enter into a consent agreement without the consent of the agency "could cause State agencies and departments, with the approval of the Governor as required by G.S. 147-17(a), to engage in more extensive employment of their own counsel. . . . This practice would . . . cause additional expense to the State." *Tice*, 67 N.C. App. at 55, 312 S.E.2d at 245. Because of this potential for added expense, § 147-17 should be construed narrowly to preclude wholesale use of outside counsel by agencies and depart-

of institutional bodies it believes are needed to provide the services essential to the people of the State. The Executive Organization Act enumerates these various state agencies, departments, bureaus, and commissions and their respective areas of responsibility.³⁹ The court in *Tice* focused on the purposes and powers of the DOT as delineated in the pertinent statutes.⁴⁰ From its research the court determined, "It is thus clear that the legislature has provided a comprehensive scheme in which all decisions relating to the State highway system have been delegated to defendant DOT."⁴¹

After reviewing the statutes governing the powers and duties of the Attorney General and the DOT, the court concluded that a consent agreement entered into by the Assistant Attorney General derogated the responsibilities and authority of the DOT and contravened the legislative intent evidenced by carefully delineated areas of responsibility. In recognizing the primacy of these statutory provisions, the court rejected application of the common-law notions governing the Office of Attorney General.

We do not believe the legislature, by providing that the Attorney General would serve as counsel for State departments, intended to authorize him to make decisions in areas which have been specifically delegated to a designated department. That would be the effect of allowing the Attorney General to enter, without the consent of defendant DOT, a consent judgment which establishes the boundaries of a road and gives defendant DOT a right-of-way. We believe, instead, that the legislature intended that when the Attorney General represents a State department pursuant to G.S. 114-2(2), the traditional attorney-client relationship should exist.⁴²

ments dissatisfied with the attorney general's decisions regarding proper handling of litigation. See also *infra* note 59 and accompanying text (discussing appropriate use of outside counsel).

39. N.C. GEN. STAT. §§ 143A-1 to -245, 143B-1 to -492 (1983).

40. N.C. GEN. STAT. § 143B-346 (1983) provides that the DOT

is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law. . . . The Department of Transportation shall be responsible for all of the transportation functions of the executive branch of the State as provided by law

N.C. GEN. STAT. § 136-18(2) (Supp. 1983) states that the DOT has power

to locate and acquire rights-of-way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof and to change or relocate any existing roads that the Department of Transportation may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system.

41. *Tice*, 67 N.C. App. at 54, 312 S.E.2d at 245.

42. *Id.* It is well established in North Carolina that in the traditional attorney-client relationship an attorney cannot enter into a consent agreement on behalf of his client without the client's consent. *Howard v. Boyce*, 254 N.C. 255, 118 S.E.2d 897 (1961); *Bath v. Norman*, 226 N.C. 502, 39 S.E.2d 363 (1946). An attorney, by virtue of inherent and implied authority, has considerable discretionary power in the management and control of litigation in which he is involved. Absent fraud or collusion, an attorney's actions, particularly those dealing with procedural matters, generally will be held to bind his client. *Bath*, 226 N.C. at 506, 39 S.E.2d at 365; *Bizzell v. Auto Tire and Equip. Co.*, 182 N.C. 98, 108 S.E. 439 (1921). The courts, however, have been unwilling to deprive the individual litigant of the power to make decisions that constitute a compromise or concession of substantive rights in litigation. *Bath*, 226 N.C. at 506, 39 S.E.2d at 365. The attorney has neither inherent nor implied authority to compromise his client's cause or to consent to a judgment that

Thus, the DOT's statutorily conferred authority to determine the location of state roads and rights-of-way⁴³ constituted a substantive right not to be compromised or conceded without the Department's consent.⁴⁴ The Assistant Attorney General's disputed consent agreement constituted a usurpation of these powers in that it conceded the "whole corpus" of the Department's position.⁴⁵

Although the logic of *Tice* is compelling,⁴⁶ the historical role of the attorney general as chief law officer and defender of the public interest may be undermined if certain principles underlying the holding are applied broadly. If the traditional attorney-client relationship is extended to all aspects of the attorney general's representation of state agencies and departments, thus eliminating the attorney general's common-law power to control litigation whenever he acts in a representative capacity, the decision could lead to a number of anomalous results.

Some authorities contend that, when acting as counsel to a state department or agency, the attorney general is not in a traditional attorney-client relationship with department or agency officials.⁴⁷ The Supreme Judicial Court of Massachusetts, for example, has held:

concedes "the whole corpus of the controversy." *Bath*, 226 N.C. at 505, 39 S.E.2d at 365; see also *Howard*, 254 N.C. at 263, 118 S.E.2d at 903.

A consent agreement frequently has been compared to a contract. See, e.g., *King v. King*, 225 N.C. 639, 35 S.E.2d 893 (1945); *Rodriguez v. Rodriguez*, 224 N.C. 275, 29 S.E.2d 901 (1944). Like a contract, a consent judgment results from an unqualified agreement between the parties. By refusing to permit an attorney to enter a consent judgment without the knowledge and acquiescence of his client, the courts have sought to ensure the primacy of clients' interests as clients perceive them.

It is important to distinguish the facts of *Tice* from those in cases involving suits brought by the attorney general on behalf of a state agency or department but not in a representative capacity. In *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981), the County Board of Education filed a federal antitrust action against certain dairy companies. Defendants moved for summary judgment on the ground that plaintiff's action was barred by *res judicata*. In an earlier action brought in state court, the Attorney General had claimed violations of state antitrust laws by the same defendants. That litigation ended when the parties reached a consent agreement. The court held for defendants, ruling that, for purposes of *res judicata*, the Attorney General and plaintiff Board of Education were the same party and that the Attorney General had the authority to act on behalf of the County and bind the County even though the County had not consented to the prior consent judgment.

43. See *supra* note 40.

44. "Neither expressly nor by necessary implication does North Carolina General Statute[s] § 114-2 authorize the Attorney General or his staff to concede a substantial right of a State agency as to a matter which the General Assembly has placed within the agency's authority and discretion." Defendant Appellee's Brief at 4.

45. Many of the compromise agreements entered into by a state attorney general involve unresolved tax liabilities. See *infra* note 49 and accompanying text. The distinction between these cases and *Tice* rests on the concept of substantive rights. When an attorney general negotiates a compromise agreement with a taxpayer, no substantive rights are conceded—the taxpayer's basic obligation to pay taxes is not disturbed. In *Tice*, however, there is no "middle ground." Either North Carolina will enjoy right-of-way access to the bay and complete use of the public road or it will not. An agreement that concedes either of these two points gives up a substantive right of the State.

46. The implied limitation on discretionary power to control litigation inhering at common law in the Office of Attorney General is clear from the express grants of authority to the DOT. See *supra* note 40 and accompanying text.

47. See, e.g., *Secretary of Admin. & Fin. v. Attorney Gen.* 367 Mass. 154, 326 N.E.2d 334 (1975) (traditional attorney-client relationship does not exist when an attorney general "appears for" an officer, department head, or secretary); *Edmisten*, *supra* note 1, at 17.

The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance. . . . He also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.⁴⁸

Belief in the primacy of the common-law duty to represent the public interest has led some courts to uphold compromise settlements entered into by attorneys general when the agreements were challenged by those agencies on whose behalf the attorneys general ostensibly acted. Typically, these compromise settlements have occurred in tax cases in which the attorney general negotiated with the taxpayer for payment of some portion of an outstanding tax liability.⁴⁹ A comparable result was reached in an Oklahoma case in which the Attorney General compromised and settled a price-fixing claim contrary to the wishes of the Governor.⁵⁰ Courts generally have held that the attorney general has the sole authority to decide whether to appeal an adverse action relating to litigation involving state agencies and departments.⁵¹

In each of these situations, the attorney general's decision to proceed without the approval of the agency or office represented was based on a good faith determination that continued litigation was not in the public's best interest. The decisions to enter into compromise agreements did not concede the agencies' substantive rights.⁵² These cases thus are distinguishable from *Tice* and are good examples of the practical application of the attorney general's common-law duty to defend the public interest.

Not all courts have been so willing to allow the attorney general this measure of discretion when he is engaged in a representative capacity on behalf of a state agency or department.⁵³ For instance, the Wyoming Supreme Court

48. *Secretary of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 163, 326 N.E.2d 334, 338 (1975).

49. See, e.g., *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So.2d 280 (1949) (compromise agreement entered into by Attorney General representing Department of Revenue upheld); *Lyle v. Luna*, 65 N.M. 429, 338 P.2d 1060 (1959) (stipulation of settlement entered into by Attorney General representing Bureau of Revenue upheld despite challenge by Bureau officials); *Cooley v. South Carolina Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445 (1943) (per curiam) (compromise agreement between executors of estate and Attorney General representing Tax Commission upheld despite attack on agreement by two of three commissioners); see also *supra* note 45 (distinguishing tax liability cases from *Tice* on basis of substantive rights).

50. *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973) (absent legislative or constitutional expression to contrary, Attorney General had complete control over all litigation in which he appeared on behalf of the state).

51. *Secretary of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 326 N.E.2d 334 (1975); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973).

52. See *supra* note 45.

53. In a 1919 North Dakota decision, the state supreme court stated:

[A]lthough it is perfectly obvious under the statute that the attorney general is the general and the legal advisor of the various departments and officers of the state government, and entitled to appear and represent them in court, this does not mean that the attorney general, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal

stated:

The rule . . . would seem to be that the Attorney General has power to settle and compromise a suit, when the rights of the state are in doubt and are in honest dispute, *at least when he acts with the approval of the executive head of the department* which may, in any case, have the matter involved in the suit in his particular charge.⁵⁴

When confronted with a similar question, another court adopted a uniquely practical approach: it refused to allow an assistant attorney general to compromise a subrogation claim of the Workmen's Compensation Bureau. The ready availability of individuals with authority to approve the compromise and the absence of an emergency that precluded obtaining consent were significant considerations in the court's decision.⁵⁵

Although the *Tice* court carefully limited its holding to an attorney general's entry into a consent judgment without the consent of the agency or department, some of the court's dicta reflect a concern over possible overreaching by the Attorney General and the potential for conflict between the Office of the Attorney General and the executive branch of state government.⁵⁶ It is unclear whether the court intended its language to be construed as a precursor to additional restrictions on the exercise of independent judgment by the attorney general when acting in a representative capacity, or whether the term "consent" as used by the court was intended to refer solely to consent agreements. If the court was forecasting additional restrictions, its decision in *Tice* may indicate a significant potential for change in the attorney general's common-law powers, with separation between the roles of chief law officer and representative counsel.⁵⁷

steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

State *ex rel.* Amerland v. Hagan, 44 N.D. 306, 311, 175 N.W. 372, 374 (1919); *see also* Pennsylvania Liquor Control Bd. v. Kusic, 7 Pa. Commw. 274, 299 A.2d 53 (1973) (court distinguished between state agency acting in an executive capacity and state agency acting in a judicial capacity; held agency bound by Attorney General only when acting in former role).

54. State *ex rel.* Wilson v. Young, 44 Wyo. 6, 20, 7 P.2d 216, 221 (1932) (emphasis added).

55. Robinson v. State, 63 N.W.2d 521 (N.D. 1954).

56. After reviewing the constitutional and statutory provisions relating to the offices of Governor and Attorney General, the court stated:

The constitutional independence of these offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers.

Tice, 67 N.C. App. at 55, 312 S.E.2d at 245.

57. Carried to its logical extreme *Tice* would lead to a "split personality" attorney general. When dealing with a matter not involving a state agency or department, the attorney general's primary goal would be to seek a resolution in the best interest of the public generally. When acting in a representative capacity on behalf of a state agency or department, however, the attorney general would be concerned only with implementing the will of agency heads—his role would be analogous to that of an outside counsel. Further, he would have little choice but to implement decisions he believed to be contrary to the public's best interest or to request appointment of special or outside counsel. *See also supra* note 38 (use of outside counsel should be restricted to avoid additional expense to state).

The North Carolina General Statutes provide that an agency may employ outside counsel if its request is approved by the Governor.⁵⁸ Obtaining outside counsel would appear to be appropriate for the limited number of cases in which the Attorney General concludes in good faith that a decision affecting the substantive rights of an executive agency would not be in the public's best interest.⁵⁹ For those disputes in which the agency's substantive rights are unaffected—that is, when expressly delegated authority is not usurped by the attorney general's proposed action—the common-law power to control litigation should be retained by the attorney general. The statutorily delineated powers of individual state agencies would be preserved, and the Attorney General would not be in a position of abdicating his official responsibility to protect the interests of the general public.

Some observers may be disturbed by the application of *Tice* to only consent judgment and substantive rights cases. One commentator has written that "the Attorney General should be extremely cautious in attempting to substitute his policy judgment as to what is in the public interest for that of a state agency for which he is the lawyer."⁶⁰ This cautionary note is appropriate. Decisions of the attorney general must not be arbitrary, capricious, or undertaken in bad faith; indeed, the courts likely will continue to overturn such decisions. Nevertheless, expansion of *Tice* would undermine the attorney general's role as the defender of the public interest, leaving the ultimate decisions as to the proper conduct of litigation in the hands of agency officials not vested either by statute or common law with this authority.

In *Tice* the North Carolina Court of Appeals crafted a narrow holding consistent with constitutional, statutory, and common-law notions of the powers inherent in the Office of Attorney General. The court's failure to preclude an expansion of its holding to a broader range of representational questions, however, leaves open the possibility that the attorney general's powers could be further diminished. Such a limitation of authority would affect adversely both the Office of Attorney General and the protection of the public interest that it provides. The court should close the door on this potentiality in order to preserve the common-law powers of the attorney general.

WILLIAM C. HAFLETT, JR.

58. See *supra* notes 33-36 and accompanying text.

59. Concerning the issue of an Attorney General's reluctance to do the bidding of an executive agency, the Massachusetts Supreme Court has stated:

[W]here there is a policy disagreement between the Attorney General and the Governor or his designee, the appropriate procedure would be for the Attorney General to appoint a special assistant to represent the Governor's interests. It is only where the Attorney General believes that there is no merit to the appeal, or where the interests of a consistent legal policy for the Commonwealth are at stake, that the Attorney General should refuse representation at all.

Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 165 n.8, 326 N.E.2d 334, 339-40 n.8 (1975).

60. POWERS, DUTIES AND OPERATIONS *supra* note 1, at 34.

State v. Jones: Double Jeopardy and Substantial Rights in North Carolina Appeals

Both the law of the land clause of the North Carolina Constitution¹ and the fifth amendment to the United States Constitution² guarantee that no person may be put in jeopardy twice for the same offense.³ North Carolina courts have regarded the right to be free from double jeopardy as "a fundamental and sacred principle of the common law,"⁴ an "integral part of the 'law of the land.'"⁵ Nevertheless, the North Carolina Court of Appeals' recent decision in *State v. Jones*⁶ makes it clear that however "sacred," "fundamental," "integral," and constitutional the right may be, it is not a "substantial" right for the purposes of an appeal under section 1-277 of the North Carolina General Statutes.⁷ Consequently, the court held that the defendant in *Jones* had no right to the immediate appeal of an interlocutory order⁸ that denied his motion to dismiss the indictment against him on double jeopardy grounds.⁹

On April 13, 1981, Andrew Lynn Jones was indicted for the murder of

1. N.C. CONST. art. I, § 19, provides: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." This clause has been interpreted as protecting persons from being tried or punished twice for the same offense, although it does not explicitly prohibit double jeopardy. See *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954) (prohibition against double jeopardy regarded as integral part of the law of the land).

2. The fifth amendment to the United States Constitution provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The double jeopardy clause of the federal Constitution was made applicable to the states by the fourteenth amendment to the United States Constitution. See *Benton v. Maryland*, 395 U.S. 784 (1969). In *Arizona v. Washington*, 434 U.S. 497 (1978), the Supreme Court reviewed the purposes behind the double jeopardy clause:

The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation"

Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." . . . Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.

Id. at 503-04.

3. Jeopardy attaches in North Carolina when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information; (2) before a court of competent jurisdiction; (3) after arraignment; (4) after plea; and (5) when a competent jury has been impaneled and sworn to make a true deliverance of the case. *State v. Crocker*, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954).

4. *Id.* at 449, 80 S.E.2d at 245.

5. *Id.*

6. 67 N.C. App. 413, 313 S.E.2d 264 (1984).

7. N.C. GEN. STAT. § 1-277 (1983) provides that "[a]n appeal may be taken from every judicial order or determination . . . which affects a substantial right claimed in any action or proceeding."

8. An interlocutory order is an order that does not determine the issues but directs some further proceeding preliminary to a final decree. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978).

9. *Jones*, 67 N.C. App. at 416, 313 S.E.2d at 266-67.

David Lee Height.¹⁰ The first of Jones' three trials based on this indictment was declared a mistrial.¹¹ Before the start of his second trial for the same offense, Jones moved to dismiss the indictment against him on double jeopardy grounds, arguing that the judge in his first trial had improperly declared a mistrial.¹² The judge presiding over Jones' second trial denied the motion and refused to stay the second trial pending the outcome of Jones' appeal.¹³ Jones' second trial also ended in a mistrial.¹⁴ At Jones' third trial for the same offense, he finally was convicted of second degree murder.¹⁵

Following his conviction, Jones appealed the second trial court's denial of his pretrial motion to dismiss. He argued that he had a constitutional right to immediate appeal of the order based on the United States Supreme Court's decision in *Abney v. United States*¹⁶ and that under North Carolina General Statutes section 1-277 the trial court's order denying his motion for dismissal was immediately appealable because it affected a substantial right.¹⁷

The North Carolina Court of Appeals found that Jones did not have a constitutional right to immediate appeal.¹⁸ In distinguishing *Abney*, the court found that the Supreme Court was merely interpreting the federal jurisdictional statute and not the federal Constitution when it held that the *Abney* defendant had a right to immediate appeal of an interlocutory order denying his motion to dismiss on double jeopardy grounds.¹⁹ Interpreting the corresponding North Carolina jurisdictional statutes, sections 7A-27²⁰ and 1-277,²¹ the court of appeals in *Jones* found that there was no right to immediate appeal of an interlocu-

10. *Id.* at 413, 313 S.E.2d at 265.

11. *Id.* Judge Britt, presiding over the case, found that the jury was deadlocked. The defendant immediately filed objections to the order of mistrial. *State v. Jones*, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984) (separate appeal from conviction at third trial).

12. *State v. Jones*, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984). The defendant asserted that the judge's declaration of a mistrial had been provoked by actions of the prosecutor and that the judge had failed to make either a judicial inquiry or finding of fact as to whether the jury actually was deadlocked. *Id.* at 386, 313 S.E.2d at 814. When a trial court makes no findings in the process of improperly ordering a mistrial over the defendant's objection, the defendant cannot be retried for the same offense. *Id.* at 388, 313 S.E.2d at 815-16.

13. Following the original trial court's order of a mistrial, defendant petitioned that court for habeas corpus relief. The trial court denied defendant's petition. Jones then petitioned the North Carolina Supreme Court for writs of supersedeas, habeas corpus, and mandamus. See *infra* note 24 for a discussion of these and other prerogative writs. The supreme court vacated Judge Britt's order of mistrial and remanded the case to the superior court for a de novo hearing on defendant's motion for habeas corpus relief before a different judge. Judge Bailey, presiding over the de novo hearing, denied defendant's petition for habeas corpus. Defendant then petitioned the North Carolina Supreme Court for writs of supersedeas and certiorari, but both writs were denied. Defendant filed similar motions in the United States District Court for the Eastern District of North Carolina, but did not succeed in preventing his retrial. *State v. Jones*, 67 N.C. App. 377, 381, 313 S.E.2d 808, 811 (1984).

14. *State v. Jones*, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984). A mistrial was granted on defendant's motion.

15. *Id.*

16. 431 U.S. 651 (1977). The Court in *Abney* held that an order denying a motion to dismiss on double jeopardy grounds was a final decision within the federal jurisdictional statute and was immediately appealable under the statute. See *infra* notes 50-55 and accompanying text.

17. *Jones*, 67 N.C. App. at 415-16, 313 S.E.2d at 266.

18. *Id.* at 416, 313 S.E.2d at 266.

19. *Id.* at 415, 313 S.E.2d at 266.

20. N.C. Gen. Stat. § 7A-27 (1981). Although the court did not cite any specific subsection of

tory order unless the order would deprive the appellant of a substantial right if not reviewed before a final judgment on the merits.²² Referring to two decisions of the North Carolina Supreme Court, the court in *Jones* determined that the right to avoid a rehearing or trial was not substantial within the meaning of the statute.²³ The court then reasoned that Jones' asserted right to avoid a second trial also was not substantial. The court added that the defendant's right to interlocutory review was adequately protected by his opportunity to obtain discretionary review in the appellate courts by means of prerogative writs.²⁴

Judge Johnson dissented from the panel decision on two grounds. First, he contended that the "final decision" requirement of the federal jurisdictional statute was substantially similar to the "final judgment" requirement in the North Carolina appellate statute;²⁵ thus, the holding in *Abney* was equally applicable to North Carolina law.²⁶ Second, Judge Johnson criticized the majority for basing its decision solely on the authority of civil cases;²⁷ he argued that the cases relied on were inapplicable and that an important case involving rights substantially similar to those asserted by Jones had been overlooked.²⁸

§ 7A-27, it appeared to be referring to the final judgment rule in § 7A-27(b) which allows appeals of right to the court of appeals "[f]rom any final judgment of a superior court." *Id.* § 7A-27(b).

21. See *supra* note 7.

22. *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266 (citing *Blackwelder v. Department of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983)).

Jones appealed separately from the conviction entered at his third trial. See *State v. Jones*, 67 N.C. App. 377, 313 S.E.2d 808 (1984). The court of appeals in that case determined that the trial judge in the original trial had improperly declared a mistrial, because the judge had failed to make a judicial inquiry or finding of fact as to whether the jury actually was deadlocked. The court of appeals then held that "where the trial court makes no findings at all in the course of improperly ordering a mistrial over defendant's timely objection . . . the defendant cannot be tried again for the same offense." *Id.* at 388, 313 S.E.2d at 815-16.

23. *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266.

24. *Id.* Prerogative writs are extraordinary writs issued in the discretion of the court on a showing of proper cause. Among the prerogative writs authorized for issuance by the court of appeals or the supreme court under N.C. GEN. STAT. § 7A-32 (1981) are:

1) *Certiorari*, which allows the appellant to seek review of a case that would not otherwise be entitled to review. *Certiorari* may be issued by the court of appeals or supreme court in situations in which the right to appeal or petition for discretionary review has been lost by appellant's failure to take timely action, or in which no right to appeal exists from an interlocutory order.

2) *Supersedeas*, which is used to stay the enforcement of an order while review of that order is being sought.

3) *Mandamus*, which is used to correct erroneous judicial action, to compel judicial action that erroneously has been refused, or to compel the exercise of judicial discretion when discretionary action has been refused. See J. POTTER, NORTH CAROLINA APPELLATE HANDBOOK 49-53 (1978). Section 7A-32 also authorizes the court of appeals or supreme court to issue the writ of habeas corpus which is a writ "designed as an effective means of obtaining . . . a speedy release of persons who are illegally deprived of their liberty or illegally detained." *In re Stevens*, 28 N.C. App. 471, 221 S.E.2d 839, 840 (1976) (quoting 39 AM. JUR. 2D *Habeas Corpus* § 1 (1968)).

25. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 267 (Johnson, J., dissenting).

26. *Id.* It is unclear whether Judge Johnson was suggesting that Jones had a constitutional right to appeal on these facts or whether he was objecting merely to the majority's cursory treatment of *Abney*.

27. *Id.* at 418, 313 S.E.2d at 268 (Johnson, J., dissenting). Given the scarcity of criminal cases involving interlocutory appeals, see *infra* note 91 and accompanying text, the dissent's criticism may be unwarranted.

28. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 268 (Johnson, J., dissenting); see *infra* notes 92-93 and accompanying text.

This Note considers the propriety of the court of appeals' decision in *Jones* in light of the history of the substantial rights doctrine and evaluates the attempts of federal and state courts to balance the competing interests of judicial efficiency and individual rights. It concludes that although the court may have been correct in not relying on federal law, North Carolina precedent and policy dictate reversal of the decision.

Before considering the substantial rights doctrine, it is necessary to examine the rule that created the need for the substantial rights doctrine exception. The final judgment rule was developed over three hundred years ago in *Metcalfe's Case*²⁹ in which the King's Bench held that no appeal could be taken until an action had been disposed of completely.³⁰ The rule grew out of the common-law conviction that a case was a single judicial unit and that it was impossible to have two records in different courts upon the same original writ.³¹ Today the rule is based on the desire for judicial economy; it allows appellate courts to consider the entire case at once, thus avoiding the inequities inherent in piecemeal review.³²

All too often individual rights were lost in the common-law quest for judicial economy.³³ The substantial rights doctrine thus evolved to relieve some of the hardships of the final judgment rule; the doctrine allows immediate appeal to be taken from any interlocutory judgment that has affected a substantial right of a litigant.³⁴ The doctrine first appeared in New York's Field Code, which merged the final judgment rule of the common law with the liberal appeals policies of the courts of equity.³⁵ North Carolina adopted the substantial rights doctrine when it enacted its own Code of Civil Procedure based upon the Field Code.³⁶

The doctrine remained part of North Carolina law even after the state adopted new rules of civil procedure based on the federal rules. Even though the federal rules did not explicitly provide for a substantial rights exception to the final judgment rule³⁷ and the substantial rights doctrine itself did not otherwise

29. 77 Eng. Rep. 1193, 11 Coke 28 (1615).

30. See Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine*, 18 WAKE FOREST L. REV. 857, 858 (1982).

31. See Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539, 541-42 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 292 (1966).

32. Frank, *supra* note 31, at 292.

33. *Id.* at 292 & n.10.

34. See Comment, *supra* note 30, at 857.

35. N.Y. CIV. PROC. LAW § 5701(a)(2)(v) (McKinney 1978) (first modern code of civil procedure). Although the common law strictly had adhered to the final judgment rule, courts of equity generally allowed appeals from nonfinal orders and decrees. See Comment, *supra* note 30, at 858.

36. See N.C. CODE CIV. PROC. LAW § 299 (1868) ("An appeal may be taken from every judicial order or determination of a judge of a superior court . . . which affects a substantial right claimed in any action or proceeding . . ."), repealed by Act of April 30, 1971, ch. 268, § 34, 1971 N.C. Sess. Laws 199.

37. Although the North Carolina Rules of Civil Procedure do not specifically provide for a substantial rights exception, the doctrine is part of the North Carolina General Statutes. See *supra* note 7; see also N.C. GEN. STAT. § 7A-27(d)(1) (1981) (providing for appeal as of right "from any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which . . . affects a substantial right").

become part of the federal law,³⁸ the federal system developed other exceptions, four judicial and four legislative, to the final judgment rule.³⁹ It was one of the judicially created exceptions, the collateral order doctrine,⁴⁰ that formed the basis for the Supreme Court's decision in *Abney v. United States*.⁴¹

The Supreme Court developed the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*⁴² *Cohen* involved a shareholder's derivative suit in which the district court had denied defendant corporation's motion to require plaintiff shareholders to post security to cover the cost of the litigation.⁴³ Defendant in *Cohen* had sought immediate review in the Third Circuit Court of Appeals, which reversed the decision of the district court.⁴⁴ On review of the appellate court's decision, the Supreme Court held that the pretrial order of the district court was a "final decision" for the purposes of the federal appellate jurisdiction statute.⁴⁵ In determining that the pretrial order was a final decision within the statute, the Court looked to three factors:

- (1) whether the order fully disposed of the security issue;⁴⁶
- (2) whether the order constituted a resolution of an issue completely collateral to the rights asserted in the actions or was merely a "step toward final disposition of the merits";⁴⁷ and

38. See Comment, *supra* note 30, at 859.

39. See *id.* The four legislative exceptions to the final judgment rule are: 28 U.S.C. § 1292(a)(1) (1982), which provides for immediate appeal to the court of appeals of interlocutory injunctive orders; 28 U.S.C. § 1651(a) (1982), which authorizes federal courts to issue writs of mandamus (North Carolina has a corollary to § 1651(a) in N.C. GEN. STAT. § 7A-32(b) (1981), which authorizes the court of appeals and supreme court to issue writs of mandamus); FED. R. CIV. P. 54(b) which allows appellate review of final judgments entered against fewer than all the parties or claims in a multiparty or multiclient action (N.C. R. Civ. P. 54(b) parallels the federal rule except to the extent that it is limited by the North Carolina General Statutes); and 28 U.S.C. § 1292(b) (1982), which allows discretionary review of cases involving a controlling question of law about which there is substantial ground for difference of opinion and where the resolution of such an issue will materially advance the ultimate disposition of the litigation.

The four judicial exceptions to the final judgment rule are: the irreparable harm doctrine formulated in *Foray v. Conrad*, 47 U.S. (6 How.) 201 (1848), which permits immediate appeal of an order directing delivery of physical property when such an appeal is necessary to prevent irreparable injury to appellant's interests; the collateral order doctrine, see *infra* notes 42-49 and accompanying text; the death knell doctrine, which authorized appeal from an interlocutory order that has the effect of terminating the litigation (in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) the Court put an end to the use of this doctrine in the federal courts); and the pragmatic balancing test formulated in *Gillespie v. United States*, 379 U.S. 148 (1964), which allows appeal of nonfinal orders that are fundamental to the furtherance of the litigation. See generally 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, §§ 3910-13 (1976) (comprehensive discussion of federal exceptions to final judgment rule).

40. See generally *Abney v. United States*, 431 U.S. 651, 657-59 (1977) (discussing development and application of collateral order doctrine); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 39, § 3911, at 467 (same); Frank, *supra* note 31, at 300-02 (same); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 364-67 (1961) (same).

41. 431 U.S. 651 (1977).

42. 337 U.S. 541 (1949).

43. *Id.* at 543.

44. *Id.* at 545.

45. *Id.* 28 U.S.C. § 1291 (1982) provides: "The court of appeals . . . shall have jurisdiction of appeals from all final decisions . . . except where direct review may be had in the Supreme Court."

46. *Cohen*, 337 U.S. at 546.

47. *Id.*

(3) whether the decision involved an important right that would be "lost, probably irreparably," if review had to await a final judgment.⁴⁸

After considering these factors, the Court concluded that the pretrial order in *Cohen* fell within the "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."⁴⁹

In determining whether the pretrial order denying a motion to dismiss on double jeopardy grounds belonged in the "small class" of *Cohen* orders, the Supreme Court in *Abney* considered each of the three factors outlined in *Cohen*.⁵⁰ The Court first found that the pretrial order constituted a final disposition of the double jeopardy claim, as no further steps could be taken in the trial court to block the trial.⁵¹ Next, the Court determined that the double jeopardy claim was collateral to and independent of the principal issue in a criminal trial, as the claim was not relevant to defendant's guilt or innocence.⁵² Last, the Court noted that the rights guaranteed by the double jeopardy clause would be "significantly undermined" if the claim were postponed until after the defendant's conviction.⁵³ The Court noted that the denial of an interlocutory appeal in this case would subject the defendant to the very "personal strain, public embarrassment, and expense of a criminal trial" from which the double jeopardy clause was designed to protect him.⁵⁴ Most significantly, the Court stated that for the defendant to enjoy the "full protection" of the double jeopardy clause, his double jeopardy challenge must be reviewable before he is exposed to a second criminal trial.⁵⁵

Rather than requiring a "final decision" on a collateral issue as the basis for interlocutory appeal, as does section 1291, North Carolina's statute allows an appeal of right from "every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding."⁵⁶ The North Carolina Supreme Court and Court of Appeals have given the term "substantial right" differing, albeit consistent, definitions. Relying on Webster's definition, the North Carolina Supreme Court has defined

48. *Id.*

49. *Id.* Other orders belonging to the small class defined by *Cohen* are: an order vacating an attachment in an admiralty appeal, the denial of a petition to proceed in forma pauperis, an order challenging the amount of bail, and an order imposing on defendants 90% of costs of notifying class members of class action. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (class action) *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (bail); *Roberts v. United States Dist. Court*, 339 U.S. 844, 844 (1950) (in forma pauperis); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 688-89 (1950) (attachment).

50. *Abney*, 431 U.S. at 659-62.

51. *Id.* at 659.

52. *Id.* at 659-60.

53. *Id.* at 660. The Court noted that the double jeopardy clause was designed to protect individuals not only from being convicted twice, but from being tried twice as well. Such protection would be lost, the Court said, if the defendant were forced to "'run the gauntlet'" a second time before an appeal could be taken. *Id.* at 660-62.

54. *Id.* at 661.

55. *Id.* at 662.

56. N.C. GEN. STAT. § 1-277 (1983).

a substantial right as "a legal right affecting or invoking a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." ⁵⁷ The court of appeals has relied on Black's definition of substantial: "of real worth and importance: of considerable value, valuable." ⁵⁸ As one commentator has noted, the term "substantial right" is best defined by example. ⁵⁹

Among those orders that North Carolina courts have found to affect a substantial right are orders granting or denying injunctions, orders maintaining the unity of adjudication, and orders concerning separation and divorce. ⁶⁰ In the case of injunctive orders, North Carolina's substantial rights doctrine is comparable to the federal statute that allows immediate appeal of interlocutory injunctive orders in the federal courts. ⁶¹ In contrast to the federal statute, the substantial rights doctrine authorizes appellate review only of those injunctive orders that affect a substantial right instead of allowing appellate review of all injunctions. ⁶² The right of a litigant to have all of his claims litigated in one suit also has been considered substantial. ⁶³ Thus, North Carolina courts have found that an interlocutory order that prevents the complete adjudication of all of a litigant's claims in one action is immediately appealable under the substantial rights doctrine. ⁶⁴ Finally, North Carolina courts generally have found that orders granting claims for alimony and child support arrearages, or granting full faith and credit to another state's decree imposing one spouse's continuing support obligation, affect a substantial right. ⁶⁵

Prior to the North Carolina Court of Appeals' decision in *Stephenson v. Stephenson*, ⁶⁶ North Carolina courts also had allowed immediate appeal of awards *pendente lite* in alimony and divorce actions. ⁶⁷ Influenced by the backlog of cases and the increased use of interlocutory appeals as delay tactics, the court in *Stephenson* found that awards *pendente lite* do not "necessarily affect a substantial right." ⁶⁸ Arguably, the *Stephenson* court's emphasis on the delay

57. *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1971)).

58. *Setzer v. Annas*, 21 N.C. App. 632, 634, 205 S.E.2d 553, 555 (1974) (quoting BLACK'S LAW DICTIONARY 1597 (4th ed. 1968)), *rev'd on other grounds*, 286 N.C. 534, 212 S.E.2d 154 (1975).

59. See Comment, *supra* note 30, at 867.

60. See *id.* at 867-73.

61. See 28 U.S.C. § 1292(a)(1) (1982).

62. See Comment, *supra* note 30, at 868 ("[T]he advantage of the case-by-case substantial right test [is] that it does not restrict the appellate courts to a black-letter rule requiring review of all injunctions, but rather allows them to examine the particular facts and the individual rights involved in deciding whether an immediate appeal should lie.").

63. *Id.* at 869.

64. See, e.g., *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (denial of motion to amend answer for purpose of asserting compulsory counterclaim affects a substantial right), *disc. rev. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978).

65. See *McGinnis v. McGinnis*, 44 N.C. App. 381, 387, 261 S.E.2d 491, 495 (1980).

66. 55 N.C. App. 250, 285 S.E.2d 281 (1981).

67. See *id.* at 252, 285 S.E.2d at 282. Alimony *pendente lite* is alimony paid pending final judgment of an action for alimony without divorce.

68. *Id.*

caused by interlocutory appeals altered that court's previous dictionary definition of substantial right to allow for consideration of judicial economy.⁶⁹

It is clear that the state and federal applications of the substantial rights and collateral order doctrines differ. If the federal doctrine, as applied in *Abney*, is not constitutionally based, then it would appear not to be controlling in state court. However, the constitutional overtones of the Supreme Court's statement in *Abney* that a defendant's challenge must be reviewable before a final judgment if he is to enjoy the "full protection" of the double jeopardy clause suggest that the dissenting judge in *Jones* may have been correct in his assertion that Jones does have a constitutional right to immediate appeal.⁷⁰ A number of state courts have found that *Abney* rests in part on constitutional grounds that are applicable to both state and federal courts.⁷¹ Nevertheless, the Court's preface to its discussion of the double jeopardy issue in *Abney* refutes such a conclusion. The Court observed that "it is well settled that there is no constitutional right to an appeal"⁷² and noted that there was no right to appeal in criminal cases in the federal courts until 1889.⁷³

Conceding that the right to appeal is purely a creature of statute, the dissenting judge in *Jones* nevertheless contended that no difference exists between the "final decision" requirement of section 1291 and the "final judgment" requirement of section 7A-27(b) of the North Carolina General Statutes.⁷⁴ Therefore, the dissenting judge argued that the constitutional principles of *Abney* are equally applicable to North Carolina law.⁷⁵ This argument has some merit because both the final judgment and the final decision requirement derive from the same common-law root.⁷⁶ Both requirements have the same practical effect of preventing piecemeal review.⁷⁷ Moreover, in the specific context of a criminal case, a final decision and a final judgment would appear to mean the same thing: the ultimate determination of the defendant's guilt or innocence. North Carolina's final judgment requirement and the federal final decision requirement are

69. See Comment, *supra* note 30, at 873 (*Stephenson* "may foreshadow a trend to constrict the path of interlocutory appeals by a re-evaluation of 'substantiality.'").

70. The Court's assertion that the denial of *Abney*'s interlocutory appeal would deny him full protection of the double jeopardy clause can be read as a suggestion that the denial works to deprive the defendant of rights guaranteed by the fifth amendment.

71. See *State v. Janvrin*, 121 N.H. 370, 430 A.2d 152 (1981) (citing *Abney* for the proposition that interlocutory appeal is necessary prior to retrial in order to protect defendant's constitutional right to be free from double jeopardy); *State v. Berberian*, 122 R.I. 693, 696, 411 A.2d 308, 309 (1980) ("[a]lthough the Court in [*Abney*] was construing statutory provisions . . . Mr. Chief Justice Burger appeared to base the majority opinion of the Court at least in part on constitutional grounds"; court found that *Abney* established constitutional right to appeal).

72. *Abney*, 431 U.S. at 656.

73. *Id.* at 656 & n.3.

74. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 267 (Johnson, J., dissenting).

75. *Id.*

76. See *supra* notes 29-32 and accompanying text.

77. Compare *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 487, 251 S.E.2d 443, 446 (1979) ("Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for a single appeal from the final judgment.") (quoting *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)) with *Abney*, 431 U.S. at 656 ("[T]here has been firm congressional policy against interlocutory or 'piecemeal' appeals.").

at odds on this point. Under North Carolina law, a final judgment is one that "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court."⁷⁸ Under the federal collateral order doctrine, an order that does not dispose of the cause as to all the parties and that does leave issues to be determined in the trial court still may be considered a final decision provided it meets the *Cohen* criteria.⁷⁹ As Justice Jackson has noted, it was specifically a "final decision that Congress ha[d] made reviewable," and that "[w]hile a final judgment is always a final decision, there are instances in which a final decision is not a final judgment."⁸⁰ Arguably *Jones* embodies just such an instance. Indeed, one state court has found *Abney's* interpretation of a final decision to be inapplicable to its own final judgment rule based on Justice Jackson's reasoning.⁸¹

Before disposing of the case completely, it should be noted that *Abney*, although not dispositive, is persuasive on the substantial rights issue. In the course of determining whether an interlocutory denial of a motion to dismiss on double jeopardy grounds was a final decision, the Court in *Abney* had to determine whether that denial "involved an important right which would be 'lost, probably irreparably' " if review had to await a final judgment.⁸² The standard the Court used is strikingly similar to the standard applied in *Jones*; that is, whether the order "deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment."⁸³ To say an *important* right that would be lost if not reviewed before a final judgment is not the same as a *substantial* right that would be lost if not reviewed before a final judgment is illogical.

Although the *Jones* decision may be sound constitutionally, it reflects an incomplete analysis of the North Carolina case law on the substantial rights issue. The court initially compared the defendant's right to be free from double jeopardy with the right to avoid a rehearing or trial.⁸⁴ The court then cited two civil cases, *Tridyn Industries, Inc. v. American Mutual Insurance, Co.*⁸⁵ and *Waters v. Qualified Personnel, Inc.*,⁸⁶ for the proposition that the right to avoid a

78. *Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981) (quoting *Veazy v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)).

79. A collateral order by its very nature is an order that is collateral to the principal issue in the case.

80. *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (separate opinion of Justice Jackson) (contending that order denying reduction in bail should be regarded as final decision even though order does not constitute final judgment, which, in a criminal trial, could be appealed only upon sentencing).

81. See *State v. Fisher*, 2 Kan. Ct. App. 353, 579 P.2d 167 (1978).

82. See *supra* note 48 and accompanying text.

83. *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266 (citing *Blackwelder v. Department of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983)).

84. *Id.*

85. 296 N.C. 486, 251 S.E.2d 443 (1979). In *Tridyn*, the superior court judge had granted plaintiff's motion for summary judgment on the issue of defendant's liability to plaintiff under a general insurance contract issued by defendant. The court reserved for trial the issue of damages. The court of appeals found that the order granting partial summary judgment did not deprive the defendant of any substantial right. The supreme court affirmed that the "case should be reviewed, if at all, in its entirety and not piecemeal." *Id.* at 494, 251 S.E.2d at 449.

86. 294 N.C. 200, 240 S.E.2d 338 (1978). In *Waters*, the superior court judge had set aside an order of summary judgment entered in favor of defendant on the ground that defendant had failed to

rehearing or trial is not substantial.⁸⁷ The court offered no explanation for its conclusion that the rights asserted in those cases were comparable to those asserted by Jones. In fact, examination of the practical effects of both *Tridyn* and *Waters* indicates that the rights asserted in those cases are *not* comparable to the constitutional right asserted by Jones. The practical effect of the decision in *Tridyn* was to subject defendant to a single trial on the issue of damages.⁸⁸ The practical effect of *Waters*, at worst, was to subject defendant to a single trial on the merits and, at best, to a rehearing on a motion for summary judgment.⁸⁹ In neither case was there a danger that the defendant would have to endure the "personal strain," "expense," or even the "embarrassment" of a second trial.⁹⁰

Given that only a single trial was involved in both *Tridyn* and *Waters*, it is difficult to see the relevance of either case to the issue in *Jones*. The issue in *Jones* was not whether the defendant had a right to avoid an initial trial, but whether the defendant had a right to avoid a second criminal trial. Reliance on civil cases might be justified by the scarcity of North Carolina criminal cases involving interlocutory appeals.⁹¹ The court, however, chose the wrong civil cases on which to rely; it failed to consider two cases that are relevant to the second trial issue. In *Oestreicher v. American National Stores, Inc.*⁹² the Supreme Court of North Carolina held that the plaintiff had an immediate right to appeal the decision to grant defendant's motion for summary judgment as to some of plaintiff's claims when the effect would be to subject plaintiff to a possible second trial on these claims if the granting of the motion were ultimately found to be erroneous.⁹³ Similarly, the court of appeals in *Roberts v. Heffner*⁹⁴

file notice of hearing in conjunction with its motion for summary judgment. The supreme court held that such an order "setting aside without prejudice a summary judgment on the grounds of procedural irregularity . . . is not immediately appealable." *Id.* at 208, 240 S.E.2d at 343.

87. *Jones*, 67 N.C. App. at 416, 313 S.E.2d at 266.

88. See Comment, *supra* note 30, at 870-71 (citing *Tridyn* for the proposition that "orders for partial summary judgment that merely determine the liabilities of parties while reserving the issue of damages for trial do not affect substantial rights").

89. See Survey of Developments in North Carolina Law—Civil Procedure, 1978, 57 N.C.L. REV. 891, 909 (1979) ("In *Waters* . . . denial of the right to appeal the setting aside of defendant's summary judgment necessitates only a rehearing of the summary judgment and at most one trial.").

90. See *Abney*, 431 U.S. at 661.

91. Judge Johnson cited *State v. Bryant*, 280 N.C. 407, 185 S.E.2d 854 (1972), apparently the only criminal case in North Carolina allowing an interlocutory appeal, in his dissent. See *Jones*, 67 N.C. App. at 419, 313 S.E.2d at 267 (Johnson, J., dissenting). In *Bryant* the North Carolina Supreme Court found that an interlocutory order of a superior court judge authorizing police to retain obscene material illegally seized from defendant's store was immediately appealable. The court in *Bryant* found that a defendant may appeal immediately an order that "'may destroy or impair or seriously imperil some substantial right of the appellant.'" *Bryant*, 280 N.C. at 411, 185 S.E.2d at 856 (quoting *State v. Childs*, 265 N.C. 575, 578, 144 S.E.2d 653, 655 (1965) (quoting *Privette v. Privette*, 230 N.C. 52, 53, 51 S.E.2d 925, 926 (1949))).

Childs, though denying the criminal defendant's interlocutory appeal of an order denying his motion for change of venue to another county, implicitly authorizes interlocutory appeals in criminal cases. See *Childs*, 265 N.C. at 578, 144 S.E.2d at 655. *Bryant* appears to be the only case in which such an appeal has ever been granted.

92. 290 N.C. 118, 225 S.E.2d 797 (1976).

93. *Id.* at 130, 225 S.E.2d at 805. In *Oestreicher*, the trial court granted summary judgment for defendant on two of plaintiff's three related claims. The supreme court held that plaintiff had a substantial right to have all three claims litigated in one action; thus, the grant of summary judgment was immediately appealable. If plaintiff had been forced to try his remaining claim, and if, on appeal

found that "the possibility of being forced to undergo two full trials on the merits . . . makes it clear that the judgment in question works an injury to defendants if not corrected before an appeal from a final judgment."⁹⁵ As the dissent in *Jones* noted, it seems illogical to hold that the mere possibility of facing a second trial on the merits in a civil case involves a substantial right, while the virtual certainty of facing a second criminal trial does not.⁹⁶

The court in *Jones* also stated that there was no right to immediate appeal from a motion to dismiss because "such refusal generally will not seriously impair any right of the defendant that cannot be corrected upon appeal"⁹⁷ There are two problems with this assertion. First, the case cited for this proposition, *North Carolina Consumers Power, Inc. v. Duke Power Co.*,⁹⁸ recognized that there is a right to immediate appeal from a refusal to dismiss a cause of action for want of jurisdiction.⁹⁹ Thus, the court's conclusion is based on faulty authority. Second, regardless of the general effect of a refusal to dismiss an action, such a refusal on the facts in *Jones* impairs a right of the defendant that cannot be corrected on appeal. Even if a post-conviction appeal reverses an unfair conviction, the defendant still will have been unconstitutionally subjected to a second trial.¹⁰⁰ When the right not to be subject to a second trial is the right at issue, an appeal after that trial cannot erase the fact that a trial has already occurred.

In response to this last contention, the court in *Jones* stated that defendant's rights were adequately protected by his right to petition the court for prerogative writs.¹⁰¹ The fallacy of this statement is illustrated by the consequences of *Jones*' appeal from his conviction in the third trial. Following the second trial court's denial of *Jones*' motion to dismiss on double jeopardy grounds, *Jones* petitioned the North Carolina Supreme Court for writs of supersedeas and prohibition, arguing that his retrial should be barred by double jeopardy principles.¹⁰² The court refused to exercise its discretion and denied the petitions.¹⁰³ When *Jones* finally was allowed an appeal from the final judgment entered in his third trial, his conviction was reversed.¹⁰⁴ In the words of the dissenting judge, "Nothing in [the appellate files] indicates that the appellate courts considered

from a final judgment, the summary judgment against plaintiff's two other claims had been overturned, the plaintiff would have been forced to face a second trial on those two claims. *Id.*

94. 51 N.C. App. 646, 277 S.E.2d 446 (1981).

95. *Id.* at 650, 277 S.E.2d at 449. Defendants in *Roberts* appealed from a trial court order dismissing their counterclaim for damages in excess of set-off to plaintiff's claims. The court of appeals found that if the denial of the counterclaim in excess of the set-off amount were overturned on defendant's appeal from a final judgment, defendants would be forced to undergo a second trial to determine their full measure of damages.

96. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 268 (Johnson, J., dissenting).

97. *Id.* at 416, 313 S.E.2d at 266 (citing *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 436, 206 S.E.2d 178, 180 (1974)).

98. 285 N.C. 434, 206 S.E.2d 178 (1974).

99. *Id.* at 438, 206 S.E.2d at 181.

100. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 267 (Johnson, J., dissenting).

101. *Id.* at 416, 313 S.E.2d at 266.

102. *Id.* at 414, 313 S.E.2d at 265.

103. *Id.*

104. See *supra* note 22.

the merits of defendant's various petitions, despite clear evidence of patently arbitrary judicial action."¹⁰⁵ The availability of prerogative writs did not offer Jones adequate protection; it offered him no protection at all.

One commentator has suggested that in interpreting the substantial rights language of section 1-277 North Carolina courts have shifted their focus from the protection of individual rights to concern for judicial economy.¹⁰⁶ It is conceivable that the majority in *Jones* was haunted by the "specter of dilatory appeals" when it endorsed an opinion that was founded neither in law nor in logic.¹⁰⁷ Even assuming that concerns for adjudicatory efficiency may outweigh considerations of constitutional rights in the context of appellate review, as a practical matter the court's decision in *Jones* may not be justifiable even on grounds of judicial economy. As a result of the denial of Jones' initial interlocutory appeal, the North Carolina judicial system was burdened with two full trials on the merits, two appeals, and countless petitions for discretionary writs, all of which might have been avoided by the grant of defendant's original appeal.¹⁰⁸

Even disregarding the misuse of precedent and the possible absence of judicial economy, the court's decision in *Jones* is not justifiable as a matter of fairness. Regarding the concept of judicial economy, the Supreme Court has stated that "the Bill of Rights . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency."¹⁰⁹ A number of state courts have recognized the wisdom of this sentiment and have permitted interlocutory appeals from orders denying motions to dismiss on double jeopardy grounds.¹¹⁰ The court in *Jones*, however, was unwilling to recognize or give protection to the fragile value of freedom from double jeopardy despite the North Carolina courts' protection of seemingly less substantial rights in the past. In contrast to the result in *Jones*, the courts have singled out for protection as "substantial rights" the rights affected by court orders directing the opening of a defendant's safe,¹¹¹ prohibiting the defendant from deposing an out-of-state expert witness,¹¹² and requiring litigants to elect between disputed land boundaries in a land title action.¹¹³ It is difficult to see how an order to open a safe compares with an order that has the effect of requiring the defendant to defend a second, or even third, criminal trial, in violation of that defendant's constitutional rights.

The cases relied on by the majority do not address the issue presented in

105. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 269 (Johnson, J., dissenting).

106. See Comment, *supra* note 30, at 857.

107. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 268 (Johnson, J., dissenting).

108. This analysis assumes that the North Carolina Court of Appeals would have reached the same conclusion had it allowed Jones' interlocutory appeal as it did when Jones appealed from the final judgment entered in his third trial.

109. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

110. See, e.g., *Gray v. State*, 36 Md. App. 708, 375 A.2d 31 (1977); *State v. Janvrin*, 121 N.H. 370, 430 A.2d 152 (1981); *State v. Berberian*, 122 R.I. 693, 411 A.2d 308 (1980).

111. See *State ex rel. Hooks v. Flowers*, 247 N.C. 558, 562, 101 S.E.2d 320, 323 (1958).

112. See *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 625, 231 S.E.2d 597, 601 (1977).

113. See *Jenkins v. Trantham*, 244 N.C. 422, 427, 94 S.E.2d 311, 316 (1956).

Jones. The court's suggestion that prerogative writs can protect a defendant who has been forced to endure two unconstitutional trials, when his efforts to procure such writs failed, is illogical. While the majority was correct in concluding that the Supreme Court's decision in *Abney v. United States* was not dispositive, the logic of that decision, nevertheless, should have been persuasive. Without an opportunity for immediate appeal of an order denying defendant's motion to dismiss on double jeopardy grounds, a defendant cannot enjoy the "full protection" guaranteed by both the United States and the North Carolina constitutions. Understandably, perhaps, criminal appeals are in disfavor. Constitutional rights, however, should not be. The decision of the court of appeals in *State v. Jones* should not stand.

KAREN E. RHEW

Appellate Rule 16(b) and *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*: New Requirements for Appeals of Right

On November 3, 1983, the North Carolina Supreme Court amended the provisions of the North Carolina Rules of Appellate Procedure governing appeals of right from the court of appeals to the supreme court.¹ The amendment, which became effective January 1, 1984,² added a new subparagraph (b) to Rule 16, restricting the scope of the supreme court's review in appeals of right that are based upon the existence of a dissent in the court of appeals.³ The new section provides that when the sole ground for an appeal of right is the existence of a dissent in the court of appeals, review by the supreme court is limited to consideration of the issues specifically set forth in the opinion as the basis for the dissent.⁴

The supreme court first applied Rule 16(b) in *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*⁵ The court stated that the purpose of Rule 16(b) is to ensure that review by the supreme court is limited to those questions on which there was a division in the intermediate appellate court.⁶ Thus, the court held that when the dissenting judge in the court of appeals fails

1. Amendment to the North Carolina Rules of Appellate Procedure, 309 N.C. 830 (1983).

2. The amendment became effective with notices of appeal filed in the supreme court on or after January 1, 1984. *Id.*

3. Under N.C. GEN. STAT. § 7A-30(2) (Supp. 1983), "an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent." In addition, parties may appeal to the supreme court as of right any decision of the court of appeals rendered in a case "[w]hich directly involves a substantial question arising under the Constitution of the United States or of [North Carolina] . . ." *Id.* § 7A-30(1). The only types of decisions of the court of appeals that may not be appealed as a matter of right under the statute are rulings upon motions for post-trial relief made more than ten days after the entry of judgment and motions for valuation of property that is exempt from the enforcement of judgments. *See id.* §§ 7A-28, -30 (Supp. 1983).

Decisions of the court of appeals also may be reviewed by the supreme court pursuant to § 7A-31. Section 7A-31 provides that, except in cases involving appeals from certain administrative bodies to the court of appeals, "the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals." *Id.* § 7A-31 (1981 & Supp. 1983); *see also* N.C.R. APP. P. 15 (procedure for certifying a claim under § 7A-31).

When the right to prosecute an appeal of right under § 7A-30 or to petition for discretionary review under § 7A-31 has been lost by failure to take timely action, or when no right of appeal exists, the supreme court may review decisions of the court of appeals by issuance of a writ of certiorari. N.C.R. APP. P. 21(a)(2); *see also* N.C. GEN. STAT. § 7A-32(b) (1981) (statutory authorization for issuance of prerogative writs, including writ of certiorari).

4. N.C.R. APP. P. 16(b) states:

Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

5. 311 N.C. 170, 316 S.E.2d 298 (1984).

6. *Id.* at 175, 316 S.E.2d at 301.

to set forth the issues on which the dissent is based, no issue is properly presented for review, and Rule 16(b) requires dismissal of the appeal of right.⁷

C.C. Walker involved a suit to collect money allegedly due plaintiff for work performed for defendant.⁸ The trial court granted summary judgment for defendant,⁹ and the court of appeals affirmed,¹⁰ with the chief judge noting a dissent but not writing a dissenting opinion.¹¹ Based on the existence of this dissent in the court of appeals, plaintiff appealed to the supreme court as a matter of right.¹² Applying Rule 16(b), the supreme court dismissed the appeal on the ground that the dissenting judge had not set forth the issues on which he based his dissent.¹³ On its own motion, however, the court certified certain issues in the case for discretionary review¹⁴ and reversed the judgment of the court of appeals.¹⁵

In its application of Rule 16(b), the decision in *C.C. Walker* marks a departure from the supreme court's previous practice with respect to appeals of right. Under section 7A-30(2) of the North Carolina General Statutes, parties are entitled, as a matter of right, to appeal any decision of the court of appeals in which there is a dissent.¹⁶ Prior to the amendment of Rule 16, the supreme court adhered to the literal language of section 7A-30(2), recognizing a right of appeal from any decision to which a judge in the court of appeals had dissented.¹⁷ In such cases, the scope of the supreme court's review was not limited to consideration of the issues raised in the dissenting opinion,¹⁸ but included all questions properly presented by the parties in the briefs filed in the supreme court.¹⁹

7. *Id.* at 176, 316 S.E.2d at 301.

8. *Id.* at 171, 316 S.E.2d at 299.

9. *Id.* at 174, 316 S.E.2d at 301.

10. *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*, 66 N.C. App. 170, 310 S.E.2d 615, *rev'd*, 311 N.C. 170, 316 S.E.2d 298 (1984).

11. *Id.* at 173, 310 S.E.2d at 616 (Vaughn, C.J., dissenting).

12. *C.C. Walker*, 311 N.C. at 171, 175, 316 S.E.2d at 299, 301.

13. The court stated:

Where an appeal of right is taken to this Court based solely on a dissent in the Court of Appeals and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before this Court. Such appeals are subject to dismissal. Application of this procedural amendment [Rule 16(b)] to the case at bar precludes further review by appeal of right.

Id. at 176, 316 S.E.2d at 301-02.

14. *Id.* at 176, 316 S.E.2d at 302.

15. *Id.* at 183, 316 S.E.2d at 305.

16. *See supra* note 3.

17. *See, e.g.*, *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972) (aggrieved parties may appeal to the supreme court as of right from any decision of the court of appeals in which there is a dissent).

18. In *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980), the supreme court specifically addressed the question whether the scope of its review in appeals of right under § 7A-30(2) was limited to consideration of the issues discussed by the dissenting judge in the court of appeals. In *Williams*, which involved questions concerning both alimony and child support, plaintiff argued that the child support provisions of the trial court's order were not subject to review by the supreme court because the dissent in the court of appeals concerned only the alimony issue. The supreme court rejected this argument, holding that it was "not limited, in reviewing a decision of the Court of Appeals, to consideration of only such matters as [might] be mentioned by the dissenting judge in the Court of Appeals' opinion." *Id.* at 190, 261 S.E.2d at 860.

19. Prior to its amendment, Rule 16(a) provided:

Rule 16(b) now restricts the scope of the supreme court's review in appeals under section 7A-30(2) to consideration of the issues set forth in the dissenting opinion in the court of appeals.²⁰ This limitation led the *C.C. Walker* court to conclude that there can be no appeal of right under the statute from decisions of the court of appeals in which the dissenting judge merely notes his dissent but does not write an opinion discussing the grounds for his disagreement with the majority.²¹ On its face this result appears to conflict with the language of section 7A-30(2), which provides for an appeal of right from any decision of the court of appeals in which there is a dissent. The court avoided this potential conflict, however, by stating that Rule 16(b) was intended to advance the existing policy limiting the scope of review in appeals of right under section 7A-30(2) to questions on which there was a division in the court of appeals.²² Relying on previous decisions construing the statute,²³ the court observed that review by the supreme court had never been intended for questions on which there was no disagreement in the intermediate appellate court.²⁴

If there is conflict between section 7A-30(2) and Rule 16(b) as construed in *C.C. Walker*, the result reached by the supreme court is controlling. Under the North Carolina Constitution, the supreme court has exclusive authority to pro-

Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

N.C.R. App. P. 16(a), 287 N.C. 720 (1975). The amendment of November 3, 1983 retained this statement of the scope of the supreme court's review but created an exception for appeals of right based solely on the existence of a dissent in the court of appeals. See Amendment to the North Carolina Rules of Appellate Procedure, 309 N.C. 830 (1983). The scope of review in such appeals is now governed by Rule 16(b). See *id.*

20. See *supra* note 4 and accompanying text.

21. See *C.C. Walker*, 311 N.C. at 176, 316 S.E.2d at 301.

22. See *id.* at 175, 316 S.E.2d at 301. The fact that a dissenting judge does not write an opinion does not indicate the absence of disagreement in the court of appeals; it merely means that the grounds for such disagreement are not apparent.

23. Before the adoption of Rule 16(b), the supreme court had held consistently that in enacting § 7A-30, the general assembly intended to ensure review by the supreme court of questions on which there was a division in the court of appeals. See, e.g., *State v. Hageman*, 307 N.C. 1, 6-7, 296 S.E.2d 433, 437 (1982); *State v. Campbell*, 282 N.C. 125, 127-28, 191 S.E.2d 752, 754-55 (1972); *Hendrix v. Alsop*, 278 N.C. 549, 554, 180 S.E.2d 802, 806 (1971).

24. *C.C. Walker*, 311 N.C. at 175-76, 316 S.E.2d at 301. Based on this reasoning, the supreme court has held that appeals of right under § 7A-30(2) must be dismissed in cases in which there is no real disagreement in the court of appeals, even if there is an opinion labelled as a dissent. See, e.g., *Harris v. Maready*, 311 N.C. 536, 538, 319 S.E.2d 912, 914 (1984) (when all three judges in court of appeals agreed as to result but disagreed as to reasoning, and two judges filed dissenting opinions that were in effect concurrences, no dissent existed, and plaintiff had no right of appeal under § 7A-30(2)); *State v. Hageman*, 307 N.C. 1, 6-7, 296 S.E.2d 433, 437 (1982) (when two criminal cases were consolidated and court of appeals ruled unanimously in one case, dissent from court's decision in other case gave defendant no right under § 7A-30(2) to appeal unanimous decision); *Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 484, 226 S.E.2d 340, 347 (1976) (when one judge in court of appeals filed an opinion designated a dissent but in effect a concurrence, such opinion did not constitute ground for appeal under § 7A-30(2)); *Hendrix v. Alsop*, 278 N.C. 549, 554, 180 S.E.2d 802, 806 (1971) (when court of appeals ruled unanimously as to two defendants, dissent from court's decision with respect to third defendant gave plaintiff no right to appeal unanimous decision as to first two defendants under § 7A-30(2)).

mulgate rules of practice and procedure in the appellate courts.²⁵ The general assembly may not prescribe rules of appellate procedure or abridge rules adopted by the supreme court.²⁶ In the event that a statute enacted by the general assembly conflicts with the appellate procedure adopted by the supreme court, the rules and case law of the court are controlling, and the statute must yield.²⁷ Thus, the apparent inconsistency between section 7A-30(2) and the supreme court's new approach to appeals of right must be resolved in favor of the court; Rule 16(b) as interpreted in *C.C. Walker* controls the scope of the supreme court's review in such appeals and overrides section 7A-30(2) to the extent it is inconsistent.

Although Rule 16(b) limits the scope of the supreme court's review in appeals of right under section 7A-30(2), it does not prevent the court from considering issues that do not fall within its scope. Rule 16(b) does narrow the class of questions that must be considered by the supreme court as a matter of right, but the rule also specifically provides²⁸ that parties may obtain review of other issues in the case by means of a petition for discretionary review²⁹ or certiorari.³⁰ In

25. N.C. CONST. art. IV, § 13(2) provides that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." The legislature specifically recognized the power of the supreme court to adopt rules of appellate procedure in N.C. GEN. STAT. § 7A-33 (1981), which states that "[t]he Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division." Although statutory recognition of the supreme court's rule-making authority with respect to discretionary review and certiorari is included in the statutes specifically concerning these procedures, see N.C. GEN. STAT. §§ 7A-31(d), -32(b) (1981), no similar provision appears in § 7A-30.

26. The supreme court has long held that the promulgation of rules of appellate procedure is within its exclusive province, into which the general assembly cannot intrude. See, e.g., *Duke Power Co. v. Winebarger*, 300 N.C. 57, 69, 265 S.E.2d 227, 234 (1980); *State v. Furrage*, 250 N.C. 616, 624, 109 S.E.2d 563, 569 (1959); *Lacy v. State*, 195 N.C. 284, 287-88, 141 S.E. 886, 889 (1928); *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927); *State v. Ward*, 184 N.C. 618, 618-19, 113 S.E. 775, 775 (1922) (per curiam); *State v. Johnson*, 183 N.C. 730, 731, 110 S.E. 782, 782 (1922); *Herndon v. Imperial Fire Ins. Co.*, 111 N.C. 384, 385-86, 16 S.E. 465, 465-66 (1892). The general assembly does have authority to prescribe rules of practice and procedure for the superior and district courts, but it has delegated this authority to the supreme court pursuant to N.C. CONST. art. IV, § 13(2). See N.C. GEN. STAT. § 7A-34 (1981) (authorizing supreme court to prescribe rules of practice and procedure for superior and district courts).

27. See, e.g., *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) (when statute conflicts with rule of appellate procedure, statute must yield to the extent it is inconsistent with rule); *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981) (general assembly lacks constitutional authority to enact statutes conflicting with rules of appellate procedure, and supreme court's rules and decisions are authoritative with respect to appellate procedure); *Duke Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980) (under constitution, supreme court, not general assembly, has final authority over questions of appellate procedure).

28. See *supra* note 4.

29. The decision whether to grant such petitions is within the discretion of the supreme court. See N.C. GEN. STAT. § 7A-31(a) (1981 & Supp. 1983). Section 7A-31(c) sets forth the grounds for allowing discretionary review by the supreme court in cases that have been decided by the court of appeals. Under the statute, the supreme court may grant discretionary review when, in its opinion, "(1) [t]he subject matter of the appeal has significant public interest, or (2) [t]he cause involves legal principles of major significance to the jurisprudence of the State, or (3) [t]he decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." *Id.* § 7A-31(c). Petitions for discretionary review of cases decided by the court of appeals must be based upon one or more of these grounds. N.C.R. APP. P. 15(a).

Grounds for allowing discretionary review before determination of a case by the court of appeals are set forth in N.C. GEN. STAT. § 7A-31(b) (1981 & Supp. 1983). Consideration of this provision is unnecessary here, however, since this discussion concerns cases in which an appeal of

cases in which a party wishes to obtain review of issues in addition to those that may be appealed as a matter of right, or in which a party is unsure whether issues are appealable by right, a petition for discretionary review of those issues should be filed along with the notice of appeal that is required for appeals of right.³¹ If Rule 16(b) requires dismissal of the appeal of right and no petition for discretionary review or certiorari has been filed, however, the supreme court may, in its discretion and on its own motion, certify the case for review.³²

As stated by the supreme court, the purpose of Rule 16(b) is to "ensure that in appeals of right based solely upon dissent, review by [the supreme court] shall be limited to those questions on which there was division in the intermediate appellate court."³³ In cases in which the dissenting judge in the court of appeals writes an opinion, the rule fulfills this purpose by denying parties the right to appeal issues as to which the dissenter expressed no disagreement with the majority. In cases in which the dissenter merely notes his dissent without opinion, however, Rule 16(b) as construed in *C.C. Walker* precludes any appeal of right, notwithstanding the obvious division among the judges of the court of

right exists under § 7A-30(2). Such cases necessarily must have been determined by the court of appeals before being appealed to the supreme court. The decision whether to grant discretionary review is based solely on the appellant's petition and any response filed by an adverse party, without oral argument. N.C.R. APP. P. 15(e)(1).

N.C. GEN. STAT. § 7A-31(a) (1981 & Supp. 1983) provides that in most cases, the supreme court may, in its discretion, certify a cause for review either before or after it has been determined by the court of appeals. See *supra* note 3. When discretionary review is granted, the scope of the supreme court's review includes all questions properly presented by the parties in the briefs filed in the supreme court. N.C.R. APP. P. 16(a).

30. Petitions for certiorari are filed when the right to prosecute an appeal of right does not exist or when the right to petition for discretionary review has been lost by failure to take timely action. See *supra* note 3.

In addition to the possibility of review by means of a petition for discretionary review or certiorari, an appeal of right will lie in cases directly involving a substantial question arising under the constitution of the United States or North Carolina. N.C. GEN. STAT. § 7A-30(1) (Supp. 1983).

31. Appeals of right from the court of appeals to the supreme court are taken by the filing and service of notices of appeal within 15 days after the mandate of the court of appeals is issued to the trial court or within 15 days after the court of appeals denies a petition for rehearing. N.C.R. APP. P. 14(a). When the appeal is based upon the existence of a dissent in the court of appeals, the notice of appeal must state the grounds for the appeal under § 7A-30 and the issues which were the basis of the dissenting opinion and which are to be presented to the supreme court for review. *Id.* 14(b)(1). In addition to a party's notice of appeal, a petition for discretionary review may be filed to request review of issues other than those set out in a dissenting opinion, or to request review of the entire case in the event the appeal is determined not to be of right. *Id.* 14(a), 15(b).

32. The supreme court did just this in *C.C. Walker*. See *supra* note 14 and accompanying text. N.C. GEN. STAT. § 7A-31 (1981 & Supp. 1983) provides that in most cases, the supreme court may, in its discretion and on its own motion, certify a cause for review either before or after it has been determined by the court of appeals. See *supra* note 3. The grounds for review and scope of review in cases certified by the supreme court on its own motion are the same as for cases certified on petition of a party. See N.C. GEN. STAT. § 7A-31 (1981 & Supp. 1983); N.C.R. APP. P. 16(a); see also *supra* note 29 (discussing grounds for discretionary review and scope of review). The supreme court makes the decision whether to certify a case for review on its own motion without prior notice to the parties and without oral argument. N.C.R. APP. P. 15(e)(2).

In view of the *C.C. Walker* decision, it is hazardous for parties merely to appeal as of right decisions of the court of appeals in which a dissenting judge notes his dissent but writes no opinion. Although the supreme court may certify such a case for review on its own motion, it is fully within the court's discretion not to do so. Thus, in this situation parties who wish to obtain supreme court review should file petitions for discretionary review or certiorari.

33. *C.C. Walker*, 311 N.C. at 175, 316 S.E.2d at 301.

appeals. Thus, under Rule 16(b) as interpreted by the supreme court, the right of appeal depends solely upon whether the dissenting judge in the court of appeals has chosen to write an opinion expressing and explaining his disagreement with the majority.³⁴

Although this result may operate inequitably in some cases by denying parties the right to appeal when there is no dissenting opinion in the court of appeals, its potential unfairness to aggrieved parties is mitigated by the availability of discretionary review. If Rule 16(b) deprives a party of the right to appeal an adverse decision of the court of appeals, the supreme court may still allow discretionary review of the case upon petition of the party or on its own motion. Thus, the rule preserves needed flexibility in the appellate review system while precluding automatic review of issues on which the court of appeals was in agreement.

The practical effect of Rule 16(b) and *C. C. Walker* will be to impel dissenting judges in the court of appeals to write opinions in cases which they believe merit review by the supreme court. The filing of dissenting opinions in such cases will likely encourage both majority and dissenting judges to evaluate and present the contested issues in each case in a thoughtful manner. If such cases are then appealed as a matter of right under Rule 16(b), the supreme court will have the benefit of well-reasoned opinions setting forth both points of view in the court below. These opinions will aid the supreme court in accomplishing the purposes of the rule by ensuring that the court is fully informed of the grounds of the disagreement in the court of appeals that it must resolve under Rule 16(b).

JANE WYLIE SAUNDERS

34. The mere presence of an opinion labelled as a "dissent" will not guarantee the right of appeal if that opinion does not express clear disagreement with the majority. See *supra* note 24.

American Motors Sales Corp. v. Peters: Green Light to Territorial Security for Automobile Dealers

Motor vehicle dealers, through extensive lobbying efforts,¹ have obtained an arsenal of statutory weapons to defend against manufacturers' abuses of the franchise system.² In North Carolina, the dealers' main weapon is the Motor Vehicle Dealers and Manufacturers Licensing Law,³ which includes a provision regulating establishment of new franchises in the trade area of an existing franchise that distributes the same line-make of motor vehicles for the manufacturer.⁴ In a recent case, *American Motors Sales Corp. v. Peters*,⁵ a manufacturer argued that giving such territorial security to a dealer created a monopoly⁶ in violation of the North Carolina Constitution.⁷ The North Carolina Supreme Court, however, held the statutory provision constitutional.⁸ That finding,⁹ along with recent amendments to North Carolina General Statutes section 20-305(5), firmly established North Carolina dealers' sovereignty within their trade areas—to the detriment of the average car buyer.¹⁰

James Pennell had maintained a Jeep franchise from American Motors Corporation (AMC) in the North Wilkesboro market area since 1960.¹¹ Even though Pennell failed for several years to sell the quota that AMC desired,¹² in 1976 AMC granted Pennell a five-year extension on his franchise.¹³ In the

1. Automobile dealers possess a great deal of political power in the state legislatures. Macaulay, *Law and Society: Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 WIS. L. REV. 483, 516; Smith, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J. LAW & ECON. 125, 154 (1982). "Often several legislators are automobile dealers. Dealers often are active in local and state politics and have close ties with legislators and party leaders. Finally, . . . it costs the legislators little if anything to give benefits to the dealers since the large automobile manufacturers have little influence." Macaulay, *supra*, at 522.

2. This arsenal includes licensing of manufacturers and restrictions on manufacturer-dealer relations. Smith, *supra* note 1, at 133. See *infra* notes 50-55 and accompanying text (listing various types of provisions found in state statutes); Note, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 VAND. L. REV. 385 (1980) (tracing the rise of the franchise as the primary automobile distribution device).

3. N.C. GEN. STAT. §§ 20-285 to -308.2 (1983).

4. N.C. GEN. STAT. § 20-305 makes it unlawful for "any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them" to engage in certain enumerated conduct. See *infra* notes 102-122 and accompanying text.

5. 311 N.C. 311, 317 S.E.2d 351 (1984).

6. "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. CONST. art. I, § 34.

7. *Peters*, 311 N.C. at 315, 317 S.E.2d at 355.

8. *Id.* at 324, 317 S.E.2d at 360.

9. The court held the statute constitutional both on its face and as applied to the facts. *Id.*

10. See *infra* note 123.

11. *American Motors Sales Corp. v. Peters*, 58 N.C. App. 684, 685, 294 S.E.2d 764, 765 (1982), *aff'd in part*, 311 N.C. 316, 317 S.E.2d 351 (1984). The Commissioner of Motor Vehicles found that the "North Wilkesboro Market Area" included "Wilkes County in its entirety and portions of Surry and Alleghany Counties." *Peters*, 311 N.C. at 316, 317 S.E.2d at 356.

The amended version of N.C. GEN. STAT. § 305(5) (1983) specifically limits the size of the area that can be labelled market area. See *infra* notes 106-109 and accompanying text.

12. *American Motors Sales Corp. v. Peters*, 58 N.C. App. at 685, 294 S.E.2d at 765.

13. *Id.* Pennell argued in his appellate brief that because N.C. GEN. STAT. § 305(6) (1983)

midst of this extension period, AMC granted an additional Jeep franchise in the North Wilkesboro Market Area to Hubert Vickers.¹⁴ Pennell then requested a hearing with the Commissioner of Motor Vehicles pursuant to section 20-305(5).¹⁵ The Commissioner conducted the hearing in March 1981 and ordered that Vickers' franchise "be enjoined, invalidated, and revoked"¹⁶ and that AMC "be enjoined from granting Jeep franchises in the North Wilkesboro area without first complying with the procedure set forth in G.S. 20-305(5)."¹⁷ After a series of procedural steps in superior court,¹⁸ AMC and Vickers sought review before the North Carolina Court of Appeals.

On appeal AMC and Vickers raised three principal issues. First, AMC contended the Commissioner did not have the authority to issue an injunction.¹⁹ Second, AMC argued that section 305(5) was unconstitutional on its face because it allowed monopolies.²⁰ Last, AMC said section 20-305(5) was unconstitutional "as applied in this case because it granted a monopoly to Pennell."²¹ The court of appeals held against the petitioners on each issue.²² The court noted that AMC could give Pennell an exclusive right to sell Jeeps in the North Wilkesboro trade area without violating the antimonopoly section of the North Carolina Constitution; the general assembly was not granting a monopoly by

severely restricts a manufacturer's ability to terminate a dealer, the manufacturer may find it easier to establish a new franchise in the same market area. "Thus, the legislature enacted G.S. 305(5) to prevent the distributor from doing indirectly what G.S. 305(6) prevents him from doing directly." Brief for Respondent at 6-7. See also *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) (court examined legislative history of a statute similar to N.C. GEN. STAT. § 305(5) (1983) and stated that "it was designed to prevent the manufacturer from accomplishing by new . . . dealerships what the law did not permit to be done directly"); S. MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 139 (1966) ("if a dealer could not be cancelled, he could be induced . . . to . . . resign his franchise 'voluntarily' by adding another dealer").

14. *American Motors Sales Corp. v. Peters*, 58 N.C. App. at 685, 294 S.E.2d at 765.

15. *Id.*; see *supra* note 4.

16. *American Motors Sales Corp. v. Peters*, 58 N.C. App. at 685, 294 S.E.2d at 765-66.

17. *Id.* at 685, 294 S.E.2d at 766.

18. The procedural aspects of this part of the case are rather involved. AMC and Vickers petitioned for judicial review in superior court pursuant to N.C. GEN. STAT. § 150A-43 (1983). Superior Court Judge Bailey affirmed the Commissioner's conclusions solely because the required written notice was not given. *Peters*, 311 N.C. at 314, 317 S.E.2d at 354-55. AMC and Vickers then appealed to the North Carolina Court of Appeals. Meanwhile, AMC and Vickers petitioned the Wake County Superior Court for an *ex parte* stay of the Commissioner's order pending judicial review. *Id.* at 314, 317 S.E.2d at 355. Judge Godwin stayed the order in March 1981. *Id.* Pennell intervened and prayed that the stay be lifted. *Id.* In April 1981 after a hearing, Judge Hobgood concluded that Judge Godwin's *ex parte* order had expired in March 1981 and denied a motion to continue the stay. *Id.* AMC and Vickers also appealed this ruling to the North Carolina Court of Appeals, and the two appeals were consolidated. *Id.*

19. *American Motors Sales Corp. v. Peters*, 58 N.C. App. at 688, 294 S.E.2d at 767.

20. *Id.*

21. *Id.* The petitioners could have argued that N.C. GEN. STAT. § 305(5) (1983) violated the Sherman Act, the commerce clause, or the police powers clause. These arguments, however, probably would have been rejected on the basis of prior decisions. See *infra* notes 67-72 & 79-81 and accompanying text.

22. Regarding the Commissioner's power to grant an injunction, the court said:

We find no merit in this argument because we do not believe the Commissioner issued an injunction. It is true that in the decretal portion of his order, he used the word "enjoin." The order was not treated by any of the parties as an injunction, but as an order revoking the franchising agreement.

American Motors Sales Corp. v. Peters, 58 N.C. App. at 688, 294 S.E.2d at 767.

requiring AMC "to do what it could bargain to do if it desires to execute a contract."²³ Judge Martin dissented, pointing out that the Georgia Supreme Court²⁴ found that a similar statute violated the Georgia Constitution's prohibition against monopolies.²⁵

The North Carolina Supreme Court agreed with the court of appeals that section 20-305(5) did not violate the prohibition against monopolies but disagreed with the court of appeals' conclusion that the Commissioner of Motor Vehicles had not issued an injunction.²⁶ The court reasoned that the statute was constitutional as applied to the facts of *Peters* because the restraint of intrabrand competition does not constitute a monopoly.²⁷ The court stated that "many consumers in the North Wilkesboro Market Area may, in fact, be geographically closer to a Jeep dealer other than Pennell."²⁸ Jeep franchises in contiguous counties, the court noted, could compete with one another for consumers who live near the boundaries of the trade area.²⁹

The court also ruled that section 20-305(5) was constitutional on its face,³⁰ rejecting petitioners' claim that it created and perpetuated monopolies.³¹ The court quoted a 1974 decision in distinguishing horizontal from vertical restraints of trade:³²

The vertical agreement is one running from the producer down through the distributor to the ultimate retailer. The horizontal agreement is one made between dealers at the same level. The horizontal

23. *Id.* at 688-89, 294 S.E.2d at 767.

24. Georgia Franchise Practices v. Massey-Ferguson, 244 Ga. 800, 262 S.E.2d 106 (1979). See *infra* notes 82-84 and accompanying text.

25. American Motors Sales Corp. v. Peters, 58 N.C. App. at 690-91, 294 S.E.2d at 768 (Martin, J., dissenting).

26. *Peters*, 311 N.C. at 322-23, 317 S.E.2d at 355. The court of appeals had sustained the commissioner's order "enjoining" AMC's grant of a franchise to Vicker on grounds that the commissioner had not issued an injunction in violation of the statute but had merely used this language "inartfully." *Id.* at 322, 317 S.E.2d at 355. The North Carolina Supreme Court held that "insofar as the Commissioner's order revoked . . . the franchise . . . it was within the Commission's statutorily delegated powers. Insofar as the order enjoined future practices of American Motors or Vickers, the order exceed[ed] the Commissioner's authority." *Id.* at 323, 317 S.E.2d at 360.

27. *Id.* at 317-18, 317 S.E.2d at 356.

28. *Id.*

29. *Id.* The court conceded that

prohibiting additional franchises amounts to a restraint of trade. But the restraint of intra-brand trade contemplated by the statute in question is not such as to amount to the creation of a monopoly. While competition may not be as full and free as with multiple AMC Jeep franchises existing in the North Wilkesboro Market Area, it is by no means eliminated. More than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic.

Id. (citations omitted).

30. *Id.* at 317-18, 317 S.E.2d at 357.

31. Petitioners argued:

Certainly, application of G.S. Sec. 20-305(5), in such a fashion as to permit an obviously inefficient dealership to continue operation without competition cannot pass constitutional muster under Article I, Sec. 34 of the State Constitution. Surely, it is not in the public interest and public welfare for a dealership like Pennell Motor Company to operate as a monopoly.

Brief for Petitioner at 8.

32. *Peters*, 311 N.C. at 318, 317 S.E.2d at 357 (citing *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974)).

agreement is deemed contrary to the public interest because it stifles competition, whereas the vertical agreement is thought to leave to the public the benefit of competition at a given level of the marketing procedure.³³

The court concluded that horizontal restraints "impede competition and lead inexorably to increased prices, . . . the evil which the anti-monopoly provision seeks to prevent."³⁴ Vertical restraints are not viewed as offensive because they do not prevent competition among dealers.³⁵ The court distinguished two earlier decisions,³⁶ which had held that certain licensing requirements violated the antimonopoly clause,³⁷ as involving horizontal restraints on trade.³⁸

After establishing that the statute was a vertical and thus legitimate restraint on trade, the court discussed the particular policy favoring protection of dealers. The court noted that manufacturers occupy a dominant position when bargaining with their franchisees.³⁹ To correct this imbalance, state legislatures have enacted statutes to protect dealers.⁴⁰ The court concluded that this legisla-

33. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 480, 206 S.E.2d 141, 150 (1974).

The court apparently analogized the constitutional prohibition against monopolies to antitrust law, quoting from *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled by Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977), which applied the Sherman Act to vertical trade restraints. *Peters*, 311 N.C. at 320, 317 S.E.2d at 358; *see also Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977) (announcing a "rule of reason" when applying the Sherman Act to vertical restraints). For a thorough discussion of the Sherman Act and vertical territorial restraints, see L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 413-19 (1977); Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 207 (1982); Note, *Antitrust—Vertical Territorial Restrictions Judged Under Rule of Reason*, 12 TUL. L. REV. 389 (1978).

To complete the analogy, the court could have discussed *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961). In *Waldron*, the court held that an exclusive franchise agreement between General Motors and a franchisee did not violate North Carolina's version of the Sherman Act, N.C. GEN. STAT. § 75-1 (1981), as an unreasonable restraint on trade. *Waldron*, 254 N.C. at 129, 118 S.E.2d at 568.

Automobile manufacturers in several jurisdictions have challenged statutes such as N.C. GEN. STAT. § 305(5) (1983) as violating the antitrust laws. *See infra* notes 73-76 and accompanying text.

34. *Peters*, 311 N.C. at 318, 317 S.E.2d at 357.

35. *Id.*

36. *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

37. In *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973), the court held that a statute regulating the construction of a private hospital on private property was unconstitutional. *Id.* at 548, 193 S.E.2d at 733. The court was primarily concerned with containing medical costs. *Id.* at 549, 193 S.E.2d at 734. In *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), the court struck down as unconstitutional a licensing statute for photographers. *Id.* at 772, 51 S.E.2d at 736.

38. *Peters*, 311 N.C. at 320, 317 S.E.2d at 358. *See infra* note 96 and accompanying text.

39. *Id.* at 319, 317 S.E.2d at 358. This imbalance in bargaining power has been noted often. *See, e.g.*, Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1140 (1957) ("[O]ften the dealer must comply simply because of economic power of the manufacturer."); Macaulay, *supra* note 1, at 492-95 (dealer has "relatively little to bargain with"); Smith, *supra* note 1, at 131-32 (noting that manufacturers have greater bargaining power); Strand & French, *The Automobile Dealer Franchise Act: Another Experiment in Federal Class Legislation*, 25 GEO. WASH. L. REV. 667, 667-70 (1957) (dealer franchise system described as one in which the manufacturer maintains all control); *see also New Motor Vehicle Bd. v. Orrin W. Fox, Co.*, 439 U.S. 96, 100-01 (1978) (discussing due process aspects of territorial security statutes); *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978) (determining whether termination of franchise agreement violated statute), *modified on other grounds*, 296 N.C. 359, 250 S.E.2d 250 (1979); *infra* note 46 (discussing the superior bargaining power of automobile manufacturers).

40. "Currently, every state regulates at least some aspect of the distribution." Smith, *supra*

tive response to the unequal bargaining power was a "valid exercise of the state's extensive police power,"⁴¹ section 20-305(5) protects the "franchisees from abuses of vertical integration."⁴²

The *Peters* court chose not to follow the Georgia Supreme Court, which struck down a similar statute;⁴³ the court noted that Georgia's constitution not only prohibited monopolies, but also prohibited legislation that would diminish competition.⁴⁴ In holding section 20-305(5) constitutional, the North Carolina Supreme Court aligned itself with the majority of other jurisdictions.⁴⁵

Abusive tactics employed by automobile manufacturers after World War II resulted in state and federal legislation to protect motor vehicle dealers.⁴⁶ In

note 1, at 133. "Of the fifty states, all but five have legislation that focuses directly upon the automobile manufacturer-dealer relationship." Note, *supra* note 2, at 399.

41. *Peters*, 311 N.C. at 320, 317 S.E.2d at 358. *Accord* Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc., 142 F. Supp. 469 (D. Minn. 1956); Tober Foreign Motors, Inc. v. Reiter Oldsmobiles, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978). *Contra* Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 244 Ga. 800, 262 S.E.2d 106 (1979); General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194 (1977), *cert. denied*, 434 U.S. 996 (1977). See *infra* note 61 and accompanying text.

42. *Peters*, 311 N.C. at 321, 317 S.E.2d at 359. The introductory paragraph to the Motor Vehicle Dealers and Manufacturers Licensing Law states:

The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives doing business in North Carolina, in order to prevent frauds, impositions and other abuses upon its citizens and to protect and preserve the investments and priorities of the citizens of this State.

N.C. GEN. STAT. § 20-285 (1983). If the public interest is so in need of protection, why are dealers the only parties who can object to a manufacturer's actions under N.C. GEN. STAT. § 305(5) (1983)? The court in *Tober Motors, Inc. v. Reiter Oldsmobiles, Inc.*, 376 Mass. 313, 381 N.E.2d 908 (1978), in distinguishing the statute at issue there from that in *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194 (1977), stated: "These cases can be distinguished on the ground that the laws seemed to make harm to existing *dealers* the only relevant criterion for judging the propriety of a new franchise, a feature giving an anti-competitive cast to the statutes." *Id.* at 324, 381 N.E.2d at 913 (emphasis added). See *infra* notes 50 & 94 and accompanying text.

43. *Peters*, 311 N.C. at 321, 317 S.E.2d at 359; see *supra* notes 24-25 and accompanying text.

44. *Peters*, 311 N.C. at 321, 317 S.E.2d at 359. The court stated: "We decline to follow *Georgia Franchise*, noting that the Georgia constitutional provision, unlike its North Carolina counterpart, concerns legislation having 'the effect . . . of defeating or lessening competition . . . ' as well as 'encouraging a monopoly.' Thus, its scope seems considerably more far-reaching into the area of commerce than our anti-monopoly provision." *Id.*

45. See *infra* notes 60-61, 66 and accompanying text.

46. S. MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 16-19 (1966). By the 1950s, supply caught up with demand in the auto industry.

During this period all manufacturers sought to induce dealers to sell more cars Promotions [for factory representatives] came to those who produced sales, and the more the dealers were pushed, the more they sold Some dealers flourished. Some quit. Others were cancelled by the factory or pushed into involuntary "voluntary" termination. *Id.* at 16-19. It has been well-documented that manufacturers abused their superior bargaining power over dealers. See Macaulay, *supra* note 1, at 495-506; Strand & French, *supra* note 39, at 668-70. Manufacturers' power over dealers stems from the system of distribution.

[T]he dealer pays for much of the distribution system in the automobile industry, and his money rather than the manufacturer's is tied up in bricks and mortar, and, more importantly, in unsold new automobiles The selling agreement is drafted by the manufacturer's lawyers in fairly legal language and accepted without change by the dealer Typically, the manufacturer gets what it wants from its dealers. It often has more applicants who would like to be dealers than it has dealerships available A dealer is in a

1956 Congress enacted the Automobile Dealers' Day in Court Act,⁴⁷ which gave dealers a federal cause of action against manufacturers who did not act in "good faith."⁴⁸ The Act did not protect dealers' territorial security, despite lobbying by the National Association of Automobile Dealers for such a provision.⁴⁹

very bad position if his franchise is terminated. Upon termination it is difficult to salvage his large investment because a cancelled dealer has difficulty selling his building, tools, inventory, and good will to another dealer.

Macaulay, *supra* note 1, at 489-95. Smith proposes an alternative hypothesis:

[F]ranchising is used by the industry because it provides a balance of retail incentives and effective control which is favorable to the manufacturer. This assertion differs from earlier explanations of the use of franchising by the auto industry, most of which regard the franchise system as a mechanism for raising capital quickly. Such explanations are not sufficient since they fail to explain why alternative systems of organization do not arise once the alleged capital shortage problem is solved.

Smith, *supra* note 1, at 126.

47. Automobile Dealers' Day in Court Act, ch. 1038, 70 Stat. 1125 (1956) (codified at 15 U.S.C. §§ 1221-1225 (1976)). This Act was the keystone of later state and federal legislation.

[T]he act provides legal remedies for dealers harmed by the actions of manufacturers which are not in good faith While a few states had enacted statutes pertaining to regulation of automobile distribution as early as the 1930's and 1940's, most of them did not substantially strengthen the legal rights of dealers. Since the 1956 Dealers' Day in Court Act, state regulation of automobile distributors has undergone significant changes.

Smith, *supra* note 1, at 132-33.

The Monroney Committee, a subcommittee of the Senate Committee on Interstate and Foreign Commerce, studied automobile distribution. Three of the committee members were closely linked with automobile dealers: Senator Paine was a former dealer; Senator Monroney's college roommate was a General Motors dealer; and Senator Thurmond served in the Army Reserve with the legislative counsel for the National Automobile Dealers' Association. S. MACAULAY, *supra* note 46, at 48-50.

The bill was amended significantly. For a description of the legislative history of the Act, see Kessler, *supra* note 39.

48. The statute provides:

An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of the suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing . . . with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer

15 U.S.C. § 1222 (1976).

49. The Eisenhower administration opposed a territorial security provision.

William P. Rogers, Deputy Attorney General, wrote Senator O'Mahoney about the Eisenhower Administration's views on . . . the good faith bills. In short, he said that the Administration did not like them. While it had no strong objection to legislation dealing with coercion, it opposed any legislative authorization for "territorial security" . . . because such [provision] would protect franchised dealers at the cost of denying consumers the benefits of competition. . . . These comments were consistent with the antitrust philosophy of the Department of Justice. Conveniently, they also pleased Ford and General Motors whose officers were supporters of the Eisenhower campaign for re-election.

S. MACAULAY, *supra* note 46, at 62-63.

Some dealers apparently opposed territorial protections. Strand & French, *supra* note 39, at 675. See also Macaulay, *Law and Society: Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System—Part II*, 1965 Wis. L. REV. 704, 846 (describing the disagreement among auto dealers over territorial security). The House Report on the Dealers' Day in Court Act states:

The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method for securing better distri-

The state legislative schemes protecting dealers vary widely and may contain, along with legislative findings and declarations,⁵⁰ provisions for licensing,⁵¹ provisions for boards and commissions,⁵² restrictions on franchise termination,⁵³ restrictions on franchise establishment,⁵⁴ and prohibitions on coercion and price discrimination.⁵⁵ The North Carolina General Assembly acted even before Congress in passing "An Act to provide for the licensing of Motor Vehicle Dealers, Salesmen, Manufacturers, Distributors, and Factory Representatives" in May 1955.⁵⁶ No provision for territorial security was enacted, however, until 1973.⁵⁷

Automobile manufacturers challenged the legislation protecting dealers on constitutional grounds.⁵⁸ The manufacturers tried a number of different legal theories but were largely unsuccessful.⁵⁹ Most courts rejected the manufacturers' argument that such statutes violated the due process clause of the United States Constitution⁶⁰ as well as the argument that the statutes represented spe-

bution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation.

H.R. REP. NO. 2850, 84th Cong., 2d Sess., reprinted in 1956 U.S. CODE CONG. & AD. NEWS 4596, 4603-04; see also *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir. 1967) (discussing legislative history), cert. denied, 389 U.S. 832 (1967); *Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (3d Cir. 1963) (discussing legislative history of Dealers' Day in Court Act).

50. Note, *supra* note 2, at 400.

Many state regulatory schemes begin with a provision setting forth either legislative findings or declarations of public policy. These provisions are included because state legislatures may not use their powers to protect special groups from competition, and legislation that is not "affected with the public interest" is outside the police power of the state.

Id. But "one must ask whether the public is actually benefitted by these laws." *Id.* at 401, n.106. Justice Stevens answers this question in the negative in his dissent in *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 120 (1978) (Stevens, J., dissenting). See *supra* note 42; *infra* notes 94-95 and accompanying text.

51. Note, *supra* note 2, at 403.

52. *Id.* at 403-05.

53. *Id.* at 405-08.

54. *Id.* at 408-10. Wisconsin was the first state to adopt a territorial security provision.

Some representatives of dealer associations have charged that the manufacturers have used and still use another tactic to blunt the effect of the state statutes. If a dealer could not be cancelled, he could be induced . . . to give up and resign his franchise "voluntarily" by adding another franchised dealer selling his make in his area. . . . The Wisconsin Automotive Traders Association reacted to this device by successfully proposing an amendment to the Wisconsin legislation. . . . Dealer associations in other states may push for similar provisions now that it has been declared constitutional by the Supreme Court of Wisconsin; manufacturers view it with horror.

S. MACAULAY, supra note 46, at 139. The Wisconsin Supreme Court upheld this provision against equal protection, interstate commerce, and vagueness challenges in *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965).

55. Note, *supra* note 2, at 411.

56. Act of May 25, 1955, ch. 1243, 1955 N.C. Sess. Laws 1282.

57. See Act of March 16, 1973, ch. 88, § 1-2, 1973 N.C. Sess. Laws 68, 68-69. That provision was amended recently. See Act of July 7, 1983, ch. 704, § 7, 1983 N.C. Sess. Laws 686, 688; *infra* notes 102-24 and accompanying text.

58. Note, *supra* note 2, at 419.

59. Annot., 7 A.L.R.3d 1173 (1966).

60. See, e.g., *Blenke Brothers Co. v. Ford Motor Co.*, 203 F. Supp. 670 (N.D. Ind. 1962) (Federal Dealers' Day in Court Act is not arbitrary and is constitutional); *Chrysler Corp. v. New Motor Vehicle Bd.*, 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979) (presence of dealers on the New Motor Vehicle Board did not deprive manufacturers of an unbiased tribunal); *Tober Foreign Motors, Inc.*

cial interest legislation and were therefore an improper exercise of the police power.⁶¹

The United States Supreme Court, in *New Motor Vehicle Board v. Orrin W. Fox Co.*,⁶² recently upheld a California statute similar to section 20-305(5) against various challenges, including an attack based on the due process clause.⁶³ The main issue before the Court was "whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers."⁶⁴ The Court held that, "[e]ven if the right to franchise had constituted a protected interest when California enacted the Automobile Franchise Act, California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right."⁶⁵ In short, the Court gave a green light to state regulation of franchise areas for automobile dealers.

Many courts determining the validity of automobile dealer statutes have considered whether such statutes violate the commerce clause of the United States Constitution.⁶⁶ The United States Court of Appeals for the Fourth Cir-

v. Reiter Oldsmobile, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978) (statute specific enough for due process); *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360 (upholding make-up of the board), *appeal dismissed*, 364 U.S. 444 (1960); *General Motors Corp. v. Capitol Chevrolet*, 645 S.W.2d 230 (Tenn. 1983) (presence of dealers on board does not violate due process).

But see *American Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977) (statute requiring that dealers be on the board unconstitutional); *Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 600 P.2d 1189 (1979) (Nevada statute violates due process "since appellants were able to obtain a de facto injunction simply by the filing of the action"), *cert. denied*, 445 U.S. 964 (1980).

61. *See, e.g., E.L. Bowen & Co. v. American Motors Sales*, 153 F. Supp. 42 (E.D. Va. 1957) (Virginia statute upheld because regulation benefits public); *Willys Motors, Inc. v. Northwestern Kaiser-Willys, Inc.*, 142 F. Supp. 469 (D. Minn. 1956) (Minnesota statute held valid exercise of police power); *Tober Foreign Motors, Inc. v. Reiter Oldsmobiles, Inc.*, 376 Mass. 313, 381 N.E.2d 908 (1978) (statute was *prima facie* within government's constitutional reach); *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978) (statute presumed constitutional), *modified on other grounds*, 296 N.C. 357, 250 S.E.2d 250 (1979); *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360 (stating that no case holds such legislation beyond police power), *appeal dismissed*, 364 U.S. 444 (1960); *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) (statute presumed constitutional); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955) (if regulation promotes fair dealing, it is legitimate exercise of police power); *see also* *Superior Motors, Inc. v. Winnebago Indus., Inc.*, 359 F. Supp. 773 (D.S.C. 1973) (unlikely that statute was valid exercise of police power, but not necessary to decide that issue). *But see* *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956) (Colorado statute held unconstitutional because it required licensing of franchised dealers but not independent dealers).

The Georgia Supreme Court believed such provisions exceeded the proper use of police powers. In *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 377, 237 S.E.2d 194, 197 (1977), the court said, "[W]e view this legislation . . . as purely anti-competitive and thus not 'affected with the public interest' and within the police power of the state." In *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 802, 262 S.E.2d 106, 108 (1979), the court said, "[T]he cited sections violate the due process clause by seeking to regulate an industry not affected with a public interest. . . ."

62. 439 U.S. 96 (1978).

63. *Id.* at 104.

64. *Id.* at 106. The Court also considered whether the statute violated the Sherman Act. *See infra* note 73-75 and accompanying text (describing the Court's handling of the Sherman Act issue).

65. *Orrin*, 439 U.S. at 104.

66. The commerce clause of the United States Constitution grants Congress the power "to regulate commerce . . . among the several states. . . ." U.S. CONST. art. I, § 8. "Thus, when a state regulation conflicts with federal regulations enacted under the commerce clause, the federal

cuit recently held that the Virginia statute⁶⁷ providing territorial security did not violate the commerce clause.⁶⁸ The court used a three-part test: whether the statute promoted a legitimate local purpose; whether the statute treated interstate and intrastate commerce even-handedly; and whether the burden imposed on commerce was excessive when balanced against the state's interest.⁶⁹ Relying on *Orrin*, the court held that Virginia's statute promoted a legitimate local purpose.⁷⁰ The statute did not discriminate between "manufacturers that produce cars within the state and those that do not."⁷¹ Finally, the court held that the statute did not unduly burden interstate commerce.⁷²

Territorial security statutes also have survived antitrust challenges based on the Sherman Act.⁷³ The antitrust laws are intended to preserve competition.⁷⁴ The Supreme Court in *Orrin* settled—or perhaps circumvented—the Sherman Act question in short order by finding the California dealer statute immune from Sherman Act scrutiny:

The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption.⁷⁵

statute controls pursuant to the Supremacy Clause." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 266 (2d ed. 1983).

See *American Motors Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219 (4th Cir. 1979) (Virginia statute regulating number of new franchises did not violate commerce clause), *rev'd* 445 F. Supp. 902 (E.D. Va. 1978); *Chrysler Corp. v. New Motor Vehicle Board*, 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979) (statute did not violate the commerce clause); *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 376 Mass. 313, 381 N.E.2d 908 (1978) (statute valid under the commerce clause); *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360 (statute constitutional notwithstanding the commerce clause), *appeal dismissed*, 364 U.S. 444 (1960); *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) (statute does not violate the commerce clause).

But see *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194 (1977) (statute violates commerce clause).

67. VA. CODE § 46.1-547(d) (1980).

68. *American Motors Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219, 223 (4th Cir. 1978).

69. *Id.* at 222. "[A]n important factor in analyzing all such cases attacking state regulation affecting interstate commerce is not only whether as an absolute matter the burden on interstate commerce is substantial but in addition whether the burden imposed on such commerce is discriminating in favor of local concerns." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 66, at 277.

70. *American Motors Sales v. Division of Motor Vehicles*, 592 F.2d 219, 222 (4th Cir. 1978). The court found support for this proposition in a footnote in *Orrin*, which stated, "For a helpful discussion of the purpose served by such laws—the promotion of fair dealing and protection of small business—see *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965)." *Orrin*, 439 U.S. at 102 n.7.

71. *American Motors Sales v. Division of Motor Vehicles*, 592 F.2d 219, 223 (4th Cir. 1978).

72. *Id.* at 224. Note that in *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 376, 237 S.E.2d 194, 196 (1977), the Georgia Supreme Court stated, "There can be no question but that the regulation limiting the available market for General Motors imposes a burden on interstate commerce."

73. See *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 376 Mass. 313, 381 N.E.2d 908 (1978) (state action a valid exception to the Sherman Act). The issue was raised in *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 380, 237 S.E.2d 194, 198 (1977), but the court failed to reach it.

74. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 20 (1977).

75. *Orrin*, 439 U.S. at 109.

The holding that such statutes come under the "state action" exemption complements several cases upholding a manufacturer's right to contract privately for exclusive dealership arrangements.⁷⁶ The statutory schemes establish territorial security analogous to an exclusive dealership arranged by contract. In either case, territorial security may be obtained without violating the Sherman Act.

Given manufacturers' general lack of success in challenging these statutes, the court's decision in *Peters* is not surprising. In fact, it is consistent with decisions in other jurisdictions. Manufacturers have been so unsuccessful in challenging dealer franchise statutes on federal constitutional and antitrust grounds that AMC had little choice in *Peters* but to challenge section 20-305(5) on the grounds that it violated the antimonopoly provision of the North Carolina Constitution. *Orrin* prevented any due process or Sherman Act challenges,⁷⁷ and the decision of the United States Court of Appeals for the Fourth Circuit upholding a similar Virginia statute suggested that a commerce clause claim would not be successful.⁷⁸ The argument that the general assembly exceeded its police powers was unattractive because the introductory paragraph to the Motor Vehicle Dealers and Manufacturers Licensing Law affirmatively declares a public interest in regulating the relationship,⁷⁹ and *Mazda Motors v. Southwestern Motors*⁸⁰ had indicated that the courts probably would not ignore the general assembly's declaration of public interest.⁸¹

AMC's argument that the statute violated the antimonopolies clause was the only avenue unresolved by a court of authority. The supreme courts of Georgia and Tennessee had reached contrary conclusions on whether the dealer statutes sanctioned unconstitutional monopolies. In *Georgia Franchise Practices*

76. See *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466 (8th Cir. 1976) (holding that reasonableness of vertical restraints of trade depends on whether effect is anticompetitive), *cert. denied*, 433 U.S. 914 (1977); *Schwing Motor Co., v. Hudson Sales Corp.*, 239 F.2d 176 (4th Cir. 1956) (holding that the Sherman Act did not destroy the common-law right to choose dealers), *cert. denied*, 355 U.S. 823 (1957); *Kapiolani Motors, Ltd. v. General Motors Corp.*, 300 F. Supp. 784 (D.C. Hawaii 1969) (granting motion to dismiss antitrust claim).

Courts generally state that exclusive arrangements create "a monopoly only in the manufacturer's brand of a product, and not in the product itself." Annot., 9 L. ED. 2d 1235, 1237 (1963). See generally Aycock, *supra* note 33, at 237-38 (describing the exclusive selling arrangement); Note, *supra* note 33 (discussing vertical territorial restrictions); 9 N.C. INDEX 3D *Monopolies* § 2.2 (1977) (auto manufacturer may execute contracts giving dealers exclusive rights); 54 AM. JUR. 2d *Monopolies* § 74 (1971) (vertical restrictions as to sales territories are not per se violations of the Sherman Act).

H. BROWN, *FRANCHISING REALITIES AND REMEDIES* 311 (2d ed. 1978) states:

Where the franchisor is only in a vertical position with its franchisees, the present rule appears to be that, in the absence of other anticompetitive practices, a franchisor may grant its dealers exclusive territories for products or services which are in free and open competition with those of a similar kind.

77. See *supra* notes 63-65 and accompanying text.

78. See *supra* notes 67-72 and accompanying text.

79. N.C. GEN. STAT. § 20-285 (1983); see *supra* note 42.

80. 36 N.C. App. 1, 243 S.E.2d 793 (1978), *modified on other grounds*, 296 N.C. 357, 250 S.E.2d 250 (1979).

81. "Additionally, the presumption is that the judgment of the General Assembly is correct and constitutional, and a statute will not be declared unconstitutional unless the conclusion is so clear that no reasonable doubt can arise." *Id.* at 7, 243 S.E.2d at 798; see also *supra* note 61 and accompanying text (citing cases upholding similar statutes in the face of police power challenges).

v. Massey-Ferguson,⁸² the Georgia Supreme Court held that certain sections of the Georgia Franchise Practices Act⁸³ violated a provision of the Georgia Constitution "declaring illegal all contracts and agreements that may have the effect or be intended to have the effect to defeat or lessen competition, or to encourage monopoly."⁸⁴ The Tennessee Supreme Court reached the opposite conclusion in *General Motors Corp. v. Capital Chevrolet Co.*,⁸⁵ holding that the territorial security statute⁸⁶ did not violate the state constitutional prohibition against monopolies.⁸⁷ Armed with little better than that split in decisions, AMC brought the state constitutional issue before the North Carolina Supreme Court.⁸⁸

In holding section 20-305(5) to be constitutional on its face, the court focused on three points. First, the court determined that the statute represented a "valid exercise of the state's extensive police power"⁸⁹ Second, the court distinguished between impermissible horizontal and permissible vertical restraints on trade.⁹⁰ The court characterized section 20-305(5) as a vertical restraint, whereas the cases relied on by AMC involved illegal horizontal restraints.⁹¹ "Vertical restraints," the court said, "do not in and of themselves, result in monopolies."⁹² Last, the court emphasized the public policy in favor of regulating the establishment of new franchises.⁹³

Justice Stevens, dissenting in *Orrin*, noted a weakness in the determination that dealer monopoly statutes are a valid exercise of the state's police power:

The conclusion that there is no state policy against new dealerships is further confirmed by the statutory limitation on the persons who have standing to object to a proposed new opening. Most significantly, no public agency has any independent right to initiate an objection, to

82. 244 Ga. 800, 262 S.E.2d 106 (1979).

83. Act of April 25, 1979, No. 671, §§ 1, 3, 1979 Ga. Laws 1625, 1626-28.

84. *Georgia Franchise Practices*, 244 Ga. at 801, 262 S.E.2d at 107.

85. 645 S.W.2d 230 (Tenn. 1983).

86. TENN. CODE ANN. § 55-17-114(c)(17) (Supp. 1983):

(c) [T]he commission may deny an application for a license or revoke or suspend the license of a manufacturer . . . who:

. . . .

(17) Has competed with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.

This provision is similar to N.C. GEN. STAT. § 20-305(5) (1983). See *infra* note 116.

87. *Capital Chevrolet Co.*, 645 S.W.2d at 238. The Tennessee Supreme Court stated: "We find no merit whatever in the suggestion of General Motors that the statutes in question purport to create a monopoly and do not consider that the matter warrants extended discussion." *Id.*

The Tennessee Constitution states, "Monopolies are contrary to the genius of a free state." TENN. CONST. art. I, § 22.

88. See *supra* note 20 and accompanying text.

89. *Peters*, 311 N.C. at 320, 317 S.E.2d at 358. See *supra* note 41 and accompanying text.

90. See *infra* notes 32-36 and accompanying text.

91. *Peters*, 311 N.C. at 320, 317 S.E.2d at 358. See *supra* notes 37-39 and accompanying text.

92. *Peters*, 311 N.C. at 320, 317 S.E.2d at 358. The court, quoting *United States v. Arnold, Schwinn, & Co.*, 388 U.S. 365 (1967), overruled by *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977), stated that "if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, . . . then no monopoly results." *Peters*, 311 N.C. at 320, 317 S.E.2d at 358 (quoting *Schwinn*, 388 U.S. at 376). See *supra* note 33 and accompanying text.

93. See *infra* notes 39-42 and accompanying text.

schedule a hearing, or to prohibit such a charge. Nor does any member of the consuming public have standing to complain.⁹⁴

The majority in *Orrin*, however, was not impressed with this argument,⁹⁵ and the North Carolina court did not consider it. Nonetheless, it is contradictory to declare that the public needs protection by way of the state's police power, but to deny the consuming public standing to complain.

The *Peters* court's analysis is also weak in that, to distinguish the two cases relied on by AMC, the court had to rely on antitrust law. The cases could have been distinguished more easily from *Peters*: both involved statutes enacted in excess of the legislature's police power.⁹⁶ Since the court established that section 20-305(5) was a valid exercise of police power, these cases were not persuasive. Furthermore, in each of these cases, the discussion of the antimonopolies clause was merely tangential to the outcome.

The most troubling weakness in the court's analysis is that in emphasizing the public policy in favor of regulating the establishment of new franchises,⁹⁷ the court failed to note the public policy arguments *against* such statutory protection of dealers. There is evidence that territorial protection results in "a large wealth transfer from consumers to dealers and a reduction in the volume of new-vehicle sales."⁹⁸ Furthermore, "[i]n growing markets this restriction will lead to substantial increases in the market power of existing dealers."⁹⁹ It also can be argued that protection for existing dealers comes at the expense of future dealers.¹⁰⁰ New dealers must make significant capital investments in the early stages of the franchise.¹⁰¹ If actual operation of franchises is delayed a long time, new investors will be discouraged from entering the industry, because few can afford to tie up large amounts of capital awaiting administrative action. Clearly, some public policy arguments cut against legislated territorial restraints on automobile franchises. Even if these arguments were not strong enough to mandate a

94. *Orrin*, 439 U.S. 96, 120 (1978) (Stevens, J., dissenting). See *supra* note 50.

95. *Orrin*, 439 U.S. 96, 106-07 (1978).

96. In *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973), the court said of the police power: "[w]e find no such reasonable relation between the denial of the right of a person, association or corporation to construct and operate upon his or its own property, with his or its own funds, an adequately staffed and equipped hospital and the promotion of public health." In *State v. Ballance*, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949), the court said: "[I]n consequence, a statute which prevents any person from engaging in any legitimate business, occupation, or trade cannot be sustained as a valid exercise of the police power unless the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary."

97. See *supra* notes 39-42 and accompanying text.

98. Smith, *supra* note 1, at 154.

99. Smith, *supra* note 1, at 138.

100. Justice Stevens stated in his *Orrin* dissent:

By the same token, the legislative judgment that manufacturers have greater bargaining power than dealers and may have sometimes used it abusively by threatening to overload dealers' markets with intrabrand competition does not provide a justification for a statutory procedure that deprives all manufacturers and all new dealers of their liberty and property without due process.

Orrin, 439 U.S. 96, 116 n.4 (Stevens, J., dissenting).

101. Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 387 (1957).

different conclusion, they should have been mentioned to indicate possible limits to the territorial protections that the court would accept.

The *Peters* court upheld section 20-305(5), giving automobile dealers a commanding position with respect to both manufacturers and consumers. In 1983 the general assembly amended section 20-305(5) to increase the dealers' already superior position.¹⁰² The significant additions are: (1) a definition of the relevant market area;¹⁰³ (2) an increase in the time limits for administrative hearings; (3) a provision regulating the relocation of existing dealers; and (4) a listing of standards to be considered in deciding whether a new franchise is justified. The net effect of these changes, along with the North Carolina Supreme Court's holding that the concept of statutory territorial security is constitutional on its face, exacerbates problems for the consumer.

As originally enacted, section 20-305(5) regulated a manufacturer's efforts to "grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make"¹⁰⁴ "Trade area" was defined simply as "those areas specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board."¹⁰⁵ Section 20-305(5) as amended uses the term "relevant market area,"¹⁰⁶ which is defined as an area within a ten, fifteen, or twenty mile radius of the existing dealer; the distance of the radius is to be determined by the population of that area.¹⁰⁷ The population criterion, however, is vague,¹⁰⁸ and one could argue that a twenty mile radius is too protective of dealers in rural areas. Nevertheless, considering that the trade area in *Peters* included an area larger than the statute's twenty mile radius area,¹⁰⁹ the court can be expected to uphold this portion of the statute.

The most disturbing change in section 20-305(5) is the new time frame for administrative procedures under the Act.¹¹⁰ Section 20-305(5) requires a manufacturer to notify existing dealers and the Commissioner of plans to establish a new dealership in the relevant market area.¹¹¹ Existing dealers in the same line-make then have thirty days in which to file a protest with the Commissioner.¹¹² "The Commissioner must conduct the hearing and render his final determination . . . no later than 180 days after a protest is filed."¹¹³ Thus, an existing dealer effectively can block the establishment of a new dealership for up to 210

102. Act of July 7, 1983, ch. 704, § 7, 1983 N.C. Sess. Laws 686, 688-89.

103. N.C. GEN. STAT. § 20-286(13)(b) (1983).

104. *Id.* § 20-305(5) (1978).

105. *Id.*

106. *Id.* § 20-305(5) (1983).

107. *Id.* § 20-286(13)(b).

108. One problem is readily identifiable: For a dealership near a state boundary, does the population count include census tracts outside the state?

109. *Peters*, 311 N.C. at 313 n.2, 317 S.E.2d at 354 n.2.

110. As originally enacted, the only time requirement was that an existing dealer file a complaint with the Commissioner within 30 days of receiving notice from the franchisor that a new dealership was planned. Act of March 16, 1973, ch. 88, § 2, 1973 N.C. Sess. Laws 68, 68.

111. N.C. GEN. STAT. § 20-305(5) (1983).

112. *Id.*

113. *Id.* § 20-305(5)(c) (1983).

days¹¹⁴—arguably an excessive waiting period.¹¹⁵

The amended version of section 20-305(5) also regulates the relocation of an existing dealer in the relevant market area of another existing dealer of the same line-make. The original statute regulated only the granting of "an additional franchise for a particular line-make"¹¹⁶ The new provision will discourage dealers from relocating, even though population shifts and neighborhood changes might make such a change beneficial.¹¹⁷ This reluctance to relocate could affect consumers adversely because they might have to return to decaying neighborhoods after the sale to have their autos serviced.

Finally, section 20-305(5) as amended provides a list, which is not exclusive,¹¹⁸ of criteria to be used in "determining whether good cause has been established for not entering into or relocating an additional . . . dealer for the same line-make"¹¹⁹ The original act required only "reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area."¹²⁰ Several of the listed criteria encompass the effect of a new franchise on consumers¹²¹ and thus, this addition is a welcome change. The final criterion is "[t]he effect on the relocating dealer of a denial of its relocation into the relevant market area."¹²² This provision, if considered carefully, might alleviate the negative effects of the new provision regulating relocation and dispel some of the reluctance to relocate that the new regulation could engender.

The net result of the amendment of section 20-305(5) is to entrench further the existing dealers, at the expense of the consuming public and prospective franchisees. Consumers will pay higher prices for new automobiles and receive less service than desired after purchase.¹²³ The entrenched dealers now have no

114. Furthermore, any party to the hearing "shall have a right of review of the decision in a court of competent jurisdiction pursuant to Chapter 105A of the General Statutes." N.C. GEN. STAT. § 20-305(5)(d) (1983). Thus, a protesting dealer could block establishment of a new dealership for far longer than 210 days.

115. The Court in *Orrin* faced a similar statute. The California statute has a time frame of 90 days; however, a 90 day extension can be granted on a showing of good cause. CAL. VEH. CODE § 3066 (West Supp. 1978). The Court did not discuss the possibility that 180 days was an excessive waiting period for the new dealership.

116. Act of March 16, 1973, ch. 88, § 2, 1973 N.C. Sess. Laws 68, 68-69. The amended version regulates manufacturers "establishing an additional new motor vehicle dealer or relocating an existing new motor vehicle dealer into a relevant market area where the same line make is then represented." N.C. GEN. STAT. § 20-305(5) (1983).

117. See S. MACAULAY, *supra* note 45, at 172:

[A]s the population of a city moves to the suburbs, . . . some older dealerships lose their customers and find themselves in undesirable locations. The solution is obvious and expensive: move the location of the dealership and build new facilities.

Id.

118. N.C. GEN. STAT. § 20-305(5)(b) (1983).

119. *Id.*

120. *Id.* § 20-305(5) (1978).

121. The statute's consumer-oriented criteria include the following: "effect on the consuming public"; "[w]hether it is injurious or beneficial to the public welfare for an additional new motor vehicle dealer to be established"; "[w]hether . . . dealers . . . are providing adequate competition and convenient customer care"; and "[w]hether [the relocated franchise] . . . would increase competition in a manner such as to be in the long-term public interest." *Id.* § 20-305(5)(b)(3-6) (1983).

122. *Id.* § 20-305(5)(b)(7) (1983).

123. One writer stated, "Automobile consumers are not an organized interest group, and they

motivation to offer competitive prices within their line-make or to provide quality service after sales. It is ironic that the purported justification for these adverse effects on consumers is to protect "the investments and priorities of the citizens of this State."¹²⁴

The North Carolina Supreme Court correctly answered the constitutional questions before it in *American Motors Sales Corp. v. Peters*.¹²⁵ The court's decision, along with the recent United States Supreme Court decision in *New Motor Vehicle Board v. Orrin W. Fox Co.*,¹²⁶ and the decision of the United States Court of Appeals for the Fourth Circuit in *American Motors Sales Corp. v. Division of Motor Vehicles*,¹²⁷ firmly establishes that statutes providing existing dealers with territorial security will be upheld, at least against challenges that the statutes violate antimonopoly clauses, the due process clause, the commerce clause, or federal antitrust legislation. Although the court correctly held section 20-305(5) constitutional, the court should have discussed the statute's adverse effect on consumers. By discussing only the manufacturers' disproportionate bargaining power,¹²⁸ the court failed to counter the dealers' erroneous assertion that such legislation is unqualifiedly for the public good. So far, consumers of new automobiles have not organized themselves politically¹²⁹ and have failed to object loudly enough to prevent legislation that benefits dealers at the expense of the buying public. *Peters* proves that relief cannot come from the courts; if consumers want healthy competition to determine new automobile prices and the quality of service after the sale, they should target section 20-305(5) for repeal.¹³⁰

CHARLES NOEL ANDERSON, JR.

could be the ones to pay the price of some types of accommodation between dealers and manufacturers in the form of higher prices, poorer products, and less reliable service." S. MACAULAY, *supra* note 46, at 181. A Raleigh, North Carolina, newspaper editor sounded the same concern:

The prime effect of [the] bill would be to entrench dealers and even extend their trade areas. Anybody who believes this will work to the benefit of the average car buyer should be checked for missing sparkplugs. The so-called model law of the National Automobile Dealers Association should be junked.

The News and Observer, June 1, 1983, at A4, col. 1. A Greensboro editorialist stated, "North Carolina doesn't need to set up further special protection for its auto dealers. The General Assembly ought to have this bill towed to the junkyard. It's just another legislative lemon." Greensboro Daily News, June 4, 1983, at 4, col. 1.

124. N.C. GEN. STAT. § 20-285 (1983). See *supra* note 42.

125. 311 N.C. 311, 317 S.E.2d 351 (1984).

126. 439 U.S. 96 (1978). See *supra* notes 62-65 and accompanying text.

127. 592 F.2d 219 (4th Cir. 1978). See *supra* notes 67-72 and accompanying text.

128. See *supra* notes 97-101 and accompanying text.

129. "As to why consumers have tacitly permitted themselves to be taxed for the benefit of dealers, the answer must lie in the cost of learning about the transfer, and then organizing an effective political coalition to deal with it." Smith, *supra* note 1, at 154.

130. Repeal of section 20-305(5) would not leave dealers without protection from manufacturers that abuse their superior bargaining power. Section 20-305(6) regulates the termination of existing dealers. N.C. GEN. STAT. § 20-305(6) (1983). Furthermore, dealers injured by a manufacturer who fails to act in "good faith" may bring a federal cause of action. 15 U.S.C. § 1222 (1976). See *supra* note 48.

Utilities—Extension of Electric Service: The Municipalities' Power Play

In two recent decisions, the North Carolina Supreme Court has undermined the ability of investor-owned utilities and electric membership corporations (EMCs)¹ to compete with municipalities for utility customers outside the municipalities' corporate limits. This Note considers the court's decisions in *Lumbee River Electric Membership Corp. v. City of Fayetteville*² and *North Carolina ex rel. Utilities Commission v. Virginia Electric and Power Co.*³ and analyzes the court's interpretation of the statutes that govern the rights of competing suppliers of electricity. The Note concludes that in these decisions the court subverts the purpose and language of the applicable statutes, particularly because it fails to harmonize them. The court's holdings may signal the end of fair competition for EMCs and investor-owned utility companies.

Prior to 1965, publicly owned utility companies, EMCs, and municipalities supplying electricity were free to compete for utility customers outside the boundaries of municipal corporate limits.⁴ In 1965, reacting to the wasteful duplication of facilities and frequent litigation that resulted from free competition,⁵ the North Carolina General Assembly passed the Electric Act.⁶ The Electric Act is codified at North Carolina General Statutes section 62-110.2 and sections 160A-331 to 160A-338.⁷ This Act, together with North Carolina General Statutes section 160A-312 (a provision that confers general authority on a municipal corporation to act outside its boundaries), governs competition among suppliers of electricity.

The Electric Act has two parts. Section 62-110.2 applies to competition for customers outside the corporate limits of municipalities, and sections 160A-331 to 160A-338 apply to competition within the corporate limits. Both parts enumerate circumstances in which one supplier exclusively is entitled to serve customers; such exclusivity of service is based on the location of a supplier's facilities relative to the facilities of other suppliers and on whether a supplier previously has been serving a particular customer.⁸ Exclusivity also may be

1. EMCs are governed by N.C. GEN. STAT. §§ 117-6 to -26 (1981).

2. 309 N.C. 726, 309 S.E.2d 209 (1983).

3. 310 N.C. 302, 311 S.E.2d 586 (1984).

4. See, e.g., *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 139-40, 203 S.E.2d 838, 841 (1974).

5. *Id.* at 141, 203 S.E.2d at 842; see also N.C. GEN. STAT. § 62-110.2(c)(1) (1982) ("In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign . . . all areas . . . that are outside the corporate limits of municipalities.").

6. Act of April 20, 1965, ch. 287, 1965 N.C. Sess. Laws 328 (codified at N.C. GEN. STAT. §§ 62-110.2, 160A-331 to -338 (1982)). The municipalities chose not to participate in the formulation of the act, but the EMCs and investor-owned utilities did collaborate in recommending the Act to the general assembly. *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 141, 203 S.E.2d 838, 842 (1974); *North Carolina ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 258, 166 S.E.2d 663, 669 (1969).

7. N.C. GEN. STAT. §§ 62-110.2, 160A-331 to -338 (1982).

8. See *id.* §§ 62-110.2(b)(4)-(7), 160A-332(a)(3)-(7).

granted to a supplier under section 62-110.2(c), a provision giving the North Carolina Utilities Commission authority to assign to an "electric supplier" exclusive rights to serve a particular territory.⁹

As used in section 62-110.2, "electric supplier" includes EMCs and public utilities, but not municipalities;¹⁰ therefore, only an EMC or investor-owned utility may be assigned exclusive territory under section 62-110.2(c). The exclusivity granted to an electric supplier cannot be invoked to exclude service by a municipality.¹¹ In fact, any exclusivity outside corporate boundaries pursuant to section 62-110.2 operates only to the exclusion of other electric suppliers, not to the exclusion of municipalities. On the other hand, the portion of the Electric Act pertaining to service inside municipal boundaries, codified at sections 160A-331 to 160A-338, is not addressed solely to "electric suppliers"; once any supplier of electricity has the exclusive right to serve a customer within corporate limits, that right may be exercised to the exclusion of any other supplier of electricity.¹² Theoretically, therefore, the Electric Act provides that municipalities may acquire exclusive rights of service within their borders but not outside them, although a municipality is free to compete outside its borders with an otherwise exclusive electric supplier.

In addition to the Electric Act, when disputes arise over competition between municipalities and either EMCs or power companies, courts usually invoke section 160A-312.¹³ Section 160A-312 is relevant in such disputes because it permits municipal corporations to extend electric service beyond their corporate boundaries. The statute provides that "a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations."¹⁴ "Within reasonable limitations" is the key phrase in determining whether extension of electric service by a municipality is permissible. In three recent North Carolina decisions, North Carolina courts have not restricted the "within reasonable limitations" language to an enabling purpose,¹⁵ but have held that this language in section 160A-312

9. *Id.* § 62-110.2(c) (1982). Section 62-110.2(c)(1) prescribes factors the Utilities Commission should consider in assigning a territory to an electric supplier.

[T]he Commission is authorized and directed to assign . . . areas . . . that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments. . . . The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

Id.

10. *Id.* § 62-110.2(a)(3). This Note uses the term "electric supplier" only in this limited sense.

11. *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 143-44, 203 S.E.2d 838, 843 (1974).

12. In North Carolina electricity is supplied by publicly owned utility companies, EMCs, and municipalities. *See id.* at 139-44, 203 S.E.2d at 841-43.

13. N.C. GEN. STAT. § 160A-312 (1982); *see, e.g., Virginia Elec.*, 310 N.C. at 303, 311 S.E.2d at 587; *Lumbee River*, 309 N.C. at 729, 309 S.E.2d at 212; *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 144, 203 S.E.2d 838, 843-44 (1974).

14. N.C. GEN. STAT. § 160A-312 (1982).

15. The predecessor to section 160A-312 was construed as an enabling statute in *Town of Grimesland v. City of Washington*, 234 N.C. 117, 122-23, 66 S.E.2d 794, 797-98 (1951).

serves as the sole authority for resolution of competitive disputes involving municipal suppliers of electricity acting outside their corporate boundaries.¹⁶

Courts making decisions about competition outside municipal borders, however, should not apply section 160A-312 in a vacuum. Instead, the "within reasonable limitations" language must be applied with the provisions of the Electric Act and the case law construing that act in mind. Because section 160A-312 has not been applied in conjunction with the Electric Act, competition among the suppliers of electric power has been undermined, and municipalities have a striking competitive advantage. Moreover, the *Lumbee River* and *Virginia Electric* decisions have undermined the right of electric suppliers to serve customers allocated to them by the Electric Act. A further, anomalous result of applying section 160A-312 independently of the Electric Act is to give more rights to electric suppliers when they serve inside corporate borders than when they serve outside them.

In *Lumbee River* plaintiff EMC sought to enjoin defendant municipality from providing electric service to a new customer, the Montibello subdivision, located outside the municipality's corporate limits and entirely within territory assigned to the EMC under section 62-110.2(c).¹⁷ The subdivision had requested that Fayetteville supply service.¹⁸ The North Carolina Supreme Court framed the issue in the case as whether Fayetteville's extension of service to the new customer was within the "reasonable limitations" required by section 160A-312; the court found no provision of the Electric Act apposite to resolution of the case.¹⁹ Persuaded by the city's current level of service and by its readiness, willingness, and ability to serve relative to Lumbee River's current service locations, the court found Fayetteville's extension of service within reasonable limits.²⁰ In arriving at its conclusion, the court did not consider as a "determinative factor" the assignment of the territory to Lumbee River by the Utilities Commission.²¹

Because section 62-110.2 applies only to electric suppliers, the exclusive privilege to serve conferred upon Lumbee River by the assignment under section 62-110.2(c) did not automatically exclude Fayetteville from servicing the assigned area. That the area was assigned, however, should have been a factor considered by the court when it determined whether extension of Fayetteville's service outside its boundaries was reasonable under section 160A-312. The relevance of a prior assignment had been suggested earlier in *Domestic Electric Service v. City of Rocky Mount*,²² the first case to resolve a dispute over competition between a municipality and an electric supplier after passage of the Electric Act.

16. *Virginia Elec.*, 310 N.C. at 305-06, 311 S.E.2d at 588-89; *Lumbee River*, 309 N.C. at 732-33, 309 S.E.2d at 214; *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 383, 317 S.E.2d 701, 703, *appeal denied*, 312 N.C. 82, 321 S.E.2d 895 (1984).

17. *Id.* at 727-29, 309 S.E.2d at 211-12.

18. *Id.* at 729, 309 S.E.2d at 212.

19. *Id.* at 732-33, 309 S.E.2d at 214.

20. *Id.* at 738-40, 309 S.E.2d at 217-18.

21. *Id.* at 738-39, 309 S.E.2d at 217.

22. 285 N.C. 135, 144-45, 203 S.E.2d 838, 844 (1974).

The *Lumbee River* court believed that this case governed its own decision.²³ The *Domestic Electric Service* court appeared to recognize that a prior assignment of territory under section 62-110.2(c) meant that there would be a supplier ready and willing to serve any customer in the assigned area. It considered this assignment an important factor in deciding whether extension of service by a new municipal supplier was "within reasonable limitations."²⁴

Elaborating on its view of the "within reasonable limitations" phrase, the *Domestic Electric Service* court noted that "[a]n extension of a city's electric system, reasonable at the time of and under the circumstances prevailing in [*Town of*] *Grimesland v. [City of] Washington*²⁵ [decided prior to the Electric Act] . . . would not necessarily be reasonable in the present day under the circumstances disclosed in the record before us."²⁶ One circumstance existing in 1974 when *Domestic Electric Service* was decided, but not in 1951 when *Grimesland* was before the court, was the existence of the Electric Act with its provisions allowing assignment of territory. Thus, assignment of territory under section 62-110.2(c) should be taken into account in a modern reading of the "within reasonable limitations" language.

That an assignment of territory outside municipal boundaries should be a factor in evaluating "reasonable limitations" under section 160A-312 follows not only from a careful reading of *Domestic Electric Service* but also from an understanding of the motivations that persuaded the general assembly to adopt the Electric Act. A major impetus for the act was the concern that unfettered competition was causing wasteful duplication of service facilities.²⁷ Although it was specifically the duplication created by facilities of EMCs and power companies that led to the adoption of the Electric Act,²⁸ duplication caused by installation of a municipality's facilities should not escape objection. To permit a municipality to duplicate already existing facilities of a competitor would be to ignore the general assembly's motivations in enacting the Electric Act. The municipalities' choice not to participate in the drafting of the Electric Act²⁹ should not allow them to avoid being affected by measures taken in response to legislative concern. While a municipality is not automatically excluded from serving an assigned or otherwise exclusive area outside its boundaries simply because there will be duplication of the facilities of an electric supplier who has exclusive rights in that area,³⁰ the duplication factor should be weighed in the "reasonable limitations" balance.

Arguably, the *Lumbee River* court did consider duplication, even though the statute did not require that it do so and even though the court did not ex-

23. *Lumbee River*, 309 N.C. at 733, 309 S.E.2d at 214.

24. See *Domestic Elec. Serv.*, 285 N.C. at 144-45, 203 S.E.2d at 844.

25. 234 N.C. 117, 66 S.E.2d 794 (1951).

26. *Domestic Elec. Serv.*, 285 N.C. at 144-45, 203 S.E.2d at 844.

27. *Id.* at 141, 203 S.E.2d at 842.

28. See, e.g., *id.*; North Carolina ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 257-58, 166 S.E.2d 663, 668-69 (1969).

29. See *supra* note 6.

30. E.g., *Lumbee River*, 309 N.C. at 736-37, 309 S.E.2d at 216; *Domestic Elec. Serv.*, 285 N.C. at 143-44, 203 S.E.2d at 843-44.

pressly articulate that it was doing so. Fayetteville already had facilities near the disputed territory. Thus, allowing the city to serve in the territory would not effect a gross duplication of facilities, even though the territory had been assigned to the EMC under section 62-110.2(c). Because the court did not indicate specifically that lack of duplication was a factor in its decision, however, it left unresolved the issue whether duplication arguments will be heard when the statute does not expressly bar a supplier from an already serviced territory.

If the duplication argument is valid even when duplicative service is not specifically precluded by the statute, then any exclusive rights granted under section 62-110.2 must be considered when section 160A-312 is applied. The duplication question actually is quite complicated.³¹ Courts have held that since the general assembly set out in the Electric Act to remedy problems of duplication, such duplication may continue unless the statute prohibits it in the context of the facts of a particular case.³² If this interpretation of the statutes prevails, then there is no room for a duplication argument when the statute does not explicitly give exclusive rights.

Applying section 160A-312 without considering the Electric Act is most injurious when a court finds, as it did in *Virginia Electric*, that once a municipality satisfies the requirements of section 160A-312 it obtains an exclusive right to serve a customer.³³ In *Virginia Electric* the customer, Polylok Corporation, originally received electric service from the city of Tarboro. Polylok was located outside Tarboro's municipal boundaries in an area unassigned to any electric supplier under section 62-110.2(c). Polylok sought to change its supplier of electric service from Tarboro to Virginia Electric and Power Co. (VEPCO). In arguing over the propriety of the requested change in suppliers, the parties to the action never urged application of section 160A-312 because neither party contended that Tarboro did not have the authority to serve a customer outside its boundaries. Instead, the parties based their arguments on section 62-110.2(b)(5), which provides:

Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the customer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier . . . , and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.³⁴

Tarboro argued that this statute gave it a continuing, exclusive privilege to serve, regardless of Polylok's preference, because Tarboro had been the initial supplier of service to Polylok.³⁵ The court ignored both Tarboro's and

31. See *infra* notes 33-35 and accompanying text (discussion of *Virginia Elec.*).

32. E.g., *North Carolina ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 257, 166 S.E.2d 663, 668 (1969).

33. *Virginia Elec.*, 310 N.C. at 303, 311 S.E.2d at 587.

34. N.C. GEN. STAT. § 62-110.2(b)(5) (1982).

35. *Virginia Elec.*, 62 N.C. App. at 265, 302 S.E.2d at 644, *rev'd*, 310 N.C. 302, 311 S.E.2d 586

VEPCO's arguments based on section 62-110.2(b)(5), correctly deciding that because section 62-110.2(b)(5) applies to "electric suppliers," its provisions are not applicable to disputes involving municipalities.³⁶ Instead, the court found section 160A-312 the only applicable statute. The court determined that section 160A-312 provided exclusivity of service rights for municipalities that satisfy section 160A-312's, "within reasonable limitations" requirement.³⁷ The court held that Tarboro satisfied 160A-312 and thereby acquired an exclusive right to serve Polylok.³⁸

It is difficult to understand where in section 160A-312 the court found this exclusive privilege. Unfortunately, the court's opinion is of no help; the conclusion of exclusivity is drawn without supporting arguments from case law, legislative history, or statutory language. The finding of exclusivity appears as a sweeping statement at the end of the opinion.³⁹ Not only is there nothing in the language of the statute to support the *Virginia Electric* court's conclusion, but there also is nothing in the purposes of section 160A-312 to support the finding. Because municipalities act only under authority of statutes or corporate charters,⁴⁰ section 160A-312 is necessary to permit a municipality to venture beyond its borders. Giving municipalities permission to do something, however, is hardly the same as giving them an exclusive right to take part in that activity.

Because section 160A-312 does not expressly confer an exclusive right on municipalities to provide electric service outside their boundaries, any ambiguity in this regard should have been resolved against the municipality in *Virginia Electric*. "[S]tatutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the corporation's authority to exercise the power. [The North Carolina Supreme] Court has long held that '[a]ny fair, reasonable doubt concerning the existence of the power is resolved against the corporation.'"⁴¹ To concede that there is ambiguity in section 160A-312 would be generous; nothing in the language of the statute hints at an exclusive right to serve. Because the primary duties of a municipality are to be performed within its borders,⁴² any extension of authority to act outside those borders

(1984) (supreme court opinion never specifically referred to the parties' arguments concerning application of N.C. GEN. STAT. § 62-110.2(c) (1982)).

36. *Virginia Elec.*, 310 N.C. at 305, 311 S.E.2d at 588.

37. *See id.* at 303-04, 311 S.E.2d at 588.

38. *Id.* at 307, 311 S.E.2d at 589.

39. The court stated:

We conclude, on these facts, that Tarboro's decision to provide electric service to Polylok in 1970 and 1973 at Polylok's request was "within reasonable limitations" as a matter of law. Its continuation of that service has been and is now "within reasonable limitations." Tarboro, therefore, has the exclusive right to continue this service. The desire of its customer, Polylok, to discontinue the service has not diminished this right.

Id.

40. *E.g., Lumbee River*, 309 N.C. at 732, 309 S.E.2d at 213; *Williamson v. City of High Point*, 213 N.C. 96, 106, 195 S.E. 90, 96 (1938).

41. *Porsh Builders v. City of Winston-Salem*, 302 N.C. 550, 554, 276 S.E.2d 443, 445 (1981) (quoting *Shaw v. City of Asheville*, 269 N.C. 90, 97, 152 S.E.2d 139, 144 (1967)).

42. *Domestic Elec. Serv.*, 285 N.C. at 144, 203 S.E.2d at 844.

should be construed even more narrowly than authority to act within those borders.

The nonexclusivity of a municipality's specific right to serve utility customers outside corporate boundaries was established in *Town of Grimesland v. City of Washington*.⁴³ In *Grimesland* the court determined that

legislative authority would not be regarded as conferring the right to exclude competition in the territory served. Having the right to engage in this business gives no exclusive franchise, and if from lawful competition [the municipality's] business be curtailed, it would seem that no actionable wrong would result, nor would it be entitled to injunctive relief therefrom.⁴⁴

Although *Grimesland* preceded the current version of section 160A-312, its interpretation of a right granted by the statute still is applicable.⁴⁵

Moreover, similar rights to serve granted by the terms of the Electric Act have been construed by case law as not conferring exclusive rights on electric suppliers.⁴⁶ When the Electric Act specifically grants an exclusive right to serve, it is very clear on this point.⁴⁷ Similar statutory language should not give exclusive rights to one competitor while withholding exclusive rights from another. Holding otherwise in this scenario creates a severe discriminatory effect against electric suppliers.

Not only is there discrimination in the court's granting exclusive rights to municipalities under section 160A-312, but there also is an undermining of the rights to serve given electric suppliers by various provisions of the Electric Act.⁴⁸ Rights granted by the Electric Act would be eroded by the municipalities' gradual accretion of exclusive privileges. What good is an assignment under section 62-110.2(c) if, theoretically, a municipality eventually could annul the rights in that assignment by acquiring exclusive rights to the entire assigned territory? What good is it to have an exclusive right as to any other electric supplier under section 62-110.2(b) if municipalities leave no territory within which those rights can operate? If the court continues to apply the "within reasonable limitations" language as it did in *Lumbee River*, without regard to

43. 234 N.C. 117, 66 S.E.2d 794 (1951).

44. *Id.* at 122, 66 S.E.2d at 797 (construing Act of March 19, 1929, ch. 285, 1929 N.C. Public Laws 342, the precursor of N.C. GEN. STAT. § 160A-312 (1982)). Although the earlier law did not contain the "within reasonable limitations" language, the court, in dictum, imposed that condition on extension of service beyond corporate boundaries. *Id.* at 122, 66 S.E.2d at 798.

45. *E.g.*, *State v. McGraw*, 249 N.C. 205, 208, 105 S.E.2d 659, 662 (1958).

46. *E.g.*, *Domestic Elec. Serv.*, 285 N.C. at 143, 203 S.E.2d at 843.

47. *See* N.C. GEN. STAT. § 62-110.2(b)(4)-(7) (1982) (language of exclusivity is that suppliers other than the one initially selected by a customer for a particular premises "shall not thereafter furnish service to such premises"); *id.* § 160A-332(a)(4)-(7) (statutory language is that another supplier "shall not" serve or that "no other supplier shall thereafter furnish service," explicitly denoting the exclusivity given suppliers servicing a particular premises inside municipal corporate limits).

48. For example, N.C. GEN. STAT. § 62-110.2(b)(2)-(3) (1982), which gives any electric supplier the right to serve certain premises located wholly within 300 feet of that supplier's lines, is subject only to the exclusive right of another electric supplier to serve those premises. The rights given by § 62-110.2(b)(2)-(3) can be empty grants if a municipality, merely by satisfying the requirements of § 160A-312, attained an exclusive right to continue to serve premises located within 300 feet of an electric supplier's lines.

whether territory is assigned or otherwise deemed even qualifiedly "exclusive" under section 62-110.2, and then applies the *Virginia Electric* result of exclusivity, electric suppliers effectively will have no rights outside municipal boundaries.

Anomalously, as the electric suppliers' rights to serve outside municipal boundaries diminish, the rights they have inside corporate boundaries in relative terms become greater. This is true because there are at least some absolutely exclusive rights recognized for electric suppliers inside corporate boundaries under sections 160A-331 to 160A-338, while all absolutely exclusive rights outside municipalities are reserved to the municipalities after *Virginia Electric*. This result might have been prevented if the court had considered the Electric Act in applying section 160A-312. If the court had considered the Electric Act, the court at least would have seen a statute that is more explicit than is section 160A-312 when it confers on a competitor exclusive rights to serve. The court, however, continues to resolve disputes between municipalities and electric suppliers without such consideration.⁴⁹

The *Virginia Electric* result may not find the support it needs in a duplication-of-facilities argument. Although a primary purpose of the Electric Act was to prohibit free competition when it led to wasteful duplication of facilities, if the general assembly did not specifically prohibit duplication, free competition might continue as before the Electric Act, despite a seemingly wasteful overlap of facilities.⁵⁰ Thus the *Virginia Electric* finding of exclusivity has only shaky

49. *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 385, 317 S.E.2d 701, 705, *appeal denied*, 312 N.C. 82, 321 S.E.2d 895 (1984).

In *Duke Power* plaintiff electric company sought to enjoin the city of High Point from extending electric service outside its municipal boundaries into an area proposed for annexation. The proposed annexation area had been assigned to Duke Power under § 62-110.2(c). *Id.* at 380, 317 S.E.2d at 702. The court of appeals acknowledged that the city desired to serve the area in question prior to annexation because after annexation, according to the Electric Act, N.C. GEN. STAT. § 160A-332(a) (1982), Duke Power would have an exclusive right to continue any service provided in the area up to the annexation date. *See Duke Power*, 69 N.C. App. at 387-88, 317 S.E.2d at 706. The court nonetheless insisted on ignoring the imminent operation of this provision of the Electric Act; the court relied solely on the authority given by the "within reasonable limitations" language of § 160A-312 and permitted the municipality to extend its service to the area.

The court's refusal to consider the operation of the Electric Act meant that it condoned the city's attempts to circumvent rights about to accrue to Duke Power under the Electric Act. Duke Power would have been better off had its service initially been inside rather than outside municipal borders because exclusivity of service given any supplier inside municipal boundaries is operative against all other suppliers and does not yield to the municipal supplier. Furthermore, the assignment of the about-to-be annexed territory to Duke Power created an empty privilege. Had the court weighed into the "reasonable limitations" balance of § 160A-312 the provisions of the Electric Act, its decision might have been different. The ease with which High Point was permitted to serve customers in the assigned, proposed annexation area, is an interesting contrast to the insurmountable barrier placed before VEPCO when it tried to serve Polyluk.

50. When the general assembly has not restricted free competition, "neither [the supreme court] nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines." *North Carolina ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 257, 166 S.E.2d 633, 668 (1969).

In many sections of the Electric Act, the general assembly has specifically established a 300-foot measure as a guideline for desired distance between facilities of different suppliers, thus buttressing the argument that when the 300-foot measure is not prescribed, overlap of facilities is condoned. Because the Electric Act provides this 300-foot measure between electric suppliers outside municipal

support in an argument that Tarboro was already equipped to service Polylok and that to allow VEPCO to serve would create wasteful duplication. Furthermore, to rest the basis for the *Virginia Electric* decision on a duplication argument is inconsistent with *Lumbee River* because the *Lumbee River* court did not openly consider any duplication that might result from allowing a particular supplier to serve a customer.

Besides duplication, another tenet of free competition that theoretically continues to govern unless statutes specify otherwise is that one supplier does not acquire an exclusive right merely by being an initial provider.⁵¹ The general assembly did not specify exclusive rights for cities to serve customers outside their city limits; therefore, despite duplicative results, cities do not have a monopoly on potential users or on users they already serve in such areas.

Customer choice was another hallmark of the pre-Electric Act competition for customers.⁵² Like duplication and non-exclusivity, customer choice presumably remains a characteristic of competition for customers even after passage of the Electric Act unless the Electric Act specifies otherwise. The exclusivity found by the *Virginia Electric* court—unsupported as it is by specific provisions of the Electric Act—is inconsistent with the right of a customer to choose his supplier. In *Virginia Electric* the court dismissed the customer's right to choose as brashly as it found an exclusive right in the municipality to serve. If the *Virginia Electric* court had heeded the words of other cases which have cautioned that customer choice is not to be denied lightly, it might have weighed customer choice into the section 160A-312 balance.⁵³

boundaries and among all types of suppliers inside municipal boundaries, it is curious that due to a gap left in the statutes, there is no measurement restricting service by municipalities outside their borders. This gap in the legislative attempt to prevent duplication might be an oversight by the general assembly, or it might evince the desire of the general assembly to ignore duplication when municipalities venture beyond their borders to compete with electric suppliers. If the general assembly intended to ignore duplication when municipalities serve beyond their borders, then a duplication argument should not support either Tarboro's attempt to prevent VEPCO from serving Polylok in *Virginia Elec.* or Lumbee River's attempt to prevent Fayetteville from serving the Montibello subdivision in the *Lumbee River* case; consistency should be required. If courts refuse to consider duplication of an electric supplier's facilities when a municipality seeks to set up new facilities beyond its borders, they also should refuse to consider a duplication argument when an electric supplier seeks to duplicate the municipality's facilities in that area. Municipalities should not be entitled to favoritism in both situations.

Legislative clarification would be helpful on this point. The general assembly could—if it is concerned about duplication in all circumstances—make § 160A-312 more specific, tying the “reasonable limitations” language to some measure such as the 300-foot measure in the remainder of the statute. Perhaps a measure less than 300 feet would be more fair. A municipality's advance beyond its borders would not be “within reasonable limitations” if it proposed to set up facilities that came too near those of another supplier. Municipalities would thus be subject to the same restrictions that govern competition among electric suppliers outside as well as inside municipal borders. Another effect of making § 160A-312 more specific would be to make § 160A-312 more closely resemble the Electric Act in form, thereby hinting to the courts that the two should be applied together.

51. *Domestic Elec. Serv.*, 285 N.C. at 139, 203 S.E.2d at 841.

52. See, e.g., *Blue Ridge Elec. Membership Corp. v. Duke Power Co.*, 258 N.C. 278, 281, 128 S.E.2d 405, 407 (1962).

53. See, e.g., *North Carolina ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 118, 171 S.E.2d 406, 413 (1970); *North Carolina ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 256, 166 S.E.2d 663, 668 (1969); *Blue Ridge Elec. Membership Corp. v. Duke Power Co.*, 258 N.C. 278, 281, 128 S.E.2d 405, 407 (1962).

Because section 160A-312 and the statutory provisions comprising the Electric Act were not enacted at the same time, it is understandable that one statute might be applied without automatic reference to the other. In enacting the Electric Act the general assembly probably did not consciously envision a unified scheme that included the act and section 160A-312. Because both the Electric Act and section 160A-312 address the rights of different suppliers to extend electric service to customers, however, a court should seek to harmonize the two when resolving a dispute over that service.

The primary result of failure to interpret section 160A-312 with regard to the Electric Act is to undermine the ability of electric suppliers to compete on equal grounds with municipalities. Free competition is precluded when a court ties one competitor's hands at the same time that it gives another competitor a head start.

The decisions in *Lumbee River* and *Virginia Electric* also bestow upon electric suppliers greater rights to serve inside municipal boundaries than outside them. Electric suppliers may maintain service within a municipality without fear of poaching by the municipality. Outside municipalities, however, electric suppliers face not only competition for new customers but also the inability to compete for customers served by the municipality. This result will become more pointed as municipalities acquire customers outside their boundaries and thereafter exclusively serve those customers with the blessing of the North Carolina courts.

The fault in the narrow application of section 160A-312 lies with the general assembly. The general assembly should express more clearly its purposes in controlling competition among providers of electricity. Is duplication of facilities a primary concern that must be considered even apart from statutory direction? Are the rules of an act whose provisions are scattered throughout the statute books to be read in a unified way? The answers given these questions by the courts have skewed the rules of the game in favor of municipalities and undermined the ability of "electric suppliers" to compete for and maintain customers.

JONI WALSER CRICHLAW

The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment: *American Clipper Corp. v. Howerton*

Approximately two-thirds of the automobiles sold in the United States are sold on an installment sale basis,¹ and credit extended for automobile purchases accounts for more than one-third of the total consumer credit extended in the American economy.² Regulating automobile credit is a concern of state legislatures, nearly all of which have enacted statutes to protect automobile buyers, sellers, and financiers.³ Commentators have noted, however, that these statutory schemes (usually embodied in certificate of title statutes)⁴ are more suitable to the turn of the century, horse-and-buggy era than to today's national automobile market.⁵ Indeed, the present system is so unworkable that "[e]uthanasia [may be] the only merciful answer for it."⁶

Much of this unworkability is caused by internal conflicts in the statutory schemes for regulating automobile transfers. The North Carolina Supreme Court in *American Clipper Corp. v. Howerton*⁷ recently addressed a conflict in the North Carolina statutes regarding transfers of automobiles. The conflicting statutes examined by the *Howerton* court were the Motor Vehicle Act (MVA)⁸ and the Uniform Commercial Code (UCC).⁹ Section 52.1 of the MVA provides

1. In a typical installment sale arrangement, the vendor tenders title and delivers the goods to the purchaser, who contracts with the vendor to pay the sales price in the future. The purchaser's debt is to be paid a portion at a time, at given intervals. Such installments generally include a predetermined finance charge. The vendor usually will attempt to reserve some interest in the goods delivered, so that the vendor may repossess the goods should the purchaser fail to pay the agreed installments. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-1 to -11 (2d ed. 1980); Note, *Retail Installment Sales—Unruh Act Permits Use of Previous Balance Method in Computing Finance Charges on Revolving Credit Accounts*—Siebert v. Sears, Roebuck & Co., 16 SANTA CLARA L. REV. 416 (1976).

2. Myers, *Multi-State Motor Vehicle Transactions Under the Uniform Commercial Code: An Update*, in 1C SECURED TRANSACTIONS UNDER THE UCC (MB) § 30A.01(2)(a) (1984).

3. See Comment, *The California Used Car Dealer and the Foreign Lien—A Study in the Conflict of Laws*, 47 CALIF. L. REV. 543, 573-89 (1959).

4. A certificate of title statute requires that owners of automobiles register their ownership with the state. The state usually will issue a written certificate of title, evidencing that ownership. See *id.*; *infra* notes 68-72 and accompanying text.

5. See Myers, *supra* note 2, at § 30A.01; see also Leary, *Horse and Buggy Lien Law and Migratory Automobiles*, 96 U. PA. L. REV. 455, 457 (1948); Welsh, *Security Interests in Motor Vehicles Under Section 9-302 of the Uniform Commercial Code*, 37 U. CIN. L. REV. 265 (1968); Note, *Security Interests in Motor Vehicles Under the UCC: A New Chassis for Certificate of Title Legislation*, 70 YALE L.J. 995 (1961).

6. Myers, *supra* note 2, § 30A.01(2)(a).

7. 311 N.C. 151, 316 S.E.2d 186 (1984).

8. The Motor Vehicle Act was enacted piecemeal, beginning in 1937. See Act of March 23, 1937, ch. 407, 1937 N.C. Sess. Laws 787. It reached its present state in 1963 and is codified at N.C. GEN. STAT. §§ 20-1 to 20-372 (1983). See *infra* notes 51-78 and accompanying text for a description of the statute's history.

9. The Uniform Commercial Code was adopted by North Carolina in 1965. See Act of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws 768. The general assembly amended certain provisions dealing with automobile sales in 1975. Act of June 26th, 1975, ch. 862, 1975 N.C. Sess. Laws 1228. The UCC is found in N.C. GEN. STAT. §§ 25-1-101 to 25-11-108 (1965 & Supp. 1983). See *infra*

that unless an automobile dealer transfers a state issued certificate of title¹⁰ to the purchaser, no title to the automobile passes.¹¹ Section 2-401(2) of the UCC provides that when the vendor delivers the car, title passes to the purchaser.¹² The *Howerton* court resolved this conflict in favor of the UCC title-passing provisions.¹³ This Note examines that resolution in light of the historical and practical underpinnings of the MVA and the UCC.

In October 1978 plaintiff American Clipper Corp. (Clipper), a manufacturer of recreational vehicles, delivered a recreational vehicle to Adventure America, Inc. (Adventure).¹⁴ Adventure, a dealer, maintained a lot on which it displayed other parties' vehicles to prospective buyers.¹⁵ Adventure did not pay Clipper for the vehicle when it was delivered. Instead, the arrangement between Clipper and Adventure, based on an informal understanding,¹⁶ called for Adventure to secure a willing purchaser for the vehicle and to notify Clipper when a purchaser had been found. Adventure then would make arrangements to purchase the vehicle from Clipper. The supreme court characterized this informal arrangement as a consignment,¹⁷ although the parties had never expressly termed it as such.¹⁸ Clipper could reclaim possession of the vehicle at any time prior to Adventure's purchase from Clipper.¹⁹ Clipper retained possession of its manufacturer's statement of origin (MSO).²⁰ Clipper neither executed a secur-

notes 82-85, 127 and accompanying text and note 109 for a description of the UCC's history in North Carolina.

10. The precise issue in *Howerton* was more problematic because when the vendor in *Howerton* sold the car, no certificate of title had yet been issued by the state. For a discussion of the North Carolina certificate of title statutes, see *infra* notes 120, 122 and accompanying text.

11. "Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute . . . an assignment of the manufacturer's certificate of origin . . . and no title to a new motor vehicle . . . shall pass or vest until such assignment is executed . . ." N.C. GEN. STAT. § 20-52.1(c) (1983). For a fuller discussion of this and other title passing provisions of the MVA, see *infra* notes 51-74 and accompanying text.

12. "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, . . . even though a document of title is to be delivered at a different time or place . . ." N.C. GEN. STAT. § 25-2-401(2) (1965).

13. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 192-93.

14. "The only written document related to [this] shipment was a writing dated October 10, 1978, on Clipper stationary . . . This document . . . identified the vehicle and revealed a price of \$15,076.00. The document specified at the bottom, 'This is not a [sic] invoice.'" Record at 10.

15. *Id.* at 11.

16. *Id.*

17. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193. "[T]he hallmark of the consignment . . . is the absence of an absolute obligation on the part of the consignee to pay for the goods." Hawklund, *Consignment Selling Under the Uniform Commercial Code*, 67 COM. L.J. 146, 147 (1962). See Dusenberry, *Consignments Under the UCC: A Comment on Emerging Principles*, 26 BUS. LAW 565 (1970); Annot., 40 A.L.R.3d 1078 (1971).

18. The supreme court found that the arrangement between Adventure and Clipper implied that a sale by Adventure to a consumer would be contemporaneous with a sale by Clipper to Adventure. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193.

19. Record at 11.

20. A manufacturer's certificate is described as "[a] certification on a form . . . , signed by the manufacturer, indicating the name of the person or dealer to whom the . . . vehicle is transferred, the date of transfer, and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce." N.C. GEN. STAT. § 20-4.01(20) (1983). The certificate also must describe the vehicle in detail. *Id.*

Clipper had purchased parts of the vehicle from Chrysler, which had obtained the original MSO

ity agreement²¹ with Adventure, nor filed a financing statement²² with the state of North Carolina.

In April 1979 defendant Walter S. Howerton agreed to purchase the vehicle from Adventure. Adventure agreed to arrange financing of the purchase price.²³ Adventure had established a regular business practice of arranging financing for its customers with defendant financing company Finance America, Inc. (Finance).²⁴ Upon Finance's approval of Howerton's credit, Adventure and Howerton executed an installment sales contract.²⁵ Adventure then assigned its interest in the installment sales contract to Finance, which paid the purchase price to Adventure.²⁶ After Howerton completed and forwarded to Adventure an application for a North Carolina certificate of title,²⁷ Adventure abandoned its normal financing procedure. Based on past practice, Finance relied on Adventure to submit Howerton's application for title, together with the appropriate MSO, to the Division of Motor Vehicles (DMV). Adventure never submitted Howerton's application; as a result, the vehicle remained untitled.²⁸ In addition,

for the vehicle. Chrysler supplied Clipper with the original MSO, and Clipper obtained a supplemental MSO in accordance with California law. See CAL. VEH. CODE § 5600 (West 1971). Clipper obtained a duplicate MSO from Chrysler after the original was lost, and retained this duplicate and its own supplemental MSO. *Howerton*, 311 N.C. at 154, 316 S.E.2d at 187.

21. "Security agreement" means an agreement which creates or provides for a security interest." N.C. GEN. STAT. § 25-9-105(l) (Supp. 1983). A "[s]ecurity interest" means an interest in personal property or fixtures which secures payment or performance of an obligation." *Id.* § 25-1-201(37). If Clipper had entered into an express security agreement with Adventure, Clipper could have obtained a security interest in the vehicle. (Clipper claimed that a security interest had been created despite the absence of an express agreement. See *infra* notes 107-110 and accompanying text.) Possessing a security interest in the vehicle could have helped Clipper in either of two ways. Possessing the interest would have given Clipper an interest to assert against defendant financing company. (The litigation was framed basically as a contest to see whether Clipper or the financing company could assert superior interest in the vehicle. See *infra* notes 32-34.) In addition, if Clipper had possessed a security interest, it could have taken steps to ensure that if Adventure defaulted, Clipper could take possession of the vehicle. See N.C. GEN. STAT. § 25-9-403 (Supp. 1983). See generally J. WHITE & R. SUMMERS, *supra* note 1, §§ 26-1 to -11 (describing creditor's options in case of default on a secured obligation, including self-help, repossession, foreclosure, and resale).

22. A financing statement is a document signed by both the debtor and the secured party and includes a description of the property in which the security interest has been created. See N.C. GEN. STAT. § 25-9-402(a) (Supp. 1983). In order to render most types of security interests completely enforceable, the party in whose favor the interest has been created must file a financing statement with the office prescribed in N.C. GEN. STAT. § 25-9-401 (Supp. 1983). See J. WHITE & R. SUMMERS, *supra* note 1, § 23-11 to -16; *infra* note 132 and accompanying text.

23. Record at 11-12.

24. *Id.* at 12.

25. For a general description of installment sale arrangements, see *supra* note 1. In this particular instance, Howerton made a cash down payment, was allowed a trade-in credit, and was obligated to pay a remaining balance of \$15,500. This debt was payable to Adventure in monthly installments. The record does not show whether an express security agreement between Adventure and Howerton existed. See Record at 11-12.

26. Record at 12-13.

27. The owner of a new vehicle is required to submit to the Division of Motor Vehicles an application for a certificate of title, including the owner's name and address, a description of the vehicle, and a description of the owner's title and of all liens on the vehicle. This application must be accompanied by the manufacturer's certificate of origin, assigned to the owner. N.C. GEN. STAT. § 20-52 (1983). The Division then issues a certificate of title on which is recorded all the information supplied by the application. *Id.* § 20-57. Security interests may be noted on the certificate. *Id.* § 20-58 to -58.10. It is unlawful to operate a vehicle for which a certificate has not been issued. *Id.* § 20-111.

28. Record at 12.

Adventure never notified Clipper that the vehicle had been sold, nor did it make any payment to Clipper.²⁹

Clipper discovered in June 1979 that the vehicle was no longer on Adventure's lot.³⁰ After learning of the sale and of the nature of the financing, Clipper entered into negotiations with Finance, the assignee of Adventure's interest in the installment sales contract, and Howerton. These negotiations resulted in a partial settlement agreement.³¹ The agreement provided that Howerton would retain possession of the vehicle and that Clipper would institute a declaratory judgment proceeding against Finance for the purpose of adjudicating title to the vehicle. In addition, Clipper agreed to forward its MSO to Finance. Upon receipt of the MSO, Finance agreed to forward the MSO and application for a certificate of title to the DMV. The certificate of title was to list Howerton as owner and was to note a lien in favor of Finance for the sole purpose of defending the declaratory judgment action brought by Clipper. Howerton assigned his right, title, and interest in the vehicle to Finance. Finance thereby became obligated to defend both Howerton's interest in the vehicle and its own.³² Most importantly, the parties agreed that if, in the declaratory judgment proceeding, Clipper's right to the vehicle was declared to be superior³³ to that of either Finance or Howerton, Finance would be liable to Clipper.³⁴

At trial Clipper argued that "neither defendant acquired rights in and to the vehicle superior to [Clipper's] own by reason of [Adventure's] attempted conversion of [the vehicle]."³⁵ Clipper claimed that, under section 52.1 of the North Carolina General Statutes, a motor vehicle dealer cannot transfer title to a new vehicle to a purchaser without proper assignment of an MSO.³⁶ Since an MSO was not assigned to Howerton, no title had passed to him. Clipper argued that because the sale by Adventure to Howerton was not valid and because no sale had been made by Clipper to Adventure, Clipper retained title to the vehicle. Clipper argued in the alternative that if title had in fact passed to Howerton, retention of the MSO had reserved a security interest in Clipper. This interest, Clipper asserted, had attached to the installment sales contract and vested in Clipper title superior to the title Finance claimed.³⁷

29. *Id.*

30. *Id.*

31. The basic terms of this agreement are set forth in *Howerton*, 311 N.C. at 155-56, 316 S.E.2d at 188-89.

32. See Record at 4-8. The partial settlement agreement further provided that Howerton's only liability was to stem from the installment sales contract, and that he could incur no liability as a result of a judgment in the action brought by Clipper. *Id.* at 7.

33. The parties never defined in the agreement what constituted "superiority" of title. See *Howerton*, 311 N.C. at 156, 316 S.E.2d at 189.

34. Adventure was not made party to the settlement negotiations or to the litigation. *Id.* at 155, 316 S.E.2d at 188.

35. Plaintiff Appellee's Brief at 6, *Howerton*, 51 N.C. App. 539, 277 S.E.2d 136.

36. See N.C. GEN. STAT. § 20-52.1(c), which provides that "no title to a new motor vehicle . . . shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee." The provision does not state expressly the result of the manufacturer's rather than the dealer's retention of the MSO. See *infra* note 125.

37. See *infra* notes 112-19 and accompanying text.

Finance argued that the UCC, not the MVA, should apply to resolve the question of title. Finance argued that, under the UCC, title to the vehicle had passed to Howerton when he purchased the vehicle. Thus, Clipper had no title to assert against either Howerton or Finance. The UCC explicitly states the time and place in which title passes to a good faith purchaser, such as Howerton.³⁸ The North Carolina version of the UCC provides that unless otherwise agreed, title passes when the goods are delivered, even though a document of title is to be delivered later.³⁹ Since title passed completely to Howerton when the vehicle was delivered to him, Finance argued, Clipper could not prevail against either Finance or Howerton.

Before trial the parties stipulated that no material facts were at issue. Both Finance and Clipper moved for summary judgment. The trial court, in granting Clipper's motion, found that Clipper could assert title superior to Finance's "under applicable law."⁴⁰ The court therefore found Finance liable to Clipper under the parties' partial settlement agreement.

The court of appeals affirmed.⁴¹ Judge Becton, writing for a unanimous court, agreed with Clipper's contention that Clipper's title was superior to Finance's. The court based its opinion on the title passage provisions set forth in the North Carolina MVA. The court reasoned that title could not pass until the MSO was properly assigned,⁴² hence, record title remained in Clipper.⁴³ The court found that Finance assumed the risk of loss when it loaned money on collateral without first determining whether its assignor, Adventure, or its debtor, Howerton, had record title to that collateral.⁴⁴ The court further found that Clipper, by retaining its MSO, did the most it could to protect its interest.⁴⁵

A unanimous supreme court, in an opinion by Justice Exum, reversed the court of appeals, holding that the UCC, not the MVA, controlled.⁴⁶ Analyzing the case as a consignment under the UCC, the court found that Clipper had taken none of the steps by which a consignor can protect his interest in consigned goods.⁴⁷ In addition the court found that Clipper had taken no steps to protect any interest it might have had in the installment sales contract.⁴⁸ Since Clipper had no interest in the vehicle or the contract, it could not assert a title superior to that claimed by Finance or Howerton. The supreme court then

38. The parties stipulated that Howerton was a "buyer in the ordinary course of business" as that term is defined by the UCC. Record at 12.

39. N.C. GEN. STAT. § 25-2-401(2) (1965). See *supra* note 12 for language of the statute.

40. Record at 19. Judge Riddle, the trial judge, did not decide expressly whether the UCC or the MVA was "the applicable law." *Id.*

41. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 545, 277 S.E.2d 136, 139 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

42. See N.C. GEN. STAT. § 20-52.1(c) (1983), set forth *supra* note 11.

43. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 544, 277 S.E.2d 136, 139 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

44. *Id.*

45. *Id.*

46. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 192-93.

47. *Id.* at 164-65, 316 S.E.2d at 194.

48. *Id.* at 166-68, 316 S.E.2d at 194-95.

granted summary judgment for Finance.⁴⁹

The MVA and the UCC have generated voluminous litigation.⁵⁰ The original version of the MVA, enacted in 1937,⁵¹ provided that once the purchaser tendered payment for a motor vehicle, and received delivery of the vehicle, the transfer was valid.⁵² Transfer of ownership without delivery of a certificate of title on which were recorded all existing liens did not invalidate the transfer, but did constitute a misdemeanor.⁵³ Soon after this statute was enacted, litigants attempted to secure a judicial declaration that the statute served as a recordation device for title to, and liens on, automobiles.⁵⁴ North Carolina previously had enacted statutes invalidating titles to, and mortgages on, realty and some forms of personalty, unless the title or mortgage was registered with the state.⁵⁵ The North Carolina Supreme Court, however, had rejected this interpretation of the predecessor to the MVA in 1925.⁵⁶ In *Carolina Discount Corp. v. Landis Motor Co.*⁵⁷ the court characterized the statute as a police regulation, with penal provisions "to protect the general public from fraud, imposition and theft of motor vehicles."⁵⁸ The court also determined that the statute did not change the common-law rule that sales of personal property were not required to be evidenced by a writing and held that certificates of title to automobiles did not determine rights of litigants in disputes arising out of automobile transfers.⁵⁹

Courts accepted this interpretation for several decades, not because this interpretation presented the soundest public policy, but because of the courts' deference to the general assembly. The North Carolina Supreme Court affirmed the rule of *Carolina Discount Corp.* in 1960 in *Southern Auto Finance Co. v. Pittman*.⁶⁰ The *Pittman* court examined sections of the 1937 MVA which provided that the owner of a motor vehicle must be registered with the Department of Motor Vehicles (DMV).⁶¹ When the owner made proper application, the DMV provided a certificate indicating all liens and encumbrances.⁶² The *Pittman* court found that the general assembly, in enacting these sections, did not intend to exempt motor vehicles from the recordation statutes,⁶³ which provided a separate system for establishing ownership of personal property.⁶⁴ The court

49. *Id.* at 170, 316 S.E.2d at 197.

50. *See, e.g.*, cases cited *infra* note 101.

51. Act of March 23, 1937, ch. 407, 1937 N.C. Sess. Laws 787.

52. *Id.* § 38, 804-05.

53. *Id.*

54. *See, e.g.*, *National Bank v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965).

55. *See* N.C. GEN. STAT. §§ 47-1 to 47-120 (1984).

56. Act of March 5, 1923, ch. 236, 1923 N.C. Sess. Laws 554 was the predecessor to the MVA. This Act required a centralized registration of all motor vehicles with the Department of Revenue. It did not invalidate sales made without transfer of title certificates.

57. 190 N.C. 157, 129 S.E. 414 (1925).

58. *Id.* at 160, 129 S.E. at 416.

59. *Id.*

60. 253 N.C. 550, 117 S.E.2d 423 (1960).

61. Act of March 23, 1937, ch. 407, §§ 37-38, 1937 N.C. Sess. Laws 787, 804-05.

62. *Id.* §§ 12, 36-38, at 793, 804-05.

63. *See* N.C. GEN. STAT. §§ 47-1 to 47-120 (1984).

64. *Pittman*, 253 N.C. at 553-54, 117 S.E.2d at 425.

did state, however, that "if public policy [required] a different system of establishing ownership and encumbrances on motor vehicles, such policy must be declared by the Legislature."⁶⁵

The general assembly soon responded to the needs of public policy. The lien recordation statute in existence at the time of *Pittman* provided that mortgages on personal property were to be recorded, in many cases, in the office of the register of deeds in the county in which the property was located.⁶⁶ Since cars are easily driven from one county to another, chances are great that a car on which there is a mortgage will not be sold in the county in which it was located when mortgaged. A prospective purchaser of an automobile would have had to investigate title records in many, if not all, of the counties in the state to discover the nature of the title to any motor vehicle. By 1960, when *Pittman* was decided, the volume of vehicle sales and the ease of vehicle transportation had become so great that the general assembly decided to lighten this burden on the prospective purchaser.

The general assembly amended the MVA in 1961.⁶⁷ Under the amended act every owner of a motor vehicle still was required to register his vehicle with the DMV, and the DMV continued to issue certificates of title noting all liens and encumbrances.⁶⁸ The 1961 amendments expressly provided that "[t]ransfer of ownership in a vehicle by an owner [was] not effective" until the vendor's certificate of title had been assigned and transferred to the purchaser, and the new vehicle had been delivered.⁶⁹ The purchaser then was required to present the assigned certificate to the DMV, which issued a new certificate to the purchaser.⁷⁰ The general assembly hoped to provide, by means of the title certification procedure, a method whereby all legal interests in motor vehicles could be determined easily.⁷¹ These amendments took several important steps toward achieving that legislative goal. Liens no longer had to be recorded in the county in which the lienor or the vehicle was located.⁷² A purchaser, after the 1961 amendments, merely had to look at the certificate of title to discover liens.

The 1961 amendments, for the first time, also made provision for a manufacturer's certificate of origin. A manufacturer was required to supply a dealer to whom he transferred a newly manufactured vehicle with a DMV form which certified that the vehicle had not previously been transferred.⁷³ When the dealer sold the vehicle to a consumer, the amendment required the dealer to transfer the MSO to the consumer. The consumer then was obligated to submit the

65. *Id.* at 553, 117 S.E.2d at 425.

66. See N.C. GEN. STAT. § 47-20.2 (1984) for the corresponding present provisions regarding mortgages on personalty.

67. Act of June 15, 1961, ch. 835, 1961 N.C. Sess. Laws 1134.

68. *Id.* § 8, at 1139.

69. *Id.*

70. See *id.* § 3, at 1135.

71. *Id.* at 1134.

72. *Id.* § 12. The amendments stated that the mortgage recordation provisions no longer applied to motor vehicles. All vehicle mortgages were required by the amendments to be recorded directly on the title certificate.

73. *Id.* §§ 1-4, at 1134-35.

MSO to the DMV, along with his application for a certification of title.⁷⁴

The first decision interpreting the 1961 amendments was *Community Credit Co., Inc. v. Norwood*.⁷⁵ The *Norwood* court found that the amendments make it the duty of the purchaser to secure from his vendor the old certificate duly endorsed or assigned and to apply for a new certificate. . . . The vesting of title is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate [of title].⁷⁶

The general assembly further refined the title-passing provisions of the MVA in 1963. The language of the provisions was changed slightly to mandate that "no title to any motor vehicle shall pass or vest until assignment [of the title certificate] is executed and the motor vehicle delivered to the transferee."⁷⁷ These sections of the MVA were strengthened in 1967. The provisions added in 1967 stated that a dealer, having obtained title to a new vehicle from a manufacturer, could not transfer that title to a consumer without also transferring the MSO to the consumer.⁷⁸ These amendments, however, contained no provision to control consignment situations, like the one in *Howerton*, in which the manufacturer originally made no transfer of the MSO to the dealer.

The supreme court offered its interpretation of the revised wording in *Nationwide Mutual Insurance Co. v. Hayes*.⁷⁹ The *Hayes* court ruled that the amendment imposed three conditions precedent on any transfer of title to a motor vehicle. First, the vendor must execute an assignment of the certificate of title to the purchaser. Second, there must be actual or constructive delivery of the vehicle to the purchaser. Last, the duly assigned title certificate must be delivered to the purchaser.⁸⁰ The *Hayes* court expressly limited its decision,

74. See *id.* § 3, at 1135.

75. 257 N.C. 87, 125 S.E.2d 369 (1962).

76. *Id.* at 90, 125 S.E.2d at 371. The court in *National Bank v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965), also relied on the language in the 1961 amendments which provided that "transfer of ownership . . . is not effective" until the title certificate is transferred, in determining that a mortgage created on two trucks was invalid. The mortgagor had taken possession of the trucks from a vendor, and prior to receiving the title certificate had created a mortgage on the trucks. See also *Seymour v. W. S. Boyd Sales Co.*, 257 N.C. 603, 127 S.E.2d 265 (1962).

77. Act of May 24, 1963, ch. 552, § 4, 1963 N.C. Sess. Laws 648 (codified at N.C. GEN. STAT. § 20-72 (b) (1983)). The wording of the 1961 amendments had provided that "transfer of ownership in a vehicle was not effective" until assignment and transfer of the title certificate. Act of June 15, 1961, ch. 835, § 8, 1961 N.C. Sess. Laws 1134.

78. Act of June 21, 1967, ch. 863, § 1, 1967 N.C. Sess. Laws 1110 (codified at N.C. GEN. STAT. § 20-52.1(c) (1983)).

79. 276 N.C. 620, 174 S.E.2d 511 (1970).

80. *Id.* at 640, 174 S.E.2d at 524. The *Hayes* court had to determine whether an insurance policy afforded protection for defendant against certain claims resulting from an automobile accident. Plaintiff had issued defendant a non-owner's policy. The non-owner's policy provided that if defendant acquired ownership of an automobile during the period covered by the policy, policy coverage would lapse 30 days after acquisition of the automobile. Defendant thereafter contracted to purchase a car. The car was delivered December 26th. Defendant tendered payment on December 27th. On December 28th, the seller assigned and delivered the title certificate to defendant. On January 27th, defendant was involved in the accident in question. *Id.* at 622-25, 174 S.E.2d at 512-14. If the court had found that defendant acquired ownership when payment was made and the car delivered, the policy would have lapsed before the accident. If the court had found defendant did not acquire ownership until the certificate of title was delivered, however, the policy would have remained in effect through the date of the accident. Although the 1961 amendments spoke in terms

declaring that the three conditions it announced as prerequisite to transfer of title only applied for purposes of determining tort law liability and liability insurance coverage.⁸¹

The UCC was enacted in North Carolina in 1965,⁸² two years after the enactment of the MVA amendments from which the *Hayes* court derived its standard for determining passage of automobile title. The *Hayes* court held that the UCC did not replace the 1963 amendments to the MVA as a means for determining legal interests in automobiles.⁸³ The court relied on the express language of the UCC in declaring that the UCC did not supplant the transfer of title provisions of the MVA. Section 10-102 of the UCC lists the statutes repealed by the passage of the UCC; the MVA is not listed.⁸⁴ Section 10-103 of the UCC, however, repeals all other statutes inconsistent with the UCC.⁸⁵

The *Hayes* court relied on the official commentary to section 2-401 to refute the contention that insofar as the MVA title passage provisions were inconsistent with section 2-401 of the UCC, the MVA provisions were repealed by passage of the UCC. This commentary indicates that section 2-401 is designed to govern private transactions and not to guide the court's interpretation of public regulation.⁸⁶ Courts remain free to decide how title passes in situations in which public regulations call for such determination. Thus, the *Hayes* court found that, because the MVA was a public regulation, passage of title thereunder was not governed by the "private sale" rules of the UCC.⁸⁷ In addition the *Hayes* court declared that section 2-401 of the UCC was general in scope and governed passage of title to "goods." Thus, section 2-401 should not affect statutes governing

of ownership, the 1963 revisions provided that "title will not pass or vest" until the certificate of title is transferred. Act of May 24, 1963, ch. 552, § 4, 1963 N.C. Sess. Laws 648. The *Hayes* court found, after a lengthy restatement of previous definitions, that "title" and "ownership" are synonymous, 276 N.C. at 630, 174 S.E.2d at 517, and thus, because the policy revoked coverage if the defendant acquired ownership of a motor vehicle, the court decided that defendant did not acquire title to the car until the certificate of title was delivered to him. *Id.* at 640, 174 S.E.2d at 524.

81. *Hayes*, 276 N.C. at 640, 174 S.E.2d at 524. The MVA has long provided that the certificate of title is "prima facie evidence" of ownership in tort cases arising out of automobile accidents. Act of March 30, 1951, ch. 494, § 1, 1951 N.C. Sess. Laws 405-06 (codified at N.C. GEN. STAT. § 20-71.1 (1983)). The *Howerton* court did not expressly consider this section of the MVA.

82. Act of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws 768, enacted the UCC in North Carolina. The UCC became effective July 1, 1967. *Id.*

83. *Hayes*, 276 N.C. at 638-40, 174 S.E.2d at 522-24 (1970).

84. N.C. GEN. STAT. § 25-10-102(1) (1965).

85. *Id.* § 25-10-103 (1965).

86. The commentary states:

[Section 2-401] in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon "sale" or upon location of "title" without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the private law.

N.C. GEN. STAT. § 25-2-401 official comment (1965). The drafters of the UCC did not intend the UCC to supplement the MVA in the operation of the MVA as aid to government regulation of automobile registration. The drafters made it clear that, when necessary, courts should interpret "sale" or "location of title" for purposes of regulatory statutes such as the MVA, to best further the goals of those regulatory statutes.

87. *Hayes*, 276 N.C. at 639, 174 S.E.2d at 523.

passage of title to more specific categories of goods. Because the MVA dealt specifically and definitely with passage of title to motor vehicles, the *Hayes* court found that the MVA could not be supplanted or repealed by the UCC, even though the UCC was enacted after the MVA.⁸⁸

The *Howerton* court addressed whether the three conditions in *Hayes* applied to a question of title not involving tort liability or insurance coverage and whether passage of the UCC in 1965 rendered the 1963 amendments to the MVA obsolete as a means for settling disputes over transfers of automobile ownership. To decide these two issues, the *Howerton* court initially had to determine whether a party could acquire ownership of a vehicle without assignment and delivery of a title certificate.

If the *Hayes* standard for transfer of ownership applied, no ownership would have been transferred to Adventure; to its assignee, Finance; or to Howerton. Finance contended that under section 2-401(2)⁸⁹ of the North Carolina version of the UCC, title passed to Howerton when the vehicle was delivered to him, even though the certificate of title was never assigned or delivered to Howerton.

The *Howerton* court distinguished *Hayes* on two grounds. First, *Hayes* dealt with the rights of third parties not involved in the sale of the automobile—insurance carriers—while *Howerton* involved a determination of the rights of the vendor and purchaser of the automobile.⁹⁰ In addition, the *Hayes* court limited its decision to a determination of tort liability and insurance coverage, thus leaving “open the question whether the MVA, as opposed to the UCC, would control in all circumstances.”⁹¹

The *Howerton* court did not directly refute the reasoning that led the *Hayes* court to apply the MVA. Instead, it offered an alternative rationale for adopting the UCC standards for passage of title. The court examined the North Carolina commentary to section 2-401 and deduced the legislative intent behind the UCC. The commentary states that the UCC abandons the examination of sales disputes that made “rights, obligations and remedies of sellers, buyers, and third parties dependent on the location of title of goods at a particular time . . . providing [instead] specific provisions with respect to the various rights and duties of the buyer and seller which are not predicated on location of title.”⁹² The *Howerton* court stressed that this commentary evidenced the intent of the general assembly that the courts no longer should employ “the concept of title as a tool for resolving sales problems.”⁹³

88. *Id.* at 639-40, 174 S.E.2d at 523.

89. *See supra* note 12.

90. *Howerton*, 311 N.C. at 151, 153, 161, 316 S.E.2d at 186, 187, 192 (1984). *Cf. Hayes*, 276 N.C. at 640, 174 S.E.2d at 524.

91. *Howerton*, 311 N.C. at 162, 316 S.E.2d at 192.

92. N.C. GEN. STAT. § 25-2-401 North Carolina comment (1965).

93. *Howerton*, 311 N.C. at 162, 316 S.E.2d at 192 (quoting *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 153, 229 S.E.2d 278, 283-84 (1976)). *See Clifford, Article Two: Sales*, 44 N.C.L. REV. 539, 551 (1966); *see also Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261, 288 N.Y.S.2d 525 (1968) (theory of the UCC relegates the issue of title to a subordinate position in determining legal interests in automobiles).

Justice Exum noted that the *Howerton* court was not the first to resolve a dispute involving transfer of title to an automobile without relying on the MVA. He cited two pre-UCC cases, *Hawkins v. M & J Finance Corp.*⁹⁴ and *King Homes, Inc. v. Bryson*,⁹⁵ in which the North Carolina Supreme Court relied on the common law of sales, not the MVA, to resolve title disputes.⁹⁶

In *Hawkins* plaintiff delivered two cars to a used car dealer, authorizing the dealer to sell the cars. Plaintiff also delivered the certificates of title, but did not execute an assignment of the certificates. The car dealer used the cars to secure a loan from defendant, without plaintiff's permission. The dealer defaulted on the loan, and the defendant took possession of one car. When plaintiff brought an action for return of the car, the court relied on the common-law principles of agency and entrustment, not on the provisions of the MVA, in reaching its decision. The court concluded that defendant had not acquired any rights to the vehicle.⁹⁷ The *Howerton* court viewed the *Hawkins* decision as authority that the MVA title provisions did not properly resolve all questions pertaining to transfer of title to motor vehicles.⁹⁸

The *Howerton* court derived further support for this view from the decision in *King Homes*. In *King Homes* a mobile home manufacturer delivered a mobile home to a dealer, but did not assign or deliver a title certificate along with the vehicle. The dealer paid for the mobile home by check. After delivering the check to the manufacturer, the dealer sold the mobile home to defendant. When the dealer's check was returned due to insufficient funds, the manufacturer brought an action for return of the mobile home. The court held that title had never passed to the dealer; therefore, the sale by the dealer to defendant was invalid. The *King Homes* court reached this decision, not because a title certificate had not been delivered to the dealer, but because the dealer had never paid the manufacturer.⁹⁹

The *Howerton* court cited *Hawkins* and *King Homes* to demonstrate that the decision to rely on the UCC instead of the MVA did not represent a break with North Carolina precedent.¹⁰⁰ The *Howerton* court then decided not to ap-

94. 238 N.C. 174, 77 S.E.2d 669 (1953).

95. 273 N.C. 84, 159 S.E.2d 329 (1968).

96. The *Howerton* case itself was never framed as a wrongful sale by a bailee. It is possible that application of these common-law concepts would have altered the court's analysis or decision.

97. *Hawkins*, 238 N.C. at 178-85, 77 S.E.2d at 672-77.

98. *Howerton*, 311 N.C. at 160, 316 S.E.2d at 190-91.

99. *King Homes*, 273 N.C. at 90-91, 159 S.E.2d at 333.

100. *Howerton*, 311 N.C. at 162-63, 316 S.E.2d at 191-92. Neither the *Hawkins* nor the *King Homes* court, however, ignored the MVA completely. The *Hawkins* court stated that a bailee could rightfully mortgage entrusted goods if the entruster had clothed the trustee with sufficient indicia of ownership. The *Hawkins* court used the MVA as an aid in applying this common-law principle. The court found that because the certificates of title delivered to the dealer were not assigned in compliance with the MVA, they could not constitute sufficient indicia of ownership. *Hawkins*, 238 N.C. at 179-80, 77 S.E.2d at 674-75. Likewise in *King Homes*, after holding that a mobile home was a motor vehicle within the meaning of the MVA, the court found that the trustee had not been clothed with indicia of ownership sufficient to induce reasonable reliance on the part of the defendant, because the dealer had not delivered a Manufacturer's Certificate of Origin in compliance with the MVA in force at the time. 273 N.C. at 91, 159 S.E.2d at 333. Today, under the UCC, it is possible for an trustee to convey ownership to a bona fide purchaser, regardless of the sufficiency of the indicia of ownership with which the trustee has been clothed. See *infra* note 104.

ply the three-step standard adopted by the *Hayes* court, concluding that "the provisions of the UCC and not the MVA properly resolve the contest" between Clipper and Finance.¹⁰¹

The drafters of the UCC, the court believed, intended the UCC to resolve the type of title question presented in *Howerton*.¹⁰² Therefore, the court must have believed that the provisions of the UCC established a more efficient and more just means of determining legal interest in motor vehicles than the methods that the MVA provides.¹⁰³

The court, however, belied its own beliefs as it applied the provisions of the UCC to the facts presented by *Howerton*. The court first dealt with the question whether Clipper or Howerton had a superior right to the vehicle. The court found the answer in section 2-403 of the UCC.¹⁰⁴ Under this section, title transferred completely to Howerton when he purchased the vehicle. Clipper transferred the vehicle to Adventure, a party in the business of selling such vehicles,¹⁰⁵ clothing Adventure with the authority to transfer absolute ownership of the vehicle. Howerton purchased as a buyer in the ordinary course of business,¹⁰⁶ without notice that Adventure did not have absolute ownership of the vehicle. Adventure, therefore, could transfer to Howerton all of Clipper's right, title, and interest in the vehicle.

Clipper acknowledged that under the UCC it could not assert title superior to Howerton's, but argued that its interest was greater than the interest held by Finance. Clipper claimed its retention of the MSO to the vehicle reserved a security interest in the vehicle, or in the alternative, in the installment sales con-

101. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 192-93. Other jurisdictions also have decided that the UCC prevails over motor vehicle registration schemes and that title passes pursuant to the UCC without completion of the statutory registration formalities. See, e.g., *Indiana Ins. Co. v. Fidelity Gen. Ins. Co.*, 393 F.2d 204 (7th Cir. 1968) (ownership is question for jury); *Semple v. State Farm Mut. Auto Ins. Co.*, 215 F. Supp. 645 (E.D. Pa. 1963); *Metropolitan Auto Sales v. Koneski*, 252 Md. 145, 249 A.2d 141 (1969) (ownership is question for jury); *St. Paul Fire and Marine Ins. Co. v. Boykin*, 251 S.C. 236, 161 S.E.2d 818 (1968) (title to vehicle passes notwithstanding want of compliance with title certificate law); *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964). The South Carolina rule stated in *Boykin* modified the rule established by a federal court sitting in diversity in *Lynch v. United States Gen. Accident, Fire and Life Assurance Corp.*, 327 F.2d 328 (4th Cir. 1964) (under South Carolina law, passage of title effective only between buyer and seller and does not affect rights of third-party insurance carrier). Several jurisdictions in which the UCC has been adopted have decided that ownership does not pass until motor vehicle statute requirements are met. See, e.g., *Merchants Produce Bank v. Mack Trucks*, 411 F.2d 1174 (8th Cir. 1969); *Melton v. Prickett*, 203 Kan. 501, 456 P.2d 34 (1969); *Roe v. Flamegas Indus. Corp.*, 16 Mich. App. 210, 167 N.W.2d 835 (1969); *McIntosh v. White*, 447 S.W.2d 75 (Mo. 1969); *Irion v. Glens Falls Ins. Co.*, 54 Mont. 156, 461 P.2d 199 (1969); *Forman v. Anderson*, 183 Neb. 715, 163 N.W.2d 894 (1969).

102. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193.

103. The MVA is designed to provide "a ready means by which all legal interests in motor vehicles may be determined." Act of June 15, 1961, 1961 N.C. Sess. Laws 1134. The contest between Finance and Clipper, framed by the parties as a question of who had "superior title," clearly seems to be a contest to decide who has a greater "legal interest."

104. "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." N.C. GEN. STAT. § 25-2-403(2) (1965).

105. Adventure maintained a lot for display of vehicles, and had had prior business dealings with Clipper. Record at 9-11.

106. *Id.* at 12.

tract to which Adventure and Howerton were the original parties. Finance claimed a competing interest. Neither party had filed a financing statement to protect and register its interest.

The court declined to decide whether retention of the MSO by Clipper created a security interest.¹⁰⁷ Clipper's failure to properly perfect its security interest, if any, prevented it from defeating Finance's interest, despite its retention of the MSO.¹⁰⁸

The MVA sets forth some guidelines for determining the order of certain competing security interests.¹⁰⁹ The MVA expressly provides, however, that if a manufacturer claims a security interest in a vehicle held in the inventory of that manufacturer, the interest must be perfected by filing a financing statement in accordance with the provisions of the UCC.¹¹⁰ Clipper admitted that it had retained the vehicle in inventory and had not filed a financing statement.¹¹¹ Therefore, Clipper could not claim a security interest under the MVA.

Under the UCC, because Clipper's entire interest in the car had been trans-

107. *Howerton*, 311 N.C. at 167, 316 S.E.2d at 195. The UCC as adopted by North Carolina states that "any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to reservation of a security interest." N.C. GEN. STAT. § 25-2-401(1) (1965). For other North Carolina decisions stating that retention of documents of title creates only a security interest, see *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722, 728 (4th Cir. 1970) (applying North Carolina law); *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 155, 229 S.E.2d 278, 285 (1976). Some courts have held that automobile certificates of title are not documents of title. See, e.g., *Semple v. State Farm Mut. Ins. Co.*, 215 F. Supp. 645 (E.D. Pa. 1963); *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970). The *Howerton* court did not address that question.

108. *Howerton*, 311 N.C. at 167, 316 S.E.2d at 195.

109. N.C. GEN. STAT. § 20-58 to -58.10 (1983). The UCC expressly provides that these sections of the MVA apply to security interests in automobiles. The original version of the UCC enacted in North Carolina provided that "[t]he filing provisions [of the UCC] do not apply to a security interest in property subject to a statute . . . of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property." N.C. GEN. STAT. § 25-9-302(3), (3)(b) (1965).

The effect [of this provision] is to preserve the operation of the North Carolina certificate of title law relating to motor vehicles and the perfection of security interests therein. . . .

This North Carolina statute does not apply to security interests created by a dealer or manufacturer who holds the vehicle for resale . . . ; therefore, those security interests are governed by the [UCC] filing provisions.

Id. § 25-9-302 North Carolina comment. This section was revised in 1975, to provide that although filing a UCC statement is still not required to perfect a security interest in a vehicle that may be perfected under the MVA, "during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions [of the UCC] apply to a security interest in that collateral created by him as debtor." N.C. GEN. STAT. § 25-9-302(3)(b) (Supp. 1983). See *Myers*, *supra* note 2, at § 30A.03(1). Adventure was a merchant in the business of selling motor vehicles. See *supra* note 105. Clipper, however, maintained the vehicle in Clipper's own inventory. *Howerton*, 311 N.C. at 166, 316 S.E.2d at 195. The *Howerton* court therefore concluded that, before it could be enforceable, any security interest created by Adventure as debtor would have to be recorded by means of a financing statement. *Id.* at 167, 316 S.E.2d at 195. The court also relied on N.C. GEN. STAT. § 20-58.8(b) (1983): "The provisions of [the MVA] shall not apply to or affect . . . (3) A security interest in a vehicle created by a manufacturer . . . who holds the vehicle in his inventory. Such security interest shall be perfected by filing a financing statement under Article 9 of the Uniform Commercial Code." See J. WHITE & R. SUMMERS, *supra* note 1, at § 22-4.

110. N.C. GEN. STAT. § 20-58.1 (1983). For legislative considerations in the enactment of this provision, see *infra* note 127.

111. Record at 10.

ferred (albeit arguably wrongly transferred)¹¹² to Howerton, Clipper could not assert an interest in the car.¹¹³ Clipper argued instead that it could claim an interest in the installment sales contract. Clipper claimed this interest arose when the vehicle, in which Clipper had an unperfected security interest,¹¹⁴ was sold. Clipper claimed it could assert an interest in the proceeds of this sale,¹¹⁵ the installment sales contract. Finance also claimed an interest in this contract. Finance argued that because Howerton had acquired an unqualified interest in the vehicle, he could freely assign all or part of this title. Finance asserted that Howerton had assigned a security interest to Adventure by means of the installment sales contract. Finance then purchased this interest from Adventure.

The court viewed the installment sales contract as chattel paper under the UCC.¹¹⁶ Under the UCC, if Finance had no knowledge¹¹⁷ that Clipper was asserting an interest in the contract, Clipper could not prevail against Finance. If Finance knew the contract was subject to Clipper's interest, Finance would still prevail if Clipper could claim an interest only because the contract was the result of a sale of property in which Clipper had a security interest.¹¹⁸ Because this was Clipper's only claim to an interest in the contract, Finance would prevail even if Finance could be charged with knowledge of Clipper's interest. The *Howerton* court concluded, therefore, that there were no conceivable circumstances under which Clipper could assert title superior to Finance's.¹¹⁹

It is debatable whether the *Howerton* decision is in accord with the legislative policies that fostered the MVA and the UCC. The decision may conflict with broad policy goals because the facts presented to the court slipped through

112. Finance argued that Adventure's action amounted to conversion. Defendant Appellant's Brief at 5, *American Clipper Corp. v. Howerton*, 51 N.C. App. 539, 277 S.E.2d 136 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

113. See *supra* notes 104-106 and accompanying text.

114. Clipper argued that this unperfected interest arose by means of Clipper's retention of the MSO. See *Howerton*, 311 N.C. at 166-67, 316 S.E.2d at 194-95.

115. Proceeds "includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." With certain exceptions, the security interest in the collateral "continues in any identifiable proceeds including collections received by the debtor." N.C. GEN. STAT. § 25-9-306(1), (2) (Supp. 1983).

116. *Howerton*, 311 N.C. at 167, 316 S.E.2d at 195. Chattel paper "means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods." N.C. GEN. STAT. § 25-9-105(1)(b) (Supp. 1983). The court of appeals did not determine whether the installment sales contract was chattel paper, or what interests the contract created as between Howerton and Clipper. See *Howerton*, 51 N.C. App. at 545, 277 S.E.2d at 139 (1981). The installment sales contract does not appear in the record, and it is unclear on what evidence the supreme court based its finding that the contract was chattel paper.

117. Under the UCC, knowledge means actual knowledge. N.C. GEN. STAT. § 25-1-201(25) (1965).

118. Clipper might have prevailed if it had filed a financing statement, recording a separate security agreement with the contract as collateral. See Coogan, *Priorities Among Secured Creditors and the "Floating Lien"* in 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (MB) § 7.09(3)(b) (1984); Clark, *Abstract Rights Versus Paper Rights Under Article 9 of the Uniform Commercial Code*, 84 YALE L.J. 445, 450 (1974); Henson, "Proceeds" Under the Uniform Commercial Code, 65 COLUM. L. REV. 282 (1965).

119. *Howerton*, 311 N.C. at 168, 316 S.E.2d at 195. Since Clipper could assert neither title nor security interest superior to Howerton or Finance, Finance prevailed in the declaratory judgment action. *Id.* at 170, 316 S.E.2d at 196-97. The supreme court therefore reversed the court of appeals. *Id.* at 170, 316 S.E.2d at 197.

some cracks in the latticework of the statutes. For example, the 1961 amendments to the MVA declared that "a certificate of title that can be relied upon as a ready means by which all legal interests in motor vehicles may be determined would be to the public interest."¹²⁰ The vehicle in question in *Howerton*, however, was not titled in North Carolina.¹²¹ The provisions in the 1961 amendments for determining interests in untitled vehicles were rather weak; even the strengthening language added to the provisions in 1970 did not encompass all situations.¹²² No provisions yet have been made for cases in which a manufacturer fails to supply an MSO to the dealer to whom he transfers a vehicle. This situation occurs most often when, as in *Howerton*, a manufacturer consigns a car to a dealer. There is no sale or contract to sell between the manufacturer and the dealer at the time the car is transferred to the dealer. The manufacturer retains the car in his inventory. The arrangement is viewed as an offer by the manufacturer to sell the car to the dealer. When the dealer sells the car to a consumer, he may be held to have accepted the offer of the manufacturer, and is bound to pay the manufacturer.¹²³ Cases such as these are expressly removed from the purview of the MVA.¹²⁴ The MVA is silent about the means by which a consumer buying from a consignee-dealer is to learn about the manufacturer's interest in the vehicle. The provisions regarding MSOs do not state whether a transfer to a consumer from a dealer can be valid if the manufacturer has not transferred an MSO to a dealer.¹²⁵ Also, the provisions of the MVA regarding the perfection of security interests by notation on the title certificate do not ap-

120. Act of June 15, 1961, ch. 835, 1961 N.C. Sess. Laws 1134.

121. Record at 13.

122. See *supra* notes 73-74 and accompanying text (discussing provisions of 1961 amendments). The applicable UCC sections provide specifically that a purchaser of chattel paper who gives value for it takes priority over a security interest in that chattel paper if he acts without knowledge of the interest, or "which is claimed merely as proceeds . . . even though [the purchaser of the chattel paper] knows that the specific paper . . . is subject to a security interest." N.C. GEN. STAT. § 25-9-308 (1965). "The obvious intended effect of this provision is to prevent the supplier or financier of a merchant from acquiring an automatic monopoly on the chattel paper of that merchant that results from the sale of the inventory in which the supplier of financier had a security interest." Smith, *Article Nine: Secured Transactions—Perfections and Priorities*, 44 N.C.L. REV. 753, 790-91 (1966); see Coogan, *Priorities Among Secured Creditors and the "Floating Lien"* in 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (MB) (1984).

123. "A principal purpose of consignments is to finance the buyer and maintain a kind of security interest in the seller." Hawkland, *Consignment Selling Under the Uniform Commercial Code*, 67 COM. L.J. 146, 147 (1962). The mere act of consignment does not maintain a true security because the seller may lose the interest in the vehicle when it is sold to a bona fide consumer, and may have no interest in the proceeds. See *supra* notes 104-118 and accompanying text. Note also that a consignment differs from a "sale or return." In a sale or return, the buyer gets complete title to the goods, with an option to return them if unsatisfactory. The seller maintains no interest. See 2 WILLISTON, SALES § 270 (Rev. ed. 1948). The *Howerton* court found the transaction between Clipper and Adventure to be a consignment. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193.

124. "The provisions of [the MVA] shall not apply to or affect . . . (3) A security interest in a vehicle created by a manufacturer . . . who holds the vehicle in his inventory." N.C. GEN. STAT. § 20-58.1 (1983). See *supra* notes 107-110 and accompanying text.

125. "(a) Any manufacturer . . . shall . . . supply the transferee with a manufacturer's certificate of origin assigned to the transferee . . . (c) no title to a new motor vehicle acquired by a dealer under the provisions of [subsection] (a) . . . shall pass or vest until" the dealer assigns the MSO to the consumer purchaser. N.C. GEN. STAT. § 20-52.1 (1983). It is clear that the dealer cannot transfer the title the manufacturer has transferred to the dealer, unless the dealer assigns the MSO. This section is unclear about the state of title that results from the failure of a manufacturer to deliver an MSO.

ply if a manufacturer has consigned the vehicle to a dealer and maintained the vehicle in the manufacturer's own inventory.¹²⁶ In this situation, the MVA system for utilizing the title certificate (or MSO if no certificate has yet been issued) as a determinative representation of legal interests breaks down.

North Carolina, with the amendments to section 9-302 of the UCC in 1975¹²⁷ and with the *Howerton* decision, has utilized the UCC to prop up the MVA in these situations. A more equitable and efficient system, however, could be constructed by fleshing out the provisions of the MVA.

The provisions of the UCC often are inadequate to resolve disputes arising out of consignment situations such as the one in *Howerton*. In the words of two leading commentators, "the Code's handling of consignments is fraught with uncertainty, and the Code cases on the subject clear up little."¹²⁸ Much of the confusion lies in the interpretation of the UCC sections which provide that consignors may perfect security interests in consigned goods in ways other than by filing financing statements.¹²⁹ Clipper clearly did none of the things which, under the UCC, would have perfected its interest. Even had Clipper attempted perfection as the UCC consignment sections direct, however, Clipper still may not have prevailed; courts often are reluctant to allow such perfection, and cases interpreting these sections have been conflicting.¹³⁰ If the consignor chooses not to file a financing statement, the UCC provides that he can perfect his security interest by posting a sign at the consignee's premises as evidence of his interest.¹³¹ This provision certainly may help to provide notice to bona fide purchasers of consigned vehicles, but it may hinder the DMV in its efforts to centralize recordation of liens. If, on the other hand, the consignor elects to file a financing statement, the bona fide purchaser is put in jeopardy. He may not know that he must search the office of the county register of deeds, where the financing statement may be filed,¹³² to investigate possible liens on consigned vehicles. In ad-

126. *Id.* § 20-58.1.

127. These amendments were basically a compromise. The buying public has come to rely on the MVA "as the primary source of protection and information as to prior liens," while professional lenders and borrowers who deal with inventory as inventory want to retain one-stop financing, and rely solely on the UCC registration system as a recordation device for all liens. *Mack Financial Corp. v. Western Leasing, Inc.*, Bankruptcy No. B74-4082 (C-8) (D. Or. 1975) (unpublished op.), reprinted in SECURED FINANCING FOR THE TRANSPORTATION INDUSTRY 153 (PLI 1980); see also Josephson, *Financing of Trucks* in SECURED FINANCING FOR THE TRANSPORTATION INDUSTRY 41, 45-63 (PLI 1980) (discussion of most common problems arising out of motor vehicles).

128. J. WHITE & R. SUMMERS, *supra* note 1, § 22-4, at 883.

129. The North Carolina UCC provisions allow priority to the consignor's interest if the consignor files a UCC financing statement, places a sign evidencing his interest at the consignee's place of business, or establishes that the consignee is generally known to be in the business of selling the goods of others. N.C. GEN. STAT. § 25-2-326(3) (1965). The *Howerton* court found that Clipper had done none of these things. *Howerton*, 311 N.C. at 164-65, 316 S.E.2d at 193-94.

130. See J. WHITE & R. SUMMERS, *supra* note 1, § 22-4, at 883.

131. See N.C. GEN. STAT. § 25-2-326 (3)(a) (1965).

132. If the collateral which is the subject of the security interest is consumer goods, the financing statement must be filed in the county in which the debtor resides, or if the debtor is not a state resident, then in the county where the collateral is located. N.C. GEN. STAT. § 25-9-401 (1965). Consumer goods are goods bought for personal, family, or household use. *Id.* § 25-9-109. Motor vehicles purchased for personal use are consumer goods. See J. WHITE & R. SUMMERS, *supra* note 1, § 23-7, at 923.

dition, filing financing statements with the county registers of deeds undermines the centralization of lien recordation with the DMV.

Certain other provisions of the UCC may put a consignor such as Clipper at the mercy of a dishonest consignee. The consignee may transfer the consignor's entire title to a consigned vehicle.¹³³ Some courts have suggested that a consignor can curtail these risks "by audits and accounting procedures or he can refuse to knowingly expose himself to the risk with the particular dealer."¹³⁴ Many vehicles are transferred to consignees located at some distance from the consignor, however, so these procedures may be particularly burdensome.

It may be possible to relieve burdens on consignors and consumers by strengthening the provisions of the MVA. Consignors should be required to transfer an MSO to a consignee/dealer. Furthermore, the MSO should indicate the consignment arrangement and any security interest created by the arrangement. The MVA should not allow a dealer to transfer any title to such a vehicle without transfer of this MSO marked "consigned vehicle." When the consumer applies for a title certificate, he would be required to submit this MSO. The DMV thus would have a record of the security interest, and it would be noted on the certificate of title. This security interest would then be treated as other interests recorded under the MVA.

In conclusion, it seems that the *Howerton* court correctly applied the letter of the law existing at the time of the decision. This decision, however, should alert the general assembly to possible flaws in the framework of the MVA. The general assembly should take steps to shore up this framework by lessening the scope of the *Howerton* court's decision to apply the UCC over the MVA. It would be inconsistent with the policy of the state if the UCC were to be substituted for the MVA as the guide for determining all legal interests in motor vehicles. The general assembly has spent fifty years fashioning a reliable certificate of title statute. The *Howerton* decision should not be allowed to eviscerate the statute. An updating of the MVA to regulate consignment sales more strictly will ensure the continuing vitality of the MVA.

PETER JAMES MCGRATH, JR.

133. N.C. GEN. STAT. § 25-2-403(2) (1965). See *supra* notes 104-106 and accompanying text.

134. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 270, 288 N.Y.S.2d 525, 533 (1968).

***State v. Huffstetler*: Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy**

To ensure that capital punishment is imposed fairly and with reasonable consistency, North Carolina's capital punishment statute¹ requires the sentencing jury to determine whether enumerated aggravating circumstances outweigh any mitigating factors.² The North Carolina Supreme Court has explicitly declared that during the sentencing phase of a capital case any reasonable doubt regarding the submission of a proposed jury instruction concerning mitigating factors should be resolved in the defendant's favor.³ In *State v. Huffstetler*,⁴ however, the supreme court indicated that the trial judge will be afforded discretion in determining whether evidence is sufficient to instruct the jury on a proposed mitigating factor.⁵ This decision differs from the manner in which the capital punishment statutes of other states have been interpreted.⁶

David Earl Huffstetler had been having marital trouble. On the morning of January 1, 1982, he visited his mother-in-law, Edna Powell, to find out where his wife had been staying.⁷ Before arriving at Mrs. Powell's trailer Huffstetler had injected himself with a solution made from two dissolved Dilaudid pills (a highly potent painkiller) and had ingested an unknown quantity of alcohol; he had engaged in similar consumption the prior evening.⁸ After an argument concerning whether Mrs. Powell knew where Huffstetler's wife was staying, Huffstetler grabbed a frying pan and began beating Mrs. Powell.⁹ Mrs. Powell's body was found that evening; she had been beaten so violently and extensively about the

1. N.C. GEN. STAT. § 15A-2000 (1983). Based on its interpretation of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the North Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973), held that the eighth and fourteenth amendments to the United States Constitution preclude either a judge or jury from exercising discretion in imposing the death penalty. *Id.* at 439, 194 S.E.2d at 25. The court invalidated and severed the portions of the death penalty statute that granted sentencing discretion to the jury, leaving the state with a mandatory punishment of death for certain offenses. *Id.* at 444-45, 194 S.E.2d at 28. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the United States Supreme Court invalidated North Carolina's mandatory death penalty statute. The statute was constitutionally defective for three reasons: (1) evolving standards of decency were contrary to the mandatory death penalty, (2) mandatory punishment failed to remove effectively the element of arbitrary jury discretion, and (3) the statute failed to allow specific consideration of the accused's character and record. *Id.* at 288-305 (plurality opinion). Following *Woodson* the North Carolina General Assembly enacted the current capital punishment statute. See Act of May 19, 1977, ch. 406, 1977 N.C. SESS. LAWS 407 (codified at N.C. GEN. STAT. § 15A-2000 (1983)). The constitutionality of this statute was first upheld in *State v. Barfield*, 298 N.C. 306, 349-54, 259 S.E.2d 510, 537-44 (1979), *cert. denied*, 448 U.S. 907 (1980). For a fuller discussion of the history of enactment of North Carolina's current statute, see *State v. Johnson*, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-10 (1979); Comment, *Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court*, 59 N.C.L. REV. 911, 911-13 (1981).

2. N.C. GEN. STAT. § 15A-2000(b) (1983).

3. *State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 223, *cert. denied*, 459 U.S. 1056 (1982).

4. 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 105 S. Ct. 1877 (1985).

5. *Id.* at 116-17, 322 S.E.2d at 125-26.

6. See *infra* notes 72-90 and accompanying text.

7. *Huffstetler*, 312 N.C. at 99, 322 S.E.2d at 115-16.

8. *Id.*

9. *Id.* at 100, 322 S.E.2d at 116.

head, neck, and shoulders that the metal frying pan had fractured.¹⁰ After disposing of the frying pan and his bloodstained clothing, Huffstetler went to visit a friend, Alice Cantrell, with whom he stayed until his arrest two days later on January 3rd.¹¹

At the guilt determination phase of his trial, Huffstetler refused to testify or to offer evidence. After he was convicted of first degree murder, but before he was sentenced, Huffstetler admitted his guilt and was permitted to testify before the jury.¹² During the sentencing phase, he submitted the following instruction among the proposed list of mitigating factors to be considered by the jury: "That during the sentencing phase, the defendant testified under oath and admitted his role in the victim's death. That this admission of wrongdoing reflects a potential for rehabilitation." ¹³ This instruction was refused by the trial judge.¹⁴ The jury sentenced Huffstetler to death.¹⁵

On appeal the North Carolina Supreme Court held that Huffstetler had failed to produce sufficient evidence to require submission of the requested instruction. The court noted that Huffstetler had testified only after he had been convicted of first degree murder, that he originally had not wished to testify but had been persuaded to do so by his family, and that his testimony had been self-serving since he had testified as to his addiction to drugs and alcohol at the time of the murder in an attempt to show evidence of his impaired condition as a mitigating factor. Justice Exum strongly dissented because he felt the court should not determine that certain evidence is nonmitigating as a matter of law. It is the jury's function, Exum wrote, to weigh all evidence of mitigating circumstances:

A jury could reasonably find that defendant's admission of his guilt was a first step toward recognition of his wrongdoing and his ultimate potential rehabilitation. . . . The question is not whether this Court thinks the defendant's admission is or is not a mitigating circumstance. The question is whether a jury could reasonably find it to be one.¹⁶

Justice Exum's dissenting opinion relied heavily on the standards established by the United States Supreme Court concerning evidence of mitigating circumstances in capital cases. The United States Supreme Court in *Lockett v. Ohio*¹⁷ struck down Ohio's capital punishment statute because the statute permitted the sentencing judge to consider only three enumerated mitigating factors.¹⁸ Under the Ohio statute, other circumstances pertaining to the defend-

10. *Id.* at 98, 322 S.E.2d at 115. Fragments of the frying pan were found near the victim's head. *Id.*

11. *Id.* at 100, 322 S.E.2d at 116.

12. *Id.* at 99, 322 S.E.2d at 115.

13. *Id.* at 116, 322 S.E.2d at 125.

14. *Id.*

15. *Id.* at 101, 322 S.E.2d at 116.

16. *Id.* at 122-23, 322 S.E.2d at 128-29 (Exum, J., dissenting).

17. 438 U.S. 586 (1978).

18. Upon the finding of one of the specified aggravating circumstances, the Ohio statute required the trial judge to determine whether one of the following three mitigating factors existed:

(1) The victim of the offense induced or facilitated it.

ant's character, record, and offense could not be considered. The Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁹ Individualized sentencing, the Court reasoned, is an essential element in the equitable imposition of capital punishment. Without the sentencer's consideration of all relevant mitigating circumstances, "guided discretion"²⁰ in the imposition of the death penalty would fail. In a footnote, the Court emphasized that its decision would not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."²¹

The standard established by the Supreme Court in *Lockett* was applied one year later by the same Court in *Green v. Georgia*.²² In *Green* the Court held that during the sentencing phase of a capital case the hearsay rule could not prevent introduction of the testimony of a third party to whom a confession was made by Green's codefendant. This confession absolved Green of any part in the murder. *Green*, therefore, stands for the proposition that state rules of evidence cannot bar proof of relevant mitigating circumstances during the sentencing phase of a capital case.

Although *Lockett v. Ohio* involved a statute that failed to permit consideration of all relevant mitigating factors, the Supreme Court has extended the rationale of *Lockett* to a sentencing judge's exclusion, as a matter of law, of relevant evidence. In *Eddings v. Oklahoma*²³ the sentencing judge believed that he was precluded from considering the sixteen year-old defendant's troubled youth because the defendant was capable of comprehending the difference between right and wrong. The Supreme Court found the sentencer's failure to consider all relevant evidence reversible error: "[S]entencer[s] . . . may determine the weight to be given relevant mitigating evidence. But they may not give

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Id. at 607 (quoting OHIO REV. CODE ANN. § 292.04(B) (1975)). If the trial judge failed to find the existence of one of these mitigating factors, the Ohio statute required that the death penalty be imposed. *Id.*

19. *Id.* at 604.

20. The common denominator among the concurring opinions of the Supreme Court justices in *Furman v. Georgia*, 408 U.S. 238 (1972), was a belief that juries should not have arbitrary discretion in imposing capital punishment. See *id.* at 253 (Douglas, J., concurring) ("[The statutes before the Court leave] to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned."); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring). In *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976), the case invalidating North Carolina's mandatory death penalty statute, the United States Supreme Court ruled: "North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die." *Id.*

21. *Lockett*, 438 U.S. at 604 n.12.

22. 442 U.S. 95 (1979) (per curiam).

23. 455 U.S. 104 (1982).

it no weight by excluding such evidence from their consideration.”²⁴

North Carolina's capital punishment statute conforms to the requirements of *Lockett* by providing in its list of enumerated factors that the jury is to consider: “[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value.”²⁵ The North Carolina statute, which to a large extent follows the Model Penal Code,²⁶ was enacted prior to the *Lockett* decision.

Upon convicting a defendant for first degree murder,²⁷ the trial court is required under North Carolina's capital punishment statute to conduct a separate sentencing proceeding before a jury to determine whether the death penalty should be imposed.²⁸ Except in extraordinary circumstances the sentencing phase is to be tried before the same jury that sat during the guilt determination phase.²⁹ During the sentencing proceeding both the State and the defendant are permitted to present evidence and argument concerning the imposition of the death penalty.³⁰ The State must prove the existence of an aggravating factor beyond a reasonable doubt;³¹ the defendant, however, need only prove the existence of a mitigating factor by a preponderance of the evidence.³² The jury then determines whether any aggravating or mitigating circumstances exist.³³ Following this determination the jury is to weigh all mitigating circumstances against the aggravating factors. Should this balance fall in favor of the State, the jury is required to impose capital punishment.³⁴ Although the jury may con-

24. *Id.* at 114-15.

25. N.C. GEN. STAT. § 15A-2000(f)(9) (1983).

26. MODEL PENAL CODE § 201.66 (Tent. Draft No. 9 (1959)); see *State v. Johnson* (Johnson I), 298 N.C. 47, 60-63, 257 S.E.2d 597, 608-10 (1979).

27. See N.C. GEN. STAT. § 14-17 (1981) (definition of first degree murder).

28. *Id.* § 15A-2000(a)(1) (1983). The trial judge is permitted to impose a life sentence only when (1) the prosecution declares it has no evidence of an aggravating factor, (2) the evidence of all aggravating factors is insufficient as a matter of law, or (3) the jury is unable to agree unanimously upon sentencing within a reasonable time. Comment, *Vague and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute*, 16 WAKE FOREST L. REV. 765, 773-74 (1980).

29. See N.C. GEN. STAT. § 15A-2000(a)(2) (1983).

30. *Id.* § 15A-2000(a)(4).

31. *Id.* § 15A-2000(c)(1).

32. *State v. Johnson* (Johnson I), 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). The court in *Johnson I* also stated that the judge must provide a peremptory instruction when all of the evidence, “if believed, tends to show that a particular mitigating circumstance does exist.” *Id.* The trial judge need not give a peremptory instruction when there is conflicting evidence. *State v. Smith*, 305 N.C. 691, 704-07, 292 S.E.2d 264, 272-74, *cert. denied*, 459 U.S. 1056 (1982). When the defendant fails to offer any evidence as to the existence of a mitigating circumstance, the defendant is not entitled to an instruction related to that circumstance. *State v. Taylor*, 304 N.C. 249, 277, 283 S.E.2d 761, 779 (1981), *cert. denied*, 103 S. Ct. 3552 (1983); *State v. Hutchins*, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981) (“It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance. . .”).

33. N.C. GEN. STAT. § 15A-2000(b) (1983). Although § 15A-2000(c) requires the jury to return in writing its determination of those aggravating circumstances that it finds beyond a reasonable doubt, there is no similar requirement that mitigating circumstances be returned in writing. The North Carolina Supreme Court has declined to interpret the statute as requiring that the mitigating factors found be returned in writing. *State v. Rook*, 304 N.C. 201, 231-32, 283 S.E.2d 732, 750-51 (1981); *cert. denied*, 455 U.S. 1038 (1982).

34. See N.C. GEN. STAT. § 15A-2000(b) (1983). In *State v. Williams*, 308 N.C. 47, 78, 301 S.E.2d 335, 354, *cert. denied*, 104 S. Ct. 202 (1983), the court stated that the proper instruction pertaining to this balancing role of the jury is:

Do you find beyond a reasonable doubt that the aggravating circumstance or circum-

sider only the aggravating circumstances enumerated in the statute,³⁵ no such restriction exists with regard to mitigating factors.³⁶ The North Carolina Supreme Court has defined a mitigating factor as:

a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of . . . murder, but which may be considered as extenuating, or reducing the moral culpa-

stances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

35. N.C. GEN. STAT. § 15A-2000(e) (1983) provides that only the following aggravating circumstances may be considered:

- (1) The capital felony was committed by a person lawfully incarcerated.
- (2) The defendant had been previously convicted of another capital felony.
- (3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.
- (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (6) The capital felony was committed for pecuniary gain.
- (7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his duty.
- (9) The capital felony was especially heinous, atrocious, or cruel.
- (10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- (11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against person or persons.

36. Section 15A-2000(f) provides that mitigating circumstances include, but are not limited to, the following:

- (1) The defendant has no significant history of prior criminal activity.
- (2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
- (3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
- (4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
- (5) The defendant acted under duress or under the domination of another person.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
- (7) The age of the defendant at the time of the crime.
- (8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
- (9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

N.C. GEN. STAT. § 15A-2000(f) (1983). Trial courts have been admonished by the North Carolina Supreme Court not to deviate from the wording of both aggravating and mitigating factors, except when instructing on additional mitigating factors. *State v. Williams* (Douglas), 308 N.C. 47, 77, 301 S.E.2d 335, 354, cert. denied, 104 S. Ct. 202 (1983).

bility of the killing, or making it less deserving of the extreme punishment than other first degree murders.³⁷

North Carolina's capital punishment statute has been criticized for not clearly defining "the proper scope and character of evidence to be received."³⁸ The North Carolina Supreme Court initially clarified the statute's ambiguity by declaring that the rules of evidence are not altered during the sentencing phase.³⁹ The court in later decisions retreated from this statement and granted defendants broad rights in presenting evidence to the jury.⁴⁰ Defendants facing the death penalty also were granted broad rights in instructing the jury as to proposed mitigating factors. The rationale for this broad interpretation of evidentiary rules during the sentencing phase of a capital case is that the jury, which is vested with the sole power under North Carolina law to determine whether aggravating factors outweigh mitigating factors, should be presented with and properly instructed on all evidence potentially affecting the decision to impose death.⁴¹ In a recent line of cases, however, the court has applied a more stringent standard that limits a defendant's right to present evidence and to submit proposed instructions to the jury.⁴²

In *State v. Cherry*⁴³ the North Carolina Supreme Court reviewed the standard for admissibility of evidence of mitigating factors. The court held that evidence concerning the general nature of the death penalty was irrelevant to sentencing; therefore, such evidence was properly excluded by the trial judge.⁴⁴ The court noted that the proffered evidence did not refer to the defendant's character or record, or to circumstances of the charged offense as required by *Lockett*. Referring to the language of the statute that any evidence having "probative value may be received,"⁴⁵ the court declared that "[t]he language of this statute does not alter the usual rules of evidence or impair the trial judge's power to rule on the admissibility of evidence."⁴⁶ Although a state court would not be precluded from restricting the admission of irrelevant evidence during the sentencing phase, a restriction on the admissibility of evidence as broad as that enunciated in *Cherry* was invalidated by the United States Supreme Court in

37. *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981).

38. Comment, *supra* note 28, at 775.

39. See *infra* notes 43-46 and accompanying text.

40. See *infra* notes 48-50 and accompanying text.

41. See *infra* notes 52-53 and accompanying text.

42. See *infra* notes 61-71 and accompanying text.

43. 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

44. *Cherry* sought to introduce the affidavit of a newspaper reporter that innocent people sometimes were executed, the affidavit of a convicted murderer who had been successfully rehabilitated, and evidence that capital punishment lacked deterrent effect. *Id.* at 97, 257 S.E.2d at 559; see also *State v. Williams* (Larry), 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056 (1982) (evidence of plea bargaining agreement between State and codefendant was irrelevant and properly excluded as mitigating factor); cf. *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983) (State's request that jury impose death penalty as a deterrent was improper, but was not error because defendant failed to object).

45. N.C. GEN. STAT. § 15A-2000(a)(3) (1983).

46. *Cherry*, 298 N.C. at 98, 257 S.E.2d at 559.

Green v. Georgia.⁴⁷

In *State v. Pinch*⁴⁸ the North Carolina Supreme Court clarified the statements made in *Cherry* concerning the admissibility of evidence. In a retreat from the wording of *Cherry*, the court explained the extent to which normal rules of admissibility were to be applied during the sentencing phase of capital cases; the trial judge may, in his discretion, exclude "repetitive or unreliable evidence or that lacking an adequate foundation."⁴⁹ Apparently the court never intended that the state's rules of evidence (beyond those pertaining to relevancy) be used to exclude mitigating circumstances during the sentencing phase. The court further solidified this position by emphatically declaring: "[C]ommon sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice. . . ."⁵⁰ Reversible error in the failure to present to the jury a mitigating factor, however, would be found only when (1) the factor was one that the jury might reasonably have found to have mitigating value, (2) sufficient evidence of the existence of that factor had been offered, and (3) the exclusion of this evidence had resulted in ascertainable prejudice.⁵¹

In *State v. Huffstetler* the defendant was allowed to testify before the jury, but his proposed instruction pertaining to his potential for rehabilitation as a mitigating factor was rejected. Under North Carolina law, a proposed instruction on a mitigating factor must be submitted to the jury when that instruction is supported by the evidence and relates to the defendant's character or prior record, or to circumstances of the offense;⁵² "[the] legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000(f)(9), be on an equal footing before the jury."⁵³ Whether the United States Supreme Court decision in *Lock-*

47. 442 U.S. 95 (1979) (per curiam).

48. 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056 (1982).

49. *Id.* at 19, 292 S.E.2d at 219. The court commented on relevancy again in *State v. Silhan*, 302 N.C. 223, 245, 275 S.E.2d 450, 468 (1981) ("Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue.").

50. *Pinch*, 306 N.C. at 27, 292 S.E.2d at 223.

51. *Id.* at 27, 292 S.E.2d at 223-24.

52. *State v. Johnson* (Johnson I), 298 N.C. 47, 74, 257 S.E.2d 597, 617 (1979). Although *Johnson I* requires that any relevant circumstance must be submitted to the jury upon a defendant's timely request, the North Carolina Supreme Court has held that when a proper request is not made, failure to submit the circumstance to the jury is not error. *State v. McDougall*, 308 N.C. 1, 24-25, 301 S.E.2d 308, 322-23 (when proper request is not made, trial court may in its discretion list only the enumerated mitigating circumstances), cert. denied, 104 S. Ct. 197 (1983); *State v. Goodman*, 298 N.C. 1, 34, 257 S.E.2d 569, 590 (1979) ("[T]he court is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value."). Even when a proper request is made, however, a mitigating circumstance need not be submitted to the jury if the existence of this circumstance would be contrary to a conclusion made during the guilt determination phase. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (because defendant was convicted of murder and breaking and entering with intent to commit larceny, requested instruction during sentencing concerning intoxication would be contrary to previous determination that defendant had the specific intent to commit larceny), cert. denied, 104 S. Ct. 202 (1983). In *State v. Huffstetler* defendant had made a proper request to instruct the jury as to the mitigating factors requested for submission. *Huffstetler*, 312 N.C. at 121, 322 S.E.2d at 128 (Exum, J., dissenting).

53. *Johnson I*, 298 N.C. at 74, 257 S.E.2d at 617.

ett mandates that the jury be *instructed* on all mitigating factors pertaining to the defendant's character, record, and offense has not yet been resolved. Currently, the federal courts of appeals are in conflict on this issue. The United States Court of Appeals for the Fourth Circuit has held that failure to instruct the jury as to a mitigating factor may constitute error under state law, but a constitutional violation occurs only if the defendant is prevented from presenting mitigating evidence.⁵⁴ The United States Court of Appeals for the Fifth Circuit has held that state courts are constitutionally required to give clear instructions on mitigating factors in capital cases.⁵⁵

Two cases, *State v. Brown*⁵⁶ and *State v. Stokes*,⁵⁷ exemplify the approach taken by the North Carolina Supreme Court in determining whether the defendant has presented evidence sufficient to support a jury instruction on the proposed mitigating factor. In *Brown* defendant requested that his failure to act in a calculated manner in killing his victim be submitted to the jury as a mitigating factor. During the guilt determination phase the state had presented evidence that defendant carried the murder weapon (a knife) from his home to the murder scene,⁵⁸ which tended to discredit defendant's assertion that he had not acted in a calculated manner. Although defendant presented virtually no evidence pertaining to the requested instruction, the court rested its decision on the grounds that it would be beyond reason to speculate that defendant acted with premeditation, but had not acted in a calculated manner.⁵⁹ Defendant had no right to receive an instruction on a mitigating factor that, if believed, would require the jury to engage in unreasonable, fanciful speculation.

The requested instruction considered by the court in *Stokes* was supported only by minimal evidence, but a finding in the defendant's favor by the jury would not have required an exercise in unreasonable speculation. Although *Stokes* had been adjudged competent to stand trial, he presented evidence showing he had been treated at the age of ten at a mental health center where he was diagnosed as having "unsocialized aggressive behavior."⁶⁰ The defense also submitted evidence that *Stokes* had an IQ of 63. Although the weight of the evidence was questionable given the length of time between his treatment at age ten and the date of the homicide, the court held that the jury would not have been acting without reason if it had found that the defendant was under the influence

54. *Hutchins v. Garrison*, 724 F.2d 1425, 1436-37 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 750 (1984); *see also Barfield v. Harris*, 540 F. Supp. 451, 472 (E.D.N.C. 1982) ("There was no constitutional violation because the jury was not precluded from considering non-statutory mitigating factors."), *aff'd*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2401 (1984).

55. *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982); *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1973); *see also Westbrook v. Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983) ("We interpret *Lockett v. Ohio* and *Gregg v. Georgia* as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of . . . evidence."). The court in *Westbrook*, however, held that the defendant's trial had not been fundamentally unfair. *Id.* at 1497.

56. 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080 (1982).

57. 308 N.C. 634, 304 S.E.2d 184 (1983).

58. *Brown*, 306 N.C. at 178-79, 293 S.E.2d at 587.

59. *Id.* at 178, 293 S.E.2d at 586.

60. *Stokes*, 308 N.C. at 654, 304 S.E.2d at 196.

of an emotional disturbance at the time he committed the homicide. The North Carolina Supreme Court, therefore, reversed the trial court because it had failed to present the proposed instruction to the jury. In both *Stokes* and *Brown* the court did not undertake to weigh the evidence before it, but rather concentrated on what a jury reasonably could have found.

In three other recent North Carolina cases, the court weighed the credibility of the proposed evidence instead of determining whether such evidence had probative value. The court in these cases established a minimum (though unstated) requirement for the sufficiency of evidence necessary for the defendant to receive a requested instruction on a mitigating factor.

In *State v. Moose*⁶¹ the North Carolina Supreme Court held, on facts very similar to those in *State v. Stokes*—defendant presented minimal evidence concerning psychiatric disorders—that defendant was properly denied an instruction concerning emotional disturbance as a mitigating factor. The defense in *Moose* presented testimony of a forensic psychiatrist who classified defendant as having “a mixed personality disorder” which was manifested by his inability to deal adequately with frustrations which led to outbursts of temper.”⁶² Defendant also was shown to have a history of repeated alcohol abuse. Despite the expert testimony concerning defendant’s emotional disorders, the court held that the evidence weighed in favor of the State’s theory that the defendant merely had “a penchant for alcohol” and a bad temper: “[the defendant’s] evidence falls short of that necessary to support the submission of G.S. § 15A-2000(f)(2), that the defendant was under the influence of mental or emotional disturbance when he murdered [the deceased].”⁶³ The trial judge, according to Justice Meyer’s majority opinion, correctly instructed the jury on intoxication as a mitigating circumstance; defendant, however, had failed to come forward with the necessary quantum of evidence concerning an emotional disturbance at the time of the homicide, so a jury instruction on this mitigating factor was properly refused.

In *State v. Craig*⁶⁴ defendants requested that the trial court submit as a mitigating factor their willingness to undergo a polygraph examination. The supreme court, affirming the decision not to submit the requested mitigating factor, responded that defendants’ willingness to take a polygraph examination was wholly self-serving and, therefore, was not a relevant factor to be submitted to the jury. Supporting its view of the evidence, the court explained that the State, during the course of its investigation, never asked defendants to take a polygraph examination. Defendants’ evidence, therefore, did not show a willingness to cooperate with the police. Justice Exum dissented, stating that a defendant’s offer to take a polygraph examination during the investigatory stages of a criminal case is a “circumstance relating to . . . character which the jury might

61. 310 N.C. 482, 313 S.E.2d 507 (1984).

62. *Id.* at 498-99, 313 S.E.2d 518.

63. *Id.* at 499, 313 S.E.2d at 518.

64. 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 104 S. Ct. 263 (1983).

reasonably deem to have mitigating value.”⁶⁵ Justice Exum noted that a polygraph examination might have assisted the investigation of the homicide.

In *State v. Boyd*⁶⁶ the court again embarked on a path of weighing the evidence before it. The trial court excluded the testimony of one of defendant's witnesses, Dr. Jack Humphrey, a criminologist and university professor who would have testified concerning his scientific study of inmates. Dr. Humphrey's study tended to show that the act of killing a family member or loved one is essentially an act of self-destruction.⁶⁷ The defendant sought to use this testimony to draw together all other mitigating evidence into a unified theory—“a unified whole which explained the apparent contradiction of killing the person the defendant loved most.”⁶⁸ The court, rejecting the relevancy of Dr. Humphrey's testimony, began by attacking the report as lacking comprehensiveness and having “questionable” scientific value as a mitigating circumstance.⁶⁹ The court balanced the defendant's claim concerning the reliability of the proposed evidence against the contrary assertions of the State: “[The defendant's evidence] would not, *we believe*, have added credibility to any of the individual mitigating factors which were supported by the evidence and considered by the jury.”⁷⁰ Justice Exum rejoined with a sharp criticism of the decision: “That an expert's opinions may be ‘questionable’ has never been a ground for excluding them from evidence. It goes to the weight not the admissibility of expert testimony.”⁷¹

Unlike the approach taken by the North Carolina Supreme Court in these three cases, the state supreme courts of Georgia, Florida, and—to a lesser extent—Texas have interpreted their respective capital punishment statutes as creating a permissive standard of admissibility when considering mitigating evidence. This permissive standard is based on the premise that the potential harm resulting from restricting the information which the jury may consider outweighs the harm that may result from repetitive and time consuming presentation of evidence. If the defendant's evidence is of marginal probative value, the greatest harm that could occur from the presentation of that evidence would be that the jury would decline to give such evidence any weight, and that the time required for its introduction would be wasted. The harm that could occur from the *exclusion* of the marginally probative evidence would be of greater consequence. When the jury is balancing aggravating circumstances against mitigating factors, even evidence considered by a trial judge to be of marginal probative value has the potential to tip the scales of this balancing process on behalf of the defendant and to lead the jury to conclude that the death penalty is not appropriate for this defendant when *all* the evidence is considered.

65. *Id.* at 469, 302 S.E.2d at 754 (Exum, J., dissenting).

66. 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 105 S. Ct. 2052 (1985).

67. *Id.* at 414-15, 319 S.E.2d at 195.

68. *Id.* at 419, 319 S.E.2d at 197.

69. *Id.* at 421, 319 S.E.2d at 198-99.

70. *Id.* at 422, 319 S.E.2d at 199 (emphasis added).

71. *Id.* at 437, 319 S.E.2d at 208 (Exum, J., dissenting).

The Georgia Supreme Court has interpreted its statute⁷² as requiring a much broader degree of admissibility than that imposed by *Lockett*. Chief Justice Burger praised the broad rules of admissibility created by the Georgia statute in *Gregg v. Georgia*:⁷³

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered. . . . So long as the evidence introduced and the arguments made . . . do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.⁷⁴

In two cases⁷⁵ the Georgia Supreme Court has allowed relatives of the defendant to testify concerning their love for the defendant and their wish not to see the defendant executed: "We are unwilling to foreclose a defendant seeking to avoid the imposition of the death penalty from appealing to the mercy of the jury by having his parents testify briefly to their love for him."⁷⁶ This broad interpretation of the Georgia statute is clearly reflected in *Brooks v. State*:⁷⁷

This court is of the opinion that evidence as to mitigation should not necessarily be confined to the strict rules of evidence. The trial court should exercise a broad discretion in allowing *any* evidence reasonably tending toward mitigation.⁷⁸

The only restriction placed on this broad definition of relevancy by the Georgia Supreme Court is that the proposed evidence must pertain to the particular defendant, rather than to the death penalty in general. Such evidence as descriptions of executions and testimony concerning religious theology has been ruled inadmissible because it lacks relevancy.⁷⁹

The Florida Supreme Court also has interpreted its statute⁸⁰ liberally in determining the admissibility and relevancy of evidence during the sentencing phase of a capital case:

In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. . . . There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence.⁸¹

72. GA. CODE ANN. § 17-10-30 (1981).

73. 428 U.S. 153 (1976).

74. *Id.* at 203-04.

75. *Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

76. *Cofield*, 247 Ga. at 112, 274 S.E.2d at 542.

77. 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated on other grounds*, 446 U.S. 961 (1980).

78. *Id.* at 584, 261 S.E.2d at 387.

79. *See Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980).

80. FLA. STAT. ANN. § 921.141 (1982 & Supp. 1984).

81. *Alvord v. State*, 322 So. 2d 533, 538-39 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976). The trial judge may consider information that neither the State nor the defendant attempted to introduce

Due to the broad rules of admissibility under Florida law, there is a paucity of cases in which evidence of a mitigating factor has been excluded by the trial court as inadmissible.⁸² This sparsity of cases suggests that, with regard to questions of relevancy, the Florida trial bench tends to err in favor of the defendant. Although the Florida Supreme Court frequently is confronted with defendants arguing to have the existence of a mitigating factor determined as a matter of law,⁸³ cases in which the court must decide whether proffered evidence was improperly rejected as irrelevant are rare. The court has had occasion to rule that the trial court's exclusion of the record of a plea bargaining agreement between the State and the defendant's accomplice was reversible error.⁸⁴ The court also has found reversible error when a psychiatrist's evaluation of the defendant was rejected as irrelevant.⁸⁵

The Texas Court of Criminal Appeals has interpreted Texas' capital punishment statute⁸⁶ as allowing the trial judge broad discretion in determining the relevancy and admissibility of evidence during the sentencing phase. This interpretation of the statute is based upon its wording: "In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence."⁸⁷ By including this provision in the Texas statute, the legislature "intended for sentencing evidence in a capital murder case to be as complete as possible."⁸⁸ The Texas statute, therefore, should be interpreted as allowing the trial judge broad discretion in admitting evidence but requiring greater restraint in the exclusion of evidence.⁸⁹ Generally, the Texas trial courts have excluded mitigating evidence offered by a defendant only when such evidence pertained to the defendant's early family history.⁹⁰

The North Carolina Supreme Court should follow the precedent set by Georgia, Florida, and Texas and apply a nonrestrictive definition of relevancy

as relevant to sentencing. See *Sawyer v. State*, 313 So. 2d 680 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976).

82. Cf. *Boyd & Logue, Developments in the Application of Florida's Capital Felony Sentencing Law*, 34 U. MIAMI L. REV. 441, 463 (1980) ("court's approach to what is relevant should be broad rather than narrow").

83. See, e.g., *Daugherty v. State*, 419 So. 2d 1067 (Fla. 1982), *cert. denied*, 459 U.S. 1228 (1983); *Riley v. State*, 413 So. 2d 1173 (Fla. 1982), *cert. denied*, 459 U.S. 981 (1983); *Smith v. State*, 407 So. 2d 894 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982); *Lucas v. State*, 376 So. 2d 1149 (Fla. 1979).

84. *Messer v. State*, 330 So. 2d 137 (Fla. 1976).

85. *Simmons v. State*, 419 So. 2d 316 (Fla. 1982).

86. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981).

87. *Id.* art. 37.071(a).

88. *Crump, Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 565 (1977).

89. Cases in which the trial judge has exercised this broad discretion in favor of admitting evidence on behalf of the State abound. See, e.g., *Sanne v. State*, 609 S.W.2d 762 (Tex. Crim. App. 1980), *cert. denied*, 452 U.S. 931 (1981); *McManus v. State*, 591 S.W.2d 505 (Tex. Crim. App. 1979); *Rumbaugh v. State*, 589 S.W.2d 414 (Tex. Crim. App. 1979); *Hammett v. State*, 578 S.W.2d 699 (Tex. Crim. App. 1979), *cert. withdrawn*, 448 U.S. 725 (1980). This broad discretion has been used to limit the defendant's evidence in a few cases. For a case in which such discretion has been erroneously used to exclude the defendant's evidence, see *Robinson v. State*, 548 S.W.2d 63 (Tex. Crim. App. 1977) (error for trial court to exercise discretion to exclude testimony of psychologist on behalf of defendant).

90. *Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1400-01 (1977).

when examining the mitigating evidence offered by the defendant in a capital case. The wording of North Carolina's capital punishment statute indicates that the legislature intended for the courts to apply a liberal standard when determining whether evidence offered by a defendant should be excluded or a supportive jury instruction denied. The statute provides that "[a]ny evidence which the court deems to have probative value may be received."⁹¹ The trial judge is required to instruct the jury that it must consider any mitigating circumstances which may be supported by the evidence.⁹² Among the list of enumerated mitigating factors, the jury is told that it is to consider any other circumstances that would weigh against the death penalty.⁹³ Further, the legislature has specifically provided that a liberal standard be applied in noncapital cases.⁹⁴

The North Carolina Supreme Court, in the well-reasoned decision of *State v. Pinch*,⁹⁵ indicated that any reasonable doubt concerning the submission of a mitigating instruction to the jury should be resolved in the defendant's favor. In a recent line of cases, however, the court has abandoned the reasoning of *Pinch* in favor of stricter rules of relevancy. The court should reestablish its prior position that any instruction not requiring the jury to engage in unreasonable speculation must be submitted upon a proper request by the defendant.

When the jury is left without standards in imposing the death penalty, such punishment constitutes cruel and unusual punishment in violation of the eighth amendment.⁹⁶ Death is a unique punishment requiring the most exacting precautions against its arbitrary imposition. Failure to allow the jury in a capital case to examine all available information and to determine the weight to be given this evidence risks imposing the death penalty without appropriate standards. Similarly, when the jury is not properly instructed on the evidence offered by the defendant to mitigate the offense, an element of arbitrariness is infused into the jury's determination. The very purpose of requiring the jury to consider mitigating factors is to give "the sentencer all the information which might be necessary to determine whether the defendant should be singled out for this extremely rare penalty."⁹⁷ This purpose is defeated when the information the jury is to receive is limited.

The North Carolina Supreme Court's decision in *State v. Huffstetler*⁹⁸ indicates that it is permissible for trial courts to weigh the evidence in determining whether a proposed instruction in a capital case is supported by the defendant's evidence. The weighing of evidence, however, is a function that North Carolina's capital punishment statute reserves exclusively for the jury. In a capital case the defendant's life hangs in the balance; the court should admit all evi-

91. N.C. GEN. STAT. § 15A-2000(a)(3) (1983).

92. *Id.* § 15A-2000(b).

93. *Id.* § 15A-2000(f)(9). This subsection of the statute is particularly significant in that the legislature required the jury to consider all possible mitigating evidence before such a requirement was constitutionally imposed.

94. *Id.* § 15A-1334(b) ("Formal rules of evidence do not apply at the [sentencing] hearing.").

95. 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982).

96. U.S. CONST. amend. VIII.

97. Kaplan, *Evidence in Capital Cases*, 11 FLA. ST. U. L. REV. 369, 372 (1983).

98. 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 105 S. Ct. 1877 (1985).

dence from which the jury could reasonably find that the defendant's moral culpability has been reduced, even if the evidence has minimal probative value. To prevent confusion of the issues, however, the court should only admit evidence pertaining specifically to the defendant; the court should exclude evidence pertaining to the death penalty in general. Any other restriction, under the guise of relevancy, prevents the jury from making a fair and fully informed decision as it determines which defendants are to live and which are to die.

CHRISTOPHER GRAFFLIN BROWNING, JR.

***State v. Wilson*: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases**

In *State v. Wilson*¹ the North Carolina Supreme Court held that a prosecutor may consider the victim's family's feelings about the case when deciding whether to seek the death penalty against an alleged murderer. A prosecutor's decision to pursue capital punishment can be overturned only if he used an unjustifiable standard such as "race, religion, or other arbitrary classification."² Absent abuse of prosecutorial discretion, the case may proceed toward a death conviction.

The current status of capital punishment in the United States is founded on the 1972 landmark case *Furman v. Georgia*.³ In *Furman* a majority of the United States Supreme Court agreed that the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.⁴ As a result, virtually every existing capital punishment statute was invalidated.⁵ The death penalty, however, was not found unconstitutional per se; *Furman* invalidated only those procedures that allowed capital punishment to be administered in an arbitrary or capricious manner.⁶ Many of the statutes were rewritten, and in *Gregg v. Georgia*⁷ the Supreme Court approved a procedurally modified capital punishment statute.⁸

In *Gregg* the Supreme Court expressly rejected the argument that arbitrary capital convictions would result from prosecutorial discretion.⁹ Nevertheless, the procedural fairness mandated in the *Furman* opinions¹⁰ conflicts with the

1. 311 N.C. 117, 316 S.E.2d 46 (1984).

2. *Id.* at 124, 316 S.E.2d at 51 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

3. 408 U.S. 238 (1972) (per curiam).

4. *Id.* at 239-40 (per curiam). "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings." *Id.* All nine justices expressed their views on capital punishment in separate opinions, but a majority of the Court agreed that the Georgia capital punishment statute violated the eighth and fourteenth amendments.

5. *Id.* at 417 & n.2 (Powell, J., dissenting). Forty states had capital punishment statutes; of these, 39 were invalidated. Rhode Island's capital punishment statute imposed the death penalty for murder committed by a life term prisoner; it was the only valid capital punishment statute after *Furman*.

6. "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

7. 428 U.S. 153 (1976).

8. *Id.* at 207. See also *infra* note 46 and accompanying text (the statute provided for separate guilt and sentencing stages of the trial, required the finding of specific aggravating factors to impose the death penalty, and made appeal automatic).

9. *Id.* at 199. See also *infra* note 47 and accompanying text (the statutory requirements in *Gregg* pertained only to the sentencing authority).

10. The Court in *Gregg* read *Furman* to require only that capital punishment statutes include sentencing guidelines that compel juries to consider the aggravating and mitigating circumstances of the crime in deciding whether to impose the death penalty. The separate opinions in *Furman*, however, were more result oriented. The justices did not pinpoint certain stages of prosecution as problematic; they objected to the arbitrary and discriminatory results of capital punishment as it existed

arbitrary and prejudicial effects that can occur if the prosecutor considers the desire of the murder victim's family to seek the death penalty against the defendant. Furthermore, Justice White, representing three concurring votes in *Gregg*, noted, "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts."¹¹ *State v. Wilson*, however, presented a case in which the prosecuting attorney was motivated by other than the legal considerations Justice White believed should be imputed to prosecutors.

On October 22, 1981, Luther R. Wilson, Jr. burglarized two Randolph County homes.¹² Wilson broke into the first house and stole a gun, two watches, and a small amount of money. In plain view of neighbors, he then proceeded to the home of Leonard A. Teel, whose presence apparently surprised Wilson. They may have fought.¹³ In any event, Wilson was seen by the same neighbors as he escaped with a ski mask pulled over his face and a "long gun in his left hand."¹⁴ The homeowner was not so lucky: dead or dying, Teel lay in his house for two days until his body was discovered. Wilson was convicted of armed robbery and first degree murder. The jury recommended that he be sentenced to life imprisonment.¹⁵

in 1972. Justice Douglas noted: "'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.'" *Furman*, 408 U.S. at 249 (Douglas, J., concurring) (quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)). Referring to the cruel and unusual punishment clause, Douglas held the eighth amendment to "require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spitefully to unpopular groups." *Id.* at 256 (Douglas, J., concurring). Justice Brennan compared the imposition of the death penalty to a lottery system. "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily." *Id.* at 293 (Brennan, J., concurring). Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice White objected that "no meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). Justice Marshall noted: "Regarding discrimination, it has been said that '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb. . . .'" *Id.* at 364 (Marshall, J., concurring) (quoting *Hearings on S. 1760 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. ii (1968)). Justice Powell conceded that if a minority could "demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established." *Id.* at 449 (Powell, J., dissenting). Powell, however, rejected discrimination arguments as "hypothetical assumptions that may or may not be realistic." *Id.* at 444 (Powell, J., dissenting).

11. *Gregg*, 428 U.S. at 225 (White, J., concurring).

12. *Wilson*, 311 N.C. at 120, 316 S.E.2d at 49.

13. Two witnesses testified that on different occasions defendant told them that he had broken into a man's house with the intention of robbing him and subsequently had to kill him after the man pointed a gun at him. *Id.* at 121, 316 S.E.2d at 49. An unexpected conflict between a defendant and the victim may be considered by the jury as a mitigating circumstance in deciding whether to impose the death penalty. N.C. GEN. STAT. § 15A-2000(f)(9) (1977).

14. *Wilson*, 311 N.C. at 120, 316 S.E.2d at 49.

15. *Id.* at 119, 316 S.E.2d at 48. "[The] jury found defendant guilty of robbery with a firearm, guilty of murder in the first degree based upon the felony-murder rule, and not guilty of murder in the first degree based upon premeditation and deliberation." *Id.*

Wilson appealed, arguing that the trial judge erred by refusing to reduce the crime charged to second degree murder.¹⁶ The motion to reduce the crime had been denied at a pre-trial hearing at which the defense attorney tried to establish that most defendants charged with first degree murder in Randolph County had been offered a chance to plead guilty to a lesser offense.¹⁷ The prosecuting attorney testified that he had not plea-bargained with the defendant because he had consulted with the victim's family: "It's their feeling that they want to pursue first degree murder. Only if the family wanted a plea to second degree murder would it be possible for that plea to be entered."¹⁸ The prosecuting attorney added that he "always, if possible, consulted with the victim's family to consider their feelings about the case."¹⁹

Wilson contended that his case was treated differently because Teel's family wanted him to be tried for first degree murder. He argued that allowing the family to decide whether a capital crime would be charged was an abuse of prosecutorial discretion.²⁰ The district attorney abdicated his responsibility and delegated it to the victim's family, thus denying Wilson due process and equal protection.²¹ The North Carolina Supreme Court reviewed the decision to prosecute for first degree murder and held that absent proof of discrimination the prosecutor is presumed to have acted within legal bounds.²² The court concluded that the "district attorney's consideration of the wishes of the family as *one factor* in determining which defendant will be prosecuted for murder and thereby subjected to the death penalty" was permissible.²³

Although North Carolina may be the only state that has expressly permitted a prosecutor to consider the wishes of the victim's family in a potential capital case,²⁴ the use of prosecutorial discretion has been widely recognized as necessary.²⁵ District attorneys are forced to balance limited prosecutorial re-

16. *Id.* at 121, 316 S.E.2d at 50. The defense argued that if Wilson had been allowed to plead guilty to second degree murder, he would have been sentenced as a Class B Felon and would have been eligible for early release or parole. Brief for Defendant-Appellant at 16.

17. *Wilson*, 311 N.C. at 122, 316 S.E.2d at 50. Defendant introduced evidence that during the tenure of the then-present district attorney in Randolph County, in "eight out of nine cases where the defendant had been charged with murder in the first degree (exclusive of defendant's case), the defendant was subsequently allowed to plead guilty to a lesser-included offense or the defendant had been tried on a lesser-included offense." *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 121, 316 S.E.2d at 50.

21. Brief for Defendant-Appellant at 19. The defense argued that this practice would "convert a system of justice into a system of irrational retribution." *Id.*

22. *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51; see also *infra* notes 29-33 and accompanying text (requirements for the defense of discriminatory prosecution).

23. *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51.

24. Capital punishment studies have recognized that prosecutors may be influenced by the victim's family. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1967, 1976 (1983). Apparently, however, no other courts have allowed consideration of the wishes of the victim's family.

25. See *Oyler v. Boes*, 368 U.S. 448 (1962); *United States v. Brokaw*, 60 F.Supp. 100, 102 (S.D. Ill. 1945) (dictum that the discretion of the prosecutor derives from the common law); *State v. Spicer*, 299 N.C. 309, 261 S.E.2d 893 (1980). In *Spicer* the court recognized that the charging function of the district attorney includes weighing "many factors such as 'the likelihood of a successful prosecution, the social value of obtaining a conviction as against the time and expense to the State,

sources against the likelihood of a conviction.²⁶ Moreover, because every case is different and may not fit clearly into one statutory classification of a crime, the prosecutor must decide which crime or crimes best fit the facts.²⁷ Prosecutorial discretion helps bridge the gap between textbook criminal prosecution and the actual charging of criminals on a day-to-day basis.

If the prosecutor abuses his discretion, however, the accused may raise the defense of "discriminatory prosecution," which usually is based on the fourteenth amendment's guarantee of equal protection.²⁸ North Carolina recognizes this defense²⁹ and follows the standards set by the United States Supreme Court in *Oyler v. Boles*.³⁰ In *Oyler* the Supreme Court ruled that a criminal prosecution "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" violated the equal protection clause.³¹ The unequal application of the law must be purposeful or intentional;³² mere unequal effects on an individual only demonstrate that the prosecutor exercised his discretion.³³

By approaching the abuse of prosecutorial discretion as a defense, courts analyzing the prosecutor's decision to seek the death penalty ask only whether certain unjustifiable standards such as race or religion were used. Thus, the legally relevant factors a prosecutor may use to decide whether to charge a capital crime remain undefined. Although *Wilson* recognized one prosecutorial factor—the wishes of the victim's family—the North Carolina Supreme Court expressly has avoided the task of establishing specific standards for when the death penalty will be sought.³⁴ The court, however, has stated that the general

and his own sense of justice in the particular case.' " *Id.* at 311, 261 S.E.2d at 895 (citing Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1119 (1961)).

26. See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1119 (1961).

27. See *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51.

28. U.S. CONST. amend XIV, § 1.

29. *State v. Lawson*, 310 N.C. 632, 644, 314 S.E.2d 493, 500-01 (1984); *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941 (1980).

30. 368 U.S. 448 (1961). In *Oyler* defendant claimed that he was the only person prosecuted as a habitual offender in Taylor County, West Virginia, from January 1940 to June 1955; five other defendants in that period could have been prosecuted as habitual offenders. *Id.* at 455. Defendant argued that the more severe penalty under the habitual offender statute was imposed only in a minority of cases and that this denied equal protection to those against whom the heavier penalty was enforced. The Court held: "Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of denial of equal protection were not alleged." *Id.* at 454-56.

31. *Id.* at 456.

32. See *State v. Spicer*, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980) (citing *Oyler*, 368 U.S. at 456, in which the Court said that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."); *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941 (1980).

33. *State v. Spicer*, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980). "A defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals. He must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design." *Id.*

34. *State v. Lawson*, 310 N.C. 632, 644 n.2, 314 S.E.2d 493, 501 n.2 (1984).

assembly could define prosecutorial considerations.³⁵ Unless the general assembly acts, the prosecutor's charging function in capital punishment cases will continue on an ad hoc basis.

The danger in not prescribing legally relevant prosecutorial factors lies in the possibility that not all arbitrary or capricious charging decisions will be checked by the defense of discriminatory prosecution. Some unfair criteria may not rise to the level required for a defense based on prosecutorial abuse, and other discrimination may not be subject to proof.³⁶ Capital punishment studies are split on whether discrimination based on socio-economic and racial grounds occurs in prosecutions despite post-*Furman* protections.³⁷ Most studies, however, recognize that prosecutors consider such non-legal factors as a judge's reputation for imposing capital punishment, pressure from police and media, and public reaction to the crime.³⁸ Legally relevant considerations generally include

35. *Id.* ("If prosecutors are to be 'guided' in the exercise of this kind of discretion, we think it is the province of the legislature and not this Court to so provide.").

36. North Carolina currently recognizes race, religion, or other arbitrary classification as unjustifiable standards for imposing the death penalty. See *supra* notes 30-33 and accompanying text. Allowing the victim's family to help decide whether to pursue capital punishment also may be an unfair or arbitrary standard; however, the North Carolina Supreme Court held in *Wilson* that this procedure is not sufficiently unjustifiable to be considered discriminatory prosecution. *Wilson*, 311 N.C. at 124, 316 S.E.2d at 51. Considerations such as the prosecutor's inclination towards capital punishment or the scheduled judge's reputation also may not rise to the level of discriminatory prosecution.

Even the use of clearly unjustifiable standards such as race or religion will be difficult to prove. With an unlimited number of factors on which a district attorney can base his decision to prosecute, any unjustifiable standards can be masked by allowable standards.

37. Bowers, *supra* note 24, at 1071-78. This study, conducted in Florida during 1976-77, found a 19 percent greater chance of a first degree murder indictment when a black killed a white than when a black killed a black. The study also found a 17 percent difference between first degree indictments of defendants with court appointed attorneys as compared with defendants who retained private attorneys. *Id.*

A study of all homicides in South Carolina between June 1977 and November 1979 in which the death penalty could have been sought found that "[w]hile prosecutors sought the death penalty nearly four times as often for blacks accused of killing whites as they did when blacks were accused of killing other blacks, they were only twice as likely to seek the death sentence when white defendants had white rather than black victims." Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges To the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 384-85 (1982); see also Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983) (disparity between rural and urban death penalty charges).

Other studies have not found conclusive evidence of discrimination in death penalty convictions. Redelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 922-23 (1981). This study was cited in Paternoster, *supra* ("Radelet found that murderers of whites were significantly more likely to be indicted for first-degree murder than were killers of blacks. . . . Radelet, however, found no evidence of discrimination by race of offender once the victim's race was controlled."); see also Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 76 (1980) ("Although sentences were the most severe in cases where blacks killed whites, there is no conclusive evidence of racial discrimination after taking into account the differences between felony murders and nonfelony killings.").

38. Bowers, *supra* note 24, at 1076. Interviews with judges, prosecutors, and defense attorneys revealed the following nonlegal influences on the prosecutor's decision to bring a capital charge:

- 1) Personal orientations or values of prosecutors which include aggressiveness of the prosecutor and his orientation towards punishment (deterrence, retribution).

- 2) Situational pressures or constraints in handling cases which include plea bargaining strategy, judge's reputation, and pressure from police.

the facts of the case, the sufficiency and quality of the evidence, and any aggravating and mitigating circumstances that relate to the crime and the defendant.³⁹ Not establishing objective guidelines and allowing such a wide range of factors makes it possible for the prosecutor to discriminate based on his personal motivations rather than analyzing possible charges in terms of the circumstances of the crime.

Removing discrimination, regardless of its source, from capital punishment was a primary consideration for the *Furman* Court. Although the per curiam opinion held only that the imposition of the death penalty in that case constituted cruel and unusual punishment,⁴⁰ six justices noted that unbridled discretion in capital proceedings could have discriminatory effects.⁴¹ Justice Stewart objected to administering the death penalty in a "wanton" and "freakish" manner.⁴² Referring to the cruel and unusual clause of the eighth amendment, Justice Douglas noted: "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."⁴³

To reduce the risk that the death penalty would be imposed in a discriminatory or capricious manner, capital statutes were rewritten to provide procedural safeguards at the sentencing phase of the trial.⁴⁴ The primary protection is the requirement that juries find at least one statutory aggravating circumstance before imposing the death penalty.⁴⁵ The Supreme Court in *Gregg* approved the changes made by the Georgia legislature in the Georgia capital punishment stat-

3) Social influences or pressures from community which include media coverage and public opinion. *Id.* (excerpt from Table 2).

The general use of prosecutorial discretion is analyzed in Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971). Abrams classified those prosecutorial factors that are applicable to all offenses in varying degrees as "practical factors." Practical factors "include the prosecutor's belief in the guilt of a suspect, the likelihood of a conviction, the possibility of obtaining the suspect's cooperation in other matters, the prosecutor's concern about his record for obtaining convictions, the influence of the law enforcement agents involved, and the general character of the offender." *Id.* at 11.

39. Bowers, *supra* note 24, at 1076.

40. *Furman*, 408 U.S. at 239-40 (per curiam) (opinion quoted *supra* note 4).

41. See *supra* note 10.

42. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

43. *Id.* at 242 (Douglas, J., concurring).

44. See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

45. See *Gregg*, 428 U.S. at 197. N.C. GEN. STAT. § 15A-2000(c) (1977) complies with this requirement:

(c) Findings in Support of Sentence of Death. When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

ute and held that the statute was constitutional.⁴⁶ The Georgia statute, however, did not restrict the prosecutor's discretion in deciding who would be subject to the death penalty.

Addressing the issue of discretion in *Gregg*, the Court concluded that only sentencing procedures were required to protect against arbitrary use of capital punishment.⁴⁷ The Court distinguished prosecutorial discretion that could only have a mercy-granting effect by removing a defendant from consideration for the death penalty from unbridled jury discretion that could result in selective imposition of the death penalty on those already convicted of a capital offense.⁴⁸ Moreover, the Court felt that removing prosecutorial discretion would be equivalent to creating a mandatory charging system that would require a capital prosecution whenever evidence existed that a suspect had committed a capital murder.⁴⁹ Such a system, the Court noted, would force the prosecutor to distinguish between murderers solely on the basis of legislative classifications of crimes,⁵⁰ a requirement very similar to the mandatory death penalty statutes held unconstitutional in *Woodson v. North Carolina*.⁵¹

Notwithstanding *Gregg*, unbridled prosecutorial discretion subsequently has been challenged as allowing discriminatory imposition of the death penalty. The North Carolina Supreme Court, relying on *Gregg*, rejected this challenge in *State v. Lawson*.⁵² *Gregg*, however, provides weak support for unrestricted prosecutorial discretion; it is stronger support for requiring prosecutorial discretion but restricting it solely to a consideration of legally relevant factors. First, the contention that prosecutorial discretion can only grant mercy,⁵³ and thus benefit a defendant, is suspect. Applied in the extreme, an offer to plea bargain could be made to all capital defendants except a select few the prosecutor feels

46. *Gregg*, 428 U.S. at 207.

Gregg established three essential components for a capital punishment statute:

1. The trial must have separate guilt and sentencing stages. "No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die." *Id.* at 197.
2. The jury must weigh aggravating and mitigating circumstances of the crime and "must find a statutory aggravating circumstance before recommending a sentence of death." *Id.*
3. The statute must provide for an automatic appeal of all death sentences. *Id.* at 198. See also *Survey of Developments in North Carolina Law*, 55 N.C.L. REV. 895, 973-74 (summary of the *Gregg* capital punishment statute requirements).

47. *Gregg*, 428 U.S. at 199 ("Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.") (emphasis added).

48. *Id.*

49. *Id.* at 199 n.50.

50. *Id.* The *Gregg* Court suggested in a footnote that without prosecutorial discretion in charging death-penalty crimes, the procedure "in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson v. North Carolina* and *Roberts v. Louisiana*." *Id.* (citations omitted). The Court in *Woodson* objected to legislative classifications of capital crimes which, if mandatory, would have unduly harsh results. *Woodson*, 428 U.S. 280, 293 (1975).

51. 428 U.S. 280 (1976) (North Carolina capital punishment statute requiring the death penalty in all cases of first-degree murder held unconstitutional).

52. 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984).

53. See *supra* text accompanying note 48.

deserve the death penalty. Using discretion in this manner is a "wanton" and "freakish" imposition of the death penalty.

Second, if prosecutorial discretion is constitutionally required to avoid the *Woodson*-type mandatory prosecution,⁵⁴ this result still can be achieved if the prosecutor only considers legally relevant factors. Consideration of the aggravating and mitigating circumstances of the crime would help avoid overly rigid compliance with legislative crime classifications.

Last, the three-justice concurring opinion in *Gregg*⁵⁵ indicated that the Supreme Court was not considering the possibility of abuse by prosecutors. Justice White assumed prosecutors would use legally relevant factors;⁵⁶ he contended that defendants would escape the death penalty through prosecutorial charging decisions only if the offense was not serious enough, or the proof was not strong enough.⁵⁷ The concurring opinion therefore shows that *Gregg* is not support for a prosecutor's reliance on nonlegal considerations.

If *Gregg* allows the use of prosecutorial discretion but limits it to legally relevant considerations, the scope of allowable factors should be defined. Under *Furman* a decision to impose the death penalty should focus on the circumstances of the crime and the defendant.⁵⁸ Justice White stated in *Gregg* that the prosecutor should use the same criteria that the jury uses to decide whether to impose the death penalty.⁵⁹ Under capital punishment statutes consistent with *Gregg*, the jury is limited to weighing the aggravating and mitigating circumstances of the crime.⁶⁰ Use of this standard in the decision to prosecute would exclude nonlegal considerations such as the personal motivation of the prosecutor or the wishes of the victim's family.

Limiting prosecutorial discretion to the circumstances of the crime and the defendant also is supported by Justice Douglas' remarks in *Gregg* that the death penalty cannot be imposed under a procedure that "gives room for the play of such prejudices" as race, religion, or social position.⁶¹ Because a request for capital prosecution by the victim's family could stem from long-harbored resentment towards a particular segment of the community, consulting the family permits these prejudices to surface. Conversely, consideration only of the circumstances of the crime and the defendant would preclude such prejudices from affecting the outcome of the case.⁶²

54. See *supra* text accompanying notes 49-51.

55. 428 U.S. at 207 (White, J., concurring) (joined by Chief Justice Burger and Justice Rehnquist).

56. *Id.* at 225 (White, J., concurring). Justice White's proposition is quoted *supra* text accompanying note 11. White noted: "*Absent facts to the contrary*," prosecutors are presumed to use legally relevant criteria. *Id.* (White, J., concurring) (emphasis added). Perhaps Justice White suggested that facts indicating a prosecutor's use of nonlegal criteria would result in arbitrary imposition of the death penalty in violation of the eighth amendment.

57. See *Gregg*, 428 U.S. at 225 (White, J., concurring).

58. See *supra* note 47.

59. *Gregg*, 428 U.S. at 225 (White, J., concurring).

60. See *supra* note 46.

61. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

62. Prejudicial and arbitrary prosecution can surface in many forms. Public or media pressure stemming from a widely publicized murder may tilt a district attorney's decision in favor of capital

Limiting the prosecutor's charging function to an analysis of the circumstances of the crime and the defendant also creates a procedural advantage. Any indication of discriminatory prosecution is likely to result in an appeal. The state appellate courts then must decide whether the prosecutor relied on proper grounds in charging a capital offense. Appeals taken by capital defendants can be as numerous as the reasons for a prosecutor to seek the death penalty.⁶³ Appeals based on the prosecutor's use of nonlegal consideration, however, can be avoided. Since the jury will find a defendant guilty of a capital offense only if sufficient evidence of guilt exists and will impose the death penalty only if sufficient aggravating circumstances exist, the prosecutor can prevent these appeals by basing his decision to seek capital punishment on only those considerations available to the jury. Because legally relevant factors are available to the prosecutor, he need not resort to nonlegal considerations. Limiting the prosecutor to a consideration of the circumstances of the crime and the defendant therefore would reduce the grounds for procedural appeals.

Despite *Furman's* nondiscrimination objectives, unbridled prosecutorial discretion permits arbitrary and capricious imposition of the death penalty. Even in a nondiscriminatory context, procedural appeals will result when the prosecutor unnecessarily strays from legally relevant considerations in deciding whether to charge a capital offense. These problems can be resolved by a minor change in North Carolina's capital punishment statute. The existing statute lists the aggravating and mitigating circumstances the jury may use in imposing the death penalty.⁶⁴ These circumstances focus on the crime and the defendant, and

prosecution. In this situation the defendant's charge would not be based on legally relevant considerations; rather, it would result from public demand for anticrime action. Restricting prosecutorial discretion to the circumstances of the crime and the defendant would limit the prejudicial effects of a defendant's notoriety.

63. See *supra* note 38 (nonlegal prosecutorial considerations).

64. The North Carolina statute states:

(e) Aggravating Circumstances.—Aggravating circumstances which may be considered shall be limited to the following:

- (1) The capital felony was committed by a person lawfully incarcerated.
- (2) The defendant had been previously convicted of another capital felony.
- (3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.
- (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (6) The capital felony was committed for pecuniary gain.
- (7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.
- (9) The capital felony was especially heinous, atrocious, or cruel.
- (10) The defendant knowingly created a great risk of death to more than one person

determine the egregiousness of the murder. Additionally, the North Carolina Constitution and General Statutes specify which crimes are capital;⁶⁵ the jury considers evidence that proves whether a capital crime was committed by the defendant. The general assembly and the courts have approved the jury's use of these factors in deciding whether a defendant committed the crime and whether a death sentence should be imposed. The prosecutor, like the jury, should be limited to considering these legally relevant factors in deciding whom to prosecute for a death-punishable crime.

PETER K. DANIEL

by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.—Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

N.C. GEN. STAT. § 15A-2000(e)-(f) (1977).

65. N.C. CONST. art. XI, § 2 (murder, arson, burglary, and rape punishable by death if the general assembly shall so enact); N.C. GEN. STAT. § 14-17 (1981) (murder in the first degree includes those murders committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon; first degree murder punishable by death).

The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases

In *Furman v. Georgia*¹ the United States Supreme Court held that the eighth and fourteenth amendments to the United States Constitution prohibit state capital sentencing schemes that operate at the unfettered discretion of the sentencing authority.² Death may be imposed only after the sentencing authority has followed specific guidelines designed to ensure fair, nonarbitrary sentencing.³ Sentencing bodies, however, must be allowed to exercise limited discretion to assure that the particular circumstances of the crime and the defendant in each case are considered before deciding on an appropriate sentence. Thus, the Court also has rejected mandatory capital sentencing as constitutionally impermissible.⁴ Consistent with these dual goals of nondiscretionary and particularized sentencing, many states have enacted "guided discretion" capital sentencing statutes.⁵ Typically, in a guided discretion scheme the jury must consider evidence of both aggravating⁶ and mitigating⁷ circumstances. Death may be im-

1. 408 U.S. 238 (1972) (per curiam).

2. *Id.* at 239-40. *Furman* was a per curiam decision with nine separate opinions (five concurring, four dissenting). Justice Stewart argued that it was cruel and unusual punishment to impose the death penalty on a "selected random handful" of defendants at the discretion of the jury. *Id.* at 309-10 (Stewart, J., concurring).

3. *Id.* at 255-57. While the United States Supreme Court did not create guidelines for acceptable capital sentencing procedures in *Furman*, the Court has approved state capital sentencing schemes in several subsequent cases. See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). The Court also has invalidated some capital sentencing procedures. See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

4. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

At issue in *Woodson* was North Carolina's capital sentencing statute, Act of April 8, 1973, ch. 1201, §1, 1973 N.C. Sess. Laws 323 (formerly codified at N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975)), which called for the automatic imposition of the death penalty upon conviction of first degree murder. The Court held that the statute was unconstitutional on three grounds. First, the statute failed to take into consideration the "character and record of the individual offender and the circumstances of the particular offense." *Woodson*, 428 U.S. at 304. Second, the statute failed to reflect "contemporary standards respecting the imposition of the punishment of death." *Id.* at 301. Last, the Court noted that juries might be unwilling to convict defendants charged with first degree murder in light of the mandatory death sentence such a conviction imposed. *Id.* at 302-03.

5. "In response to [*Furman*], roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion . . ." *Pulley v. Harris*, 104 S. Ct. 871, 876 (1984). North Carolina's capital sentencing statute, N.C. GEN. STAT. § 15A-2000 (1983), is fairly typical. The statute provides for a bifurcated procedure in capital felony cases: the guilt and sentencing phases of the trial are conducted separately. *Id.* § 15A-2000(a). At the sentencing phase, evidence may be presented to the jury relating to aggravating and mitigating circumstances. *Id.* § 15A-2000(a)(3). The jury decides whether to impose death or life imprisonment by weighing the circumstances: if the aggravating circumstances are found to outweigh the mitigating circumstances, the defendant may be sentenced to death. *Id.* § 15A-2000(b)(1) to (3). The sentence recommendation must be unanimous; if the jury cannot agree on a sentence the trial judge must impose a sentence of life imprisonment. *Id.* § 15A-2000(b). A jury recommending death must return in writing the statutory aggravating circumstances found. *Id.* § 15A-2000(c)(1). For a discussion of the history and application of the North Carolina capital sentencing statute, see Comment, *Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court*, 59 N.C.L. REV. 911 (1981).

6. See, e.g., N.C. GEN. STAT. § 15A-2000(e) (1983).

posed only upon a finding of one or more aggravating circumstances and only if such circumstances outweigh any mitigating circumstances found.⁸

As an added "safeguard against arbitrarily imposed death sentences,"⁹ many states incorporate a proportionality review into their capital sentencing procedures.¹⁰ There are two basic types of proportionality review.¹¹ Traditional proportionality review examines the "appropriateness of a sentence for a particular crime."¹² For example, a traditional proportionality review might examine whether the death penalty is too severe a punishment for kidnapping.¹³

The second type of proportionality review—the subject of this Note—is comparative proportionality review.¹⁴ Comparative proportionality procedures require the reviewing court to compare the case under review to "similar" cases previously decided in the same jurisdiction. The court must decide "whether the [death] penalty is . . . unacceptable . . . because [such penalty is] disproportionate to the punishment imposed on others convicted of the same crime."¹⁵ Unless the case is found to be sufficiently similar to other cases in which the death penalty has been imposed, the death penalty will be deemed disproportionate. Although comparative proportionality review is not constitutionally required,¹⁶ the United States Supreme Court clearly approves of such review in capital sentencing procedures.¹⁷

7. See, e.g., *id.* § 15A-2000(f).

8. *Id.* § 15A-2000(c).

9. *Pulley v. Harris*, 104 S. Ct. 871, 879 (1984).

10. Thirty-two states currently provide for proportionality review, either by statute or case law. See Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 793 n.61 (1983) (complete listing of proportionality statutes).

11. See *Pulley v. Harris*, 104 S. Ct. 871, 875-76 (1984).

12. *Id.* at 875.

13. The United States Supreme Court has invalidated statutes after applying traditional proportionality analysis in several cases. See, e.g., *Solem v. Helm*, 463 U.S. 227 (1983) (life imprisonment without possibility of parole disproportionate punishment for issuing a \$100 bad check); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate punishment for an accessory to robbery convicted of murder under the felony murder rule); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate punishment for the rape of an adult victim); see also D. PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* (1982) (discussing traditional proportionality principles).

14. This type of review has been described as "proportionality review," "comparative excessiveness," "comparative sentence review," and "comparative proportionality review." See Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentencing: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 663 n.1 (1983). Thirty-one states require comparative proportionality review. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1189 n.382 (1984).

15. *Pulley v. Harris*, 104 S. Ct. 871, 876 (1984).

16. The issue in *Pulley* was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases." *Id.* The Court unequivocally rejected the concept of constitutionally mandated comparative proportionality review, holding that "there is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case." *Id.* at 879.

Justice Brennan, in dissent, argued that comparative proportionality review is constitutionally required. Brennan noted that while comparative proportionality review is no panacea to the problems inherent in any capital sentencing scheme, "such review often serves to identify the most extreme examples of disproportionality among similarly situated defendants . . . [and] to eliminate some of the irrationality that currently surrounds imposition of a death sentence." *Id.* at 890 (Brennan, J., dissenting).

17. See e.g., *Zant v. Stephens*, 462 U.S. 862, 890 (1983) (the Court upheld a death sentence

Two determinations are central to the effective functioning of a comparative proportionality review scheme. First, the reviewing court must define the group or "pool" of cases that are to be used in making similarity comparisons.¹⁸ Second, the court must decide how to determine similarity: the court must identify the factors that will be considered pertinent in comparing one case to another.¹⁹ This Note will examine how North Carolina has dealt with these issues in the development and application of its comparative proportionality review procedure.

The current North Carolina capital sentencing statute was enacted in 1977.²⁰ Under the statute any case in which the jury imposes a sentence of death is automatically appealed to the North Carolina Supreme Court.²¹ On appeal the court reviews assignments of error from both the guilt and sentencing phases of the trial.²² If both phases are found to be error-free,²³ the court then undertakes three additional inquiries. First, the court examines whether the record supports the "jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death."²⁴ Second, the court must determine that the sentence was not imposed "under the influ-

under Georgia's capital sentencing statute, stating that "[o]ur decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence . . . to avoid arbitrariness and to assure proportionality."); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("[a]s an important additional safeguard against arbitrariness and caprice . . . [the Georgia Supreme Court] is required by statute . . . [to determine] whether the sentence is disproportionate compared to those sentences imposed in similar cases.").

Several theories have been advanced for the necessity of comparative proportionality review. Such review "may be the best means of ensuring that a state's statutory capital sentencing scheme is functioning within . . . eighth amendment guidelines . . . [because it] measures the consistency with which sentencing authorities impose the death penalty—a crucial factor in discerning potentially cruel and unusual punishment." Special Project, *supra* note 14, at 1189. Comparative proportionality review is "the only review technique which tests capital sentences against accumulated evidence of contemporary mores, as required by *Woodson*." Goodpaster, *supra* note 10, at 814.

18. Possible pools include all the cases in which (1) the defendant was convicted of a capital crime, (2) the defendant was convicted of a capital crime or pleaded guilty to a capital crime as a part of a plea-bargaining arrangement, (3) the defendant was sentenced to death, (4) the defendant was sentenced to death and the sentence was affirmed on appeal, (5) the defendant was sentenced to death or life imprisonment and the sentence was affirmed on appeal.

19. The United States Supreme Court has held that to impose a death penalty the sentencing authority must consider the particular circumstances of the crime and of the defendant and that there must be a "principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). Beyond these guidelines it is not clear what factors a court may or should consider controlling in assessing similarity. In any fact situation there are many different possible comparison factors. For example, if an intoxicated 18 year-old defendant is convicted of the first degree murder of two store clerks during an armed robbery, the case could be compared on proportionality review to armed robbery cases, youthful offender cases, multiple murder cases, felony murder cases, diminished capacity cases, or some combination of these cases.

20. Act of May 19, 1977, ch. 406, 1977 N.C. Sess. Laws 407. North Carolina drew heavily on MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962) in creating the current statute. *State v. Johnson*, 298 N.C. 47, 60, 257 S.E.2d 597, 608 (1979).

21. N.C. GEN. STAT. § 15A-2000(d) (1983). The current statute allows imposition of the death penalty only upon a conviction of first degree murder. *Id.* § 14-17 (1981).

22. *Id.* § 15A-2000(d)(1) (1983).

23. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983) (proportionality review is performed by the court only if both phases of the trial are error-free).

24. N.C. GEN. STAT. § 15A-2000(d)(2) (1983).

ence of passion, prejudice, or any other arbitrary factor.”²⁵ Last, the court must conduct a comparative proportionality review. The court must overturn the death sentence and impose life imprisonment “upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”²⁶

North Carolina’s comparative proportionality scheme is intended to serve “as a check against the capricious or random imposition of the death penalty”²⁷ and to assure that “individualized consideration [is] given to the defendant before the death sentence can be upheld.”²⁸ In carrying out its proportionality review, the court must be “sensitive not only to the mandate of the Legislature, but also to the constitutional dimensions of [the] review.”²⁹

For purposes of assessing similarity, the court recognizes the “pool” of cases available for comparison purposes as

*all cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury’s failure to agree upon a sentencing recommendation within a reasonable period of time.*³⁰

This pool is further limited to only those cases that have been affirmed on appeal by the North Carolina Supreme Court.³¹ The court also may “suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions” of the statute.³²

In conducting the proportionality review, the court compares “the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant.”³³ Significant factors in comparing cases are “the manner in which the crime was committed and defendant’s character, back-

25. *Id.*

26. *Id.*

27. *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983).

28. *State v. McDougall*, 308 N.C. 1, 36, 301 S.E.2d 308, 329, *cert. denied*, 104 S. Ct. 197 (1983).

29. *State v. Rook*, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981) (citing *Gregg v. Georgia*, 428 U.S. 153, 204-06 (1976), and *Proffitt v. Florida*, 428 U.S. 242, 258-59 (1976)), *cert. denied*, 455 U.S. 1038 (1982).

30. *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 104 S. Ct. 202 (1983).

31. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983). As of January 30, 1985, the proportionality pool consisted of 88 cases. See *infra* Appendix. For a compilation of additional information on some of these cases, see Petersen, *Outline of Legal Principles Established by the North Carolina Supreme Court for Capital Cases Under G.S. § 15A-2000, 1977-1983*, in NORTH CAROLINA CAPITAL DEFENSE TRIAL MANUAL 39-46 (1983). The North Carolina Supreme Court has made clear that in conducting a comparative proportionality review, it will not “necessarily feel bound . . . to give a citation to every case in the pool of ‘similar cases’ used for comparison.” *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 104 S. Ct. 202 (1983).

32. N.C. GEN. STAT. § 15A-2000(d)(2) (1983). The North Carolina Supreme Court never has invoked this language. Presumably, this language would enable the court to defer review of a death penalty case until such time as sufficiently similar cases become available for comparative review purposes.

33. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984). Thus, the court need not compare the case under review with every case in the pool, but only with those deemed roughly similar.

ground, and physical and mental condition."³⁴ For purposes of proportionality review, if the trial court finds one or more mitigating circumstances³⁵ but does not specify exactly what those mitigating circumstances are, the reviewing court must assume that the jury found *all* the mitigating circumstances submitted for consideration in the sentencing phase.³⁶ Other than the general guidelines mentioned above, the North Carolina Supreme Court has not established a framework for consistently conducting a comparative proportionality review.³⁷

Although the provisions for comparative proportionality review were enacted in 1977,³⁸ the North Carolina Supreme Court did not have occasion to apply the scheme until 1979. In *State v. Barfield*³⁹ the court applied the proportionality review for the first time. The court concluded that the death penalty was not excessive or disproportionate considering "the manner in which death was inflicted and the way in which [the] defendant conducted herself after she administered the poison to [the victim]."⁴⁰ Clearly the court did not conduct a true *comparative* proportionality review in *Barfield*. Instead of comparing *Barfield* to similar cases in the proportionality pool, the court merely applied the traditional proportionality test—general appropriateness of the punishment for the crime at issue⁴¹—and decided that the death penalty was not excessive or inappropriate in *Barfield*'s case. In a line of cases following *Barfield* the court continued this conclusory review, simply stating that the death penalty was not disproportionate without citing or analyzing specific similar or dissimilar cases.⁴²

34. *Id.*

35. See N.C. GEN. STAT. § 15A-2000(f) (1983).

36. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984).

37. Highly structured quantitative schemes for assessing similarities between cases have been suggested by some commentators. See, e.g., Baldus, Pulaski & Woodworth, *supra* note 14 (advocating statistical analysis of similarity variables using a computer-based data management system); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979) (analyzing appellate review of death penalty cases in Georgia, Florida, and Texas). The North Carolina Supreme Court rejects such quantitative factor analyses on several grounds. First, the court has noted that the factors used for comparative proportionality review "are not readily subject to complete enumeration and definition." *State v. Williams*, 308 N.C. 47, 80, 301 S.E.2d 335, 355, *cert. denied*, 104 S. Ct. 202 (1983). "[The relevant] factors will be as numerous and as varied as the cases coming before us on appeal." *Id.* Second, the use of quantitative analysis in comparing cases would tend to "become the last word on the subject of proportionality rather than serving as the initial point of inquiry." *Id.* at 80-81, 301 S.E.2d at 356. Third, the courts might tend to base their decisions on the scientific analyses rather than the "experienced judgments of [their] own members." *Id.* at 81, 301 S.E.2d at 356. Last, the court believes that sole reliance on scientific analysis would deny the defendant "the constitutional right to 'individualized consideration.'" *Id.* Consistent with this goal of individualized consideration, the court has held that "although the cases in the pool offer guidance in determining whether a sentence of death in a particular case is excessive or disproportionate, ultimately each case must rest on its own unique facts." *State v. Vereen*, 312 N.C. 499, 519, 324 S.E.2d 250, 263 (1985).

38. See *supra* note 20.

39. 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980). In *Barfield* defendant was convicted of poisoning the victim to death for pecuniary gain. The evidence indicated that defendant previously had poisoned four others, also for pecuniary gain. *Id.* at 310-16, 259 S.E.2d at 518-22.

40. *Id.* at 355, 259 S.E.2d at 544.

41. See *supra* notes 12-13 and accompanying text.

42. See, e.g., *State v. Brown*, 306 N.C. 151, 186, 293 S.E.2d 569, 591 ("[T]he record before us reveals two of the most blood-thirsty and brutal crimes which have ever been reviewed by this Court The bloody facts disclosed by the record before us leave this Court no choice but to conclude

In *State v. Hutchins*⁴³ the North Carolina Supreme Court for the first time identified cases used for comparison purposes in conducting its proportionality review.

The present case does not present the situation in which a victim was brutally murdered in such a way that the episode could be characterized as being a torture slaying. Compare *State v. Martin*, [citation omitted]; *State v. McDowell*, [citation omitted]. . . . However, the record clearly establishes a course of conduct on the part of defendant which amounts to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities. These factors lead us to conclude that the sentence of death is not disproportionate or excessive.⁴⁴

It is not clear from this language what factors in the cited cases the court deemed sufficiently similar to support imposition of the death penalty against Hutchins.⁴⁵

In *State v. Pinch*⁴⁶ the court again identified cases used for comparison in conducting its proportionality review. The court cited six previous cases in which the death penalty had been affirmed, but did not discuss any particular

that the sentence of death imposed is not disproportionate or excessive."), *cert. denied*, 459 U.S. 1080 (1982); *State v. Smith*, 305 N.C. 691, 711, 292 S.E.2d 264, 276 (no cases cited) ("The sentence of death for the intentional, deliberate and senseless murder of [the victim] was not excessive or disproportionate."), *cert. denied*, 459 U.S. 1056 (1982); *State v. Taylor*, 304 N.C. 249, 292, 283 S.E.2d 761, 787 (1981) ("[Because] the murder of [the victim] was, simply put, a cold-blooded killing of an innocent woman on her way to work, we see no reason to reverse the judgment of the jury. The sentence of death is not excessive or disproportionate."), *cert. denied*, 463 U.S. 1213 (1983); *State v. Rook*, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981) ("Defendant's sadistic and blood-thirsty crimes committed against this victim compel the conclusion that the sentence of death is not disproportionate or excessive."), *cert. denied*, 455 U.S. 1038 (1982); *State v. Martin*, 303 N.C. 246, 256, 278 S.E.2d 214, 220-21 ("The brutal manner in which death was inflicted, which followed defendant's declaration approximately six months previously that he was going to kill [the victim], leads us to conclude that the sentence of death is not excessive or disproportionate."), *cert. denied*, 454 U.S. 933 (1981); *State v. McDowell*, 301 N.C. 279, 294, 271 S.E.2d 286, 296 (1980) ("Considering the brutal manner in which . . . [the victims were murdered] and considering defendant's prior history of violent criminal behavior, we conclude that the sentence of death is not excessive."), *cert. denied*, 450 U.S. 1025 (1981). The North Carolina Supreme Court's perfunctory review of death penalty cases during this period led one commentator to note that the court "appears to be engaging in cursory or rubber stamp review." Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 WAKE FOREST L. REV. 737, 759 (1980).

43. 303 N.C. 321, 279 S.E.2d 788 (1981). Hutchins was convicted of the first degree murder of two police officers who responded to a call from Hutchins' daughter. The daughter claimed that Hutchins was drunk, had beaten her, and had threatened other family members. Hutchins shot the officers as they were getting out of their police car in the Hutchins' driveway. *Id.* at 327, 279 S.E.2d at 793.

44. *Id.* at 357, 279 S.E.2d at 810. The two cases used for comparison by the court were *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981) and *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981).

45. The court might have intended to imply that the stated "wanton disregard for the value of human life" was a similar factor in the cited cases. It also is interesting to note that the court specified the disregard of law enforcement as a ground for upholding the death penalty. *Hutchins*, 303 N.C. at 357, 279 S.E.2d at 810. See *infra* note 111.

46. 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982). In *Pinch* defendant was convicted of two counts of first degree murder. Defendant had expressed a dislike for and intention to kill the victims. He borrowed a shotgun, went to a club and shot both victims in the chest at close range. The second victim pleaded for his life before being shot. One victim was killed instantly; the other victim lay moaning on the ground until defendant shot him again. *Id.* at 4-6, 292 S.E.2d at 210-11.

factors that made these six cases similar to *Pinch*.⁴⁷ In affirming the death penalty, the court concluded that "[a]ll things considered, we cannot say, *as a matter of law*, that this defendant is somehow less deserving of capital punishment than the other occupants of death row."⁴⁸ Two justices noted that the majority had failed to identify the relevant pool of cases for purposes of proportionality review.⁴⁹ Justice Exum, in dissent, urged as a comparison pool all cases tried under the 1977 death penalty statute in which the defendant had received the death penalty or life imprisonment.⁵⁰

In *State v. Williams*⁵¹ the court adopted Justice Exum's proposed proportionality pool.⁵² In conducting the proportionality review the *Williams* court cited no cases, but simply stated that they had made "a comparison of this case to the cases in the pool of 'similar cases.'"⁵³ The court concluded that the murder was "so brutal and so utterly senseless as to lead us to conclude that the sentence of death imposed in this case is not disproportionate."⁵⁴

For the first time in *State v. McDougall*,⁵⁵ a companion case to *Williams*, the court identified specific variables in the cases chosen for comparison upon which its decision to uphold the death penalty was based. In *McDougall* defendant was convicted of stabbing his victim to death while he was under the influence of cocaine.⁵⁶ The jury found as mitigating circumstances defendant's impaired capacity⁵⁷ and his mental or emotional disturbance at the time of the murder.⁵⁸ On review, the court noted that "[w]hile these findings are often per-

47. *Id.* at 35-36, 292 S.E.2d at 228. The six cases were *State v. Rook*, 304 N.C. 301, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213 (1983); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

48. *Pinch*, 306 N.C. at 35, 292 S.E.2d at 228. The court also noted that the death penalty "do[es] not seem excessive or disproportionate considering the premeditated and callous manner in which the defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life." *Id.* at 37, 292 S.E.2d at 229. Thus, it appears the court upheld the death penalty in *Pinch* not as a result of comparison with similar cases, but simply on the facts of the case itself.

49. *Id.* at 62, 292 S.E.2d at 229-30 (Carlton, J., concurring); *id.* at 59, 292 S.E.2d at 242-43 (Exum, J., dissenting).

50. *Id.* at 60-61, 292 S.E.2d at 243 (Exum, J., dissenting).

51. 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 104 S. Ct. 202 (1983). In *Williams* defendant was convicted of sexually assaulting and beating to death a 100-year-old woman. *Id.* at 51-55, 301 S.E.2d at 339-41.

52. *Id.* at 79, 301 S.E.2d at 355; *see supra* note 30 and accompanying text.

53. *Williams*, 308 N.C. at 82, 301 S.E.2d at 357.

54. *Id.* The court continued this perfunctory review, citing affirmed death penalty cases without discussion, in a case following *Williams*. *See State v. Craig*, 308 N.C. 446, 464, 302 S.E.2d 740, 750-51 (no cases cited) ("We . . . have compared this case with all similar cases . . . [and] [w]e believe that the imposition of the death penalty . . . is not disproportionate."), *cert. denied*, 104 S. Ct. 263 (1983).

55. 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 104 S. Ct. 197 (1983). In *McDougall* defendant was convicted of stabbing the victim to death after he had tricked the victim and her roommate into letting him into their home by pretending that he needed to use the phone to get medical assistance for his wife. *Id.* at 5-7, 301 S.E.2d at 311-13.

56. *Id.* at 7, 301 S.E.2d at 313.

57. *Id.* at 16, 301 S.E.2d at 318.

58. *Id.*

suasive on the jury in recommending life imprisonment, they are not conclusive."⁵⁹ The court noted cases in which juries had sentenced the defendant to death when the defendant had exhibited impaired capacity and emotional disturbance; the court noted similar cases in which the defendant was sentenced to life imprisonment.⁶⁰ The court distinguished *McDougall* from the life imprisonment cases on the ground that the defendant in *McDougall* might have voluntarily injected the cocaine that resulted in impaired capacity and emotional disturbance.⁶¹ The court reasoned that the jury thus could have given the mitigating circumstances less weight than in the life imprisonment cases.⁶² Based on this conclusion, the court found *McDougall* to be sufficiently dissimilar from the life imprisonment cases and affirmed the death penalty.⁶³

The court employed a more stringent analysis in conducting its comparative proportionality review in several cases decided in 1984. In *State v. Lawson*⁶⁴ defendant was interrupted by the victim homeowner while burglarizing a house. Defendant shot and killed the homeowner and also shot the homeowner's father to eliminate witnesses to the burglary.⁶⁵ In conducting the proportionality review the court considered a number of factors. The *Lawson* jury found two aggravating circumstances: murder for the purpose of avoiding a lawful arrest⁶⁶ and murder committed as a part of a course of conduct of violence against other persons.⁶⁷ The court noted that the latter circumstance had been found by the jury in seven of the fourteen cases in which the death penalty had been affirmed.⁶⁸ The court also compared mitigating circumstances, noting that in *Williams* as well as in *Lawson* the jury found as mitigating the defendant's lack of prior convictions.⁶⁹ The court continued the proportionality review by comparing *Lawson* to cases in which a similar type of crime had been committed. The court identified another case in which the victim surprised the defendant who was in the act of burglarizing the victim's home⁷⁰ and cited similar robbery-murder cases.⁷¹ Defendant's character, background, and physical and mental condition also were cited as grounds for similarity comparisons.⁷² After noting

59. *Id.* at 36, 301 S.E.2d at 329.

60. *Id.* at 36 nn.9-10, 301 S.E.2d at 329 nn.9-10.

61. *Id.* at 37, 301 S.E.2d at 329.

62. *Id.*

63. *Id.* In another 1983 case, *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), the court upheld the death penalty for a defendant convicted of murdering a witness during an armed robbery. The court compared the case to *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056 (1982), a robbery-murder case in which the death penalty was affirmed, and held the death penalty not disproportionate. Central to the *Oliver* court's decision was the fact that the murder was motivated chiefly by the desire to eliminate witnesses to the armed robbery. *Oliver*, 309 N.C. at 375, 307 S.E.2d at 335.

64. 310 N.C. 632, 314 S.E.2d 493 (1984).

65. *Id.* at 634-35, 314 S.E.2d at 495-96.

66. *Id.* at 637, 314 S.E.2d at 497.

67. *Id.* at 637-38, 314 S.E.2d at 497.

68. *Id.* at 648-49, 314 S.E.2d at 503-04.

69. *Id.* at 649, 314 S.E.2d at 504; *Williams*, 308 N.C. at 57, 301 S.E.2d at 342.

70. *Lawson*, 310 N.C. at 649, 314 S.E.2d at 504. The cited case was *Williams*.

71. *Lawson*, 310 N.C. at 649-51, 314 S.E.2d at 504-05.

72. *Id.* at 650-51, 314 S.E.2d at 504-05.

the similarities and dissimilarities of the relevant cases, the court concluded that the death penalty should be upheld because cases in which life imprisonment had been imposed were "for the most part distinguishable on the basis of the absence of an aggravating factor present in this case or the presence of mitigating factors absent in this case."⁷³

In the next death penalty case affirmed by the court, *State v. Maynard*,⁷⁴ the court returned to the pre-*Lawson* practice of dispensing with the proportionality review; the court made a conclusory determination that the death penalty was not disproportionate and supported this conclusion with case citations⁷⁵ but without discussion or analysis. Central to the court's decision to uphold the death penalty in *Maynard*, another witness elimination case, were "compelling policies which encourage witnesses to testify in criminal trials without fear."⁷⁶ Although the court then cited without discussion two cases in support of its similarity comparisons,⁷⁷ it seems clear that the *Maynard* proportionality review focused on a single facet of the crime—witness elimination—as a basis of comparison. The court did not analyze any other aggravating or mitigating circumstances or characteristics of the crime or defendant. The decision to affirm the death penalty, based primarily on a single feature of the crime, is uncomfortably similar to the mandatory death penalty sentencing schemes outlawed in *Woodson v. North Carolina*.⁷⁸

The North Carolina Supreme Court conducted a somewhat more detailed proportionality review in two recent cases. Defendant in *State v. Boyd*⁷⁹ stabbed his ex-lover to death in the presence of her mother and child. The court compared *Boyd* to another murder case involving a domestic relationship in which the death penalty had been upheld.⁸⁰ The court observed that in both cases the murder was preceded by threats against the victim and that the victim was not murdered "in a quick and efficient manner."⁸¹ The court also noted that in both cases the victim was murdered in the presence of her child and that both defend-

73. *Id.* at 651, 314 S.E.2d at 505.

74. 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 105 S. Ct. 363 (1984). In *Maynard* defendant beat, stabbed, and shot the victim and then threw the victim into a river, to keep the victim from testifying against defendant. *Id.* at 5-7, 316 S.E.2d at 200-01.

75. *Id.* at 36, 316 S.E.2d at 216.

76. *Id.*

77. *Id.* The court cited *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980), and *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), noting that in both those cases the motivation for the murders was to "avoid detection or arrest." *Maynard*, 311 N.C. at 36 n.3, 316 S.E.2d at 216 n.3.

78. 428 U.S. 280 (1976); *see supra* note 4 and accompanying text.

79. 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 105 S. Ct. 2052 (1985).

80. *Id.* at 435, 319 S.E.2d at 207. The court compared *Boyd* to *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981), in which defendant shot his estranged wife to death in front of their young child.

81. *Boyd*, 311 N.C. at 435, 319 S.E.2d at 207. The suffering experienced by the victim before death is often noted as a consideration in the review of death penalty cases. *See, e.g., Boyd*, 311 N.C. 408, 319 S.E.2d 189; *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

ants "presented evidence of social and emotional problems."⁸² The court reviewed the estranged lover and estranged spouse murder cases in which the defendant had received life imprisonment and found them to be dissimilar.⁸³

In another case involving a domestic relationship, *State v. Noland*,⁸⁴ the court focused on previous murder cases involving domestic relationships⁸⁵ as well as previous cases that involved "death or serious injury to one or more people other than the murder victim."⁸⁶ Because *Noland* was similar to these previous cases the court affirmed the death penalty. A dissent⁸⁷ examined the case with an emphasis on completely different factors. The dissent compared the case with other mental disturbance cases, noting that the death penalty generally had not been imposed when mental and emotional disturbance was found to be a mitigating circumstance⁸⁸ and that the death penalty previously had been upheld in domestic murder cases only when the murder was particularly brutal and the victim had been made to suffer needlessly.⁸⁹ Thus, the supreme court's review of *Noland* illustrates that a case logically can be compared with previous cases using completely different variables⁹⁰ and that the choice of different comparison variables may lead to an entirely different result.

In *State v. Huffstetler*,⁹¹ decided only one month after *Noland*, the court inexplicably returned to cursory review.⁹² In *Huffstetler* the court cited no cases in support of its decision to uphold the death penalty, but simply stated that

the record before us reveals a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault by an adult male upon a sixty-five year old female . . . Having compared the defendant and the crime in this case to others in the pool of similar cases, we conclude that the sentence of death . . . is not disproportionate.⁹³

A strong dissent criticized the majority's failure to identify the cases on which the proportionality review was based and alluded to possible constitutional problems raised by such a perfunctory review.⁹⁴

82. *Boyd*, 311 N.C. at 435, 319 S.E.2d at 207.

83. *Id.* at 436, 319 S.E.2d at 207.

84. 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 105 S. Ct. 1232 (1985). In *Noland* defendant's estranged wife moved to another state. Defendant threatened to kill his wife's family unless she returned to North Carolina. When his wife refused to return, defendant carried out his threat, killing her father and sister and severely injuring her mother. *Id.* at 4-6, 320 S.E.2d at 645-46.

85. *Id.* at 24-25, 320 S.E.2d at 656. The court cited *Boyd* and *Martin* as comparable domestic relations murder cases. *Id.* The court also noted that in all three cases the defendant previously had threatened the murder victims. *Id.*

86. *Noland*, 312 N.C. at 25, 320 S.E.2d at 656.

87. *Id.* at 25, 320 S.E.2d at 657 (Exum, J., dissenting).

88. *Id.* at 33, 320 S.E.2d at 661 (Exum, J., dissenting).

89. *Id.* (Exum, J., dissenting).

90. *See supra* note 19.

91. 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 105 S. Ct. 1877 (1985). In *Huffstetler* defendant brutally beat his mother-in-law to death with a cast iron skillet. *Id.* at 95-98, 322 S.E.2d at 113-15. *See Note*, *State v. Huffstetler: Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy*, 63 N.C.L. REV. 1122 (1985).

92. *See supra* note 42 and accompanying text.

93. *Huffstetler*, 312 N.C. at 118, 322 S.E.2d at 126.

94. *Id.* at 123, 322 S.E.2d at 129 (Exum, J., dissenting). The dissent argued that:

Since 1977, the North Carolina Supreme Court has vacated the death penalty in four cases based on a finding of disproportionality. In *State v. Jackson*⁹⁵ defendant feigned car trouble and persuaded a passerby to give him a ride to a local service station. The victim later was found in his car, robbed and murdered.⁹⁶ In holding the death sentence disproportionate, the court noted that in *Jackson*, unlike the other robbery-murder cases in which the death penalty was imposed, there was no evidence as to the exact circumstances of the victim's death and thus no reason to conclude that the murder had been "especially heinous."⁹⁷ The court concluded that this murder did not "rise to the level of those murders in which we have approved the death sentence upon proportionality review."⁹⁸

The court again vacated the death penalty in *State v. Bondurant*.⁹⁹ Pivotal in its decision that the case was not similar to other death penalty cases were findings that defendant did not "coldly calculate" the commission of the crime, that it was not a "torturous" murder, and that the murder did not occur while defendant was perpetrating another felony.¹⁰⁰ The court also noted that in this case defendant was highly intoxicated, that there apparently was no motive in the shooting, that defendant and victim were friends, that defendant helped rush the victim to the hospital immediately after the shooting, and that defendant was

The majority seems to treat the [proportionality] issue as being one exclusively within this Court's unbridled discretion.

I think the question of proportionality . . . is more serious than this. It is not a question for the unbridled discretion of this Court. We do not sit as a super jury on this issue. Whether a death sentence in any case is disproportionate is a question of law.

Id. In another recent case, *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250 (1985), the court affirmed the death penalty after citing previous cases in which the death penalty was affirmed, without a discussion of relevant factors or relevant life imprisonment cases used in its comparison. In *Vereen* defendant strangled, stabbed, and sexually assaulted his 72 year-old victim and sexually assaulted and stabbed the victim's mentally retarded daughter. *Id.* at 502-04, 324 S.E.2d at 253-54. The court concluded that "[c]onsidering both the crime and the defendant, the circumstances of this case fall well within the class of first-degree murders in which we have previously upheld the penalty of death." *Id.* at 518, 324 S.E.2d at 262.

95. 309 N.C. 26, 305 S.E.2d 703 (1983).

96. *Id.* at 30, 305 S.E.2d at 708.

97. *Id.* at 46, 305 S.E.2d at 717. Whether the crime is considered "heinous" has been significant in several cases in which the death penalty was imposed. See, e.g., *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, cert. denied, 104 S. Ct. 263 (1983); *State v. Williams*, 303 N.C. 47, 301 S.E.2d 335, cert. denied, 104 S. Ct. 202 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 104 S. Ct. 197 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056 (1982); *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, 455 U.S. 1038 (1982); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907 (1980).

98. *Jackson*, 309 N.C. at 46, 305 S.E.2d at 717.

99. 309 N.C. 674, 309 S.E.2d 170 (1983). In *Bondurant* defendant and several acquaintances had been drinking and driving. The victim, in the back seat of the car, expressed a desire to go home. Defendant, in the front seat, turned and pointed a gun at the victim's face. Although the other passengers in the car pleaded with defendant to put down the gun, defendant told the victim, "You don't believe I'll shoot you, do you?" and fatally shot him. *Id.* at 677, 309 S.E.2d at 173.

100. *Id.* at 693, 309 S.E.2d at 182.

helpful to law enforcement officials.¹⁰¹ The court noted that "[i]n no other capital case among those in our proportionality pool did the defendant express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased." The court stressed, however, that the expression of remorse was not controlling for purposes of the proportionality review.¹⁰² The court also noted that the totality of circumstances must be considered on proportionality review and that the "presence or absence of a particular factor will not necessarily be controlling."¹⁰³

In *State v. Hill*¹⁰⁴ defendant was convicted of shooting a police officer to death in the course of an eighty second encounter in which defendant ran from the policeman, the policeman tackled defendant, and defendant got control of the officer's gun and shot him.¹⁰⁵ The court found only two previous cases in which the victim was a police officer and compared *Hill* to these. On roughly similar facts one defendant had received the death penalty and the other had received only life imprisonment.¹⁰⁶ Because of this irreconcilable disparity in sentencing, the court did not find these cases helpful in assessing proportionality and thus proceeded to compare *Hill* to the "entire pool of cases in which the death penalty had been affirmed."¹⁰⁷ Based on this comparison and on the circumstances surrounding the murder, the court vacated the death penalty.¹⁰⁸

The court employed an interesting method in *Hill* to conduct its proportionality review. First, the court compared the only two previous cases in which the defendant had been convicted when an aggravating circumstance had been the commission of a "capital felony . . . against a law enforcement officer."¹⁰⁹ When this comparison proved fruitless, the court did not try to compare *Hill* with cases in the pool based on other nonstatutory variables, such as the existence of a "struggle" in the case or the presence of alcohol. Instead, the court proceeded to distinguish *Hill* from dissimilar death penalty cases. The court grouped these dissimilar cases into five categories: "heinous" murder cases, cases of torturous crimes, cases in which the crime was part of a violent course of conduct, felony murder cases, and cases in which the crime had been coldly

101. *Id.* at 693-94, 309 S.E.2d at 182-83.

102. *Id.*

103. *Id.* at 693 n.1, 309 S.E.2d at 182 n.1.

104. 311 N.C. 465, 319 S.E.2d 163 (1984).

105. The police officer stopped to check Hill's parked car, which earlier had been observed circling the block. Apparently, Hill was trying to locate the house of an acquaintance. *Id.* at 467, 319 S.E.2d at 165. Hill did not testify, *id.* at 467, 319 S.E.2d at 166, so it is unclear why he fled from the police officer.

106. *Id.* at 477, 319 S.E.2d at 171. The two other cases in the proportionality pool in which policemen were the victims were *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983) (defendant received life imprisonment for the shooting of a police officer during the course of an armed robbery) and *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981) (death penalty affirmed for defendant who shot and killed two officers who came to defendant's home to investigate a domestic disturbance).

107. *Hill*, 311 N.C. at 477-78, 319 S.E.2d at 171 (The "great disparity of sentences in those two cases renders any meaningful comparison in this limited pool virtually impossible.").

108. *Id.* at 479-80, 319 S.E.2d at 172.

109. *Id.* at 477, 319 S.E.2d at 171 (construing N.C. GEN. STAT. § 15A-2000(e)(8) (1983)).

calculated.¹¹⁰ The court did not explain why cases in these categories were considered sufficiently similar to be appropriate for use in comparative proportionality. Thus, *Hill* implicitly approved a procedure in which proportionality review can be conducted primarily by distinguishing dissimilar death penalty cases in the absence of relevant similar cases with which to compare the case under review.¹¹¹

The North Carolina Supreme Court vacated a death sentence on proportionality grounds for the fourth time in *State v. Young*.¹¹² In conducting the

110. *Id.* at 478, 319 S.E.2d at 172.

111. Two strong dissents by Justices Meyer and Mitchell criticized the manner in which the majority conducted the proportionality review. Justice Meyer argued that the court erred in comparing *Hill* only with brutal murder cases and cases in which the jury had found more than two aggravating circumstances because these two types of cases were not sufficiently similar to *Hill* to yield relevant comparison. He suggested instead that the court focus on the "targeted victim, the motive for the killing, and important policy considerations" in the case under review. *Id.* at 484, 319 S.E.2d at 175 (Meyer, J., dissenting). The killing of a law enforcement officer should warrant the death penalty "[i]n the absence of *compelling circumstances* which would militate against a sentence of death" because "the effective administration of justice requires that some murders must indeed be treated as different 'in kind and not merely in degree from other murders.'" *Id.* at 485, 319 S.E.2d at 175 (Meyer, J., dissenting) (quoting *Hill*, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell, J., dissenting)) (emphasis added).

Justice Mitchell also argued that the majority's comparison was flawed. Mitchell would have upheld the jury's death penalty in this case based on the lack of relevant similar cases for comparison purposes and on public policy supporting effective law enforcement. He noted:

The murder of a law enforcement officer engaged in the performance of his official duties differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

A jury having found after solemn consideration that the defendant killed a law enforcement officer engaged in the performance of his official duties and that this aggravating circumstance outweighed the mitigating circumstances and called for the penalty of death, I do not believe that we should hold the penalty disproportionate.

Id. at 488, 318 S.E.2d at 177 (Mitchell, J., dissenting).

The dissents' arguments are erroneous for two reasons. First, the statute clearly requires that the case under review be compared to similar cases. *See supra* notes 14-17 and accompanying text. Any analysis that depends primarily on policy considerations instead of similar cases is inappropriate. To rely on policy considerations under these circumstances is to apply the wrong standard of review: the statute does not require a finding that the death penalty is appropriate for a certain *kind* of crime, such as murders of police officers, but instead requires a finding that the case is sufficiently similar to other cases in the comparison pool to warrant imposition of the death penalty.

Second, the court may use its discretion to give the factors in a proportionality review different weight, depending on the facts and circumstances in each case. An analysis that adopts a single factor as controlling for comparison purposes, however, is erroneous under the Supreme Court's prohibition against any "automatic" imposition of the death penalty without consideration of all the facts and circumstances of the particular case. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). In *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam), the United States Supreme Court held that a Louisiana statute imposing a mandatory death penalty for the murder of a police officer was unconstitutional. The Court recognized the state's special interest in protecting public servants, but insisted that other circumstances must be taken into consideration before the imposition of a death sentence will be deemed constitutional. The Court did not require that these circumstances be "compelling." *Id.* at 637; *cf. Hill*, 311 N.C. 485, 319 S.E.2d at 175 (Meyer, J., dissenting).

112. 312 N.C. 669, 325 S.E.2d 181 (1985). In *Young* defendant suggested that he and two accomplices go to the victim's house to rob and kill him. The three men gained entrance to the victim's house on a pretext, whereupon defendant stabbed the victim twice in the chest, and one accomplice stabbed the victim several times in the back. *Id.* at 672, 325 S.E.2d at 184.

proportionality review the court focused on the two statutory aggravating circumstances found by the jury: murder committed for pecuniary gain,¹¹³ and murder committed while defendant was engaged in the commission of an armed robbery.¹¹⁴ The court cited twenty-three robbery-murder cases in which the jury sentenced the defendant to life imprisonment and five robbery-murder cases in which the defendant was sentenced to death.¹¹⁵ The court wished to make it "abundantly clear," however, that the mere difference in the number of cases in which life imprisonment was imposed and the number of cases in which death was imposed was not dispositive in determining proportionality.¹¹⁶ The court found the death penalty to be disproportionate because "[t]he facts presented by this appeal more closely resemble those cases in which the jury recommended life imprisonment than those in which the defendant was sentenced to death."¹¹⁷ The court then specifically compared *Young* with three cases: two in which life imprisonment was imposed for robbery-murder and one in which the death penalty was vacated on proportionality grounds.¹¹⁸ The court noted that in the two life imprisonment cases, the juries had found four and six aggravating circumstances (including, in both cases, the two aggravating circumstances found in *Young*) and still had declined to impose the death penalty.¹¹⁹ The court also compared *Young* to *Jackson*, in which the death penalty was vacated on proportionality grounds,¹²⁰ and found the two cases similar.¹²¹ Finally, the court examined a group of robbery-murder cases in which the defendant received the death penalty and found the cases dissimilar.¹²² This finding of dissimilarity was based on the facts that the *Young* murder was not as "egregious" as the murders in the comparison cases, that the defendant in *Young* had not been engaged in a course of conduct which included the commission of violence against another person, and that the murder in *Young* was "not especially heinous, atrocious or cruel."¹²³

The proportionality review conducted in *Young* clearly is superior to the perfunctory review conducted by the court in many previous death penalty cases. The court cited not only relevant cases in which the death penalty had been affirmed but also relevant life imprisonment cases and a case in which the death penalty had been vacated on proportionality grounds. In addition to citing these cases, the court discussed the factors in the cases that made them relevant for comparison purposes. This approach not only evidences a thorough

113. *Id.* at 690, 325 S.E.2d at 192. See N.C. GEN. STAT. § 15A-2000(e)(6) (1983).

114. *Young*, 312 N.C. at 690, 325 S.E.2d at 192. See N.C. GEN. STAT. § 15A-2000(e)(5) (1983).

115. *Young*, 312 N.C. at 687-88 n.1, 325 S.E.2d at 192 n.1.

116. *Id.* at 688, 325 S.E.2d at 193.

117. *Id.*

118. *Id.* at 689-90, 325 S.E.2d at 193-94. The court compared *Young* to *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983) (death penalty vacated on proportionality grounds); *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983) (defendant sentenced to life imprisonment); and *State v. Hunt*, 305 N.C. 238, 287 S.E.2d 818 (1982) (defendant sentenced to life imprisonment).

119. *Young*, 312 N.C. at 689-90, 325 S.E.2d at 193-94.

120. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

121. *Young*, 312 N.C. at 690, 325 S.E.2d at 194.

122. *Id.*

123. *Id.*

consideration by the court of the particular facts and circumstances of the case under review in comparison to the facts and circumstances of prior cases, but also gives the bar necessary guidance as to which factors are important in comparative proportionality review.

A clear conclusion emerges from an analysis of cases in which the North Carolina Supreme Court has applied the comparative proportionality review to uphold or vacate a death penalty. Although the court recognizes the importance of a meaningful proportionality review,¹²⁴ its performance has been strikingly inconsistent. The cases in which the court has conducted an in-depth analysis of the similarities of both the relevant death penalty and life imprisonment cases¹²⁵ sharply contrast with the cases in which the court has applied a perfunctory review as a mere formality in affirming a death sentence.¹²⁶ Although the court has clearly indicated that it does not feel compelled to cite every relevant case from the proportionality pool in conducting its review,¹²⁷ at least some guidance is necessary in every decision. Without any analysis of, or citations to, the controlling cases, the bar can only speculate about the factors relevant to sentencing decisions at the appellate level.¹²⁸

In summary, the court has recognized that certain factors are important for comparison purposes in proportionality review. These include the statutory aggravating¹²⁹ and mitigating¹³⁰ circumstances, the general type of crime,¹³¹ the number of victims involved,¹³² the defendant's character, background, physical and emotional condition,¹³³ the manner in which the victim died,¹³⁴ and whether the murder was especially heinous or bloodthirsty.¹³⁵ The court also has held that special policy considerations may apply in witness elimination and police murder cases.¹³⁶ Overall, the court has tended to compare cases under

124. "[A]ny imposition of the death penalty . . . should be searchingly reviewed . . . to insure the absence of unfairness, arbitrariness or caprice in the result." *State v. Johnson*, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979). "[W]e consider the responsibility placed on us by [N.C. GEN. STAT.] § 15A-2000(d)(2) as serious as any responsibility placed upon an appellate court." *State v. Rook*, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981), *cert. denied*, 455 U.S. 1038 (1982).

125. *See, e.g.*, *State v. Young*, 312 N.C. 699, 325 S.E.2d 181 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984).

126. *See, e.g.*, *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984).

127. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 104 S. Ct. 202 (1983).

128. *See State v. Pinch*, 306 N.C. 1, 61, 292 S.E.2d 203, 254 (Exum, J., dissenting) ("The bar is entitled to know upon what basis we are conducting the proportionality review. . . . We should not continue to keep the manner in which we perform this duty shrouded in mystery."), *cert. denied*, 459 U.S. 1056 (1982).

129. *See, e.g.*, *State v. Young*, 312 N.C. 699, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984).

130. *See, e.g.*, *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 104 S. Ct. 197 (1983).

131. *See, e.g.*, *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 105 S. Ct. 363 (1984); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984).

132. *See, e.g.*, *State v. Young*, 312 N.C. 699, 325 S.E.2d 181 (1985); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 105 S. Ct. 1232 (1985).

133. *See, e.g.*, *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984).

134. *See, e.g.*, *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984).

135. *See, e.g.*, *State v. Young*, 312 N.C. 699, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984).

136. *See, e.g.*, *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Maynard*, 311 N.C. 1,

review with relevant death penalty cases more often than with relevant life imprisonment cases. The court, however, has not developed a framework for deciding which variables should be controlling for comparison purposes or how these variables should be chosen for any particular case. This lack of a consistent approach to comparative proportionality review is arguably an unconstitutional exercise of "unbridled discretion" by the court in affirming sentencing decisions in capital cases. On the other hand, the court must not go too far in creating rigid guidelines by which to assess the similarities between cases because such inflexibility also is constitutionally suspect.¹³⁷

There are two compelling reasons for the continued development and application of a meaningful comparative proportionality review. First, proportionality review provides a vital safeguard against the arbitrary and capricious infliction of the death penalty by ensuring that the penalty will not be imposed on a defendant when there "is no principled way to distinguish [the] case, in which the death penalty [would be] imposed, from the many cases in which it was not."¹³⁸ Second, because it requires analysis and comparison of both death penalty and life imprisonment cases, proportionality review is the only effective way for the reviewing court to be certain that its sentencing decisions reflect contemporary attitudes about which crimes and which defendants warrant the death penalty.¹³⁹ The North Carolina Supreme Court has made tremendous progress in giving the statutorily mandated proportionality review depth and substance. A clearly defined, consistent framework¹⁴⁰ for approaching the comparative analysis, however, still is needed as an additional safeguard in the application of the death penalty.¹⁴¹ In developing such a framework the court should emphasize the need to consider more life imprisonment cases as a part of the comparative review. Case comparisons must be full, multifaceted examinations

301 S.E.2d 308, *cert. denied*, 105 S. Ct. 363 (1984); *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981).

137. "[N]either unbridled, unguided discretion, nor the absence of all discretion in the imposition of the death penalty is constitutionally permissible." *State v. Johnson*, 298 N.C. 47, 58, 257 S.E.2d 597, 607 (1979).

138. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

139. *See supra* note 4.

140. Such a framework could emphasize the totality of circumstances approach articulated in *Bondurant*, *see* text accompanying note 103, while setting forth a specific method of review. For example, the court might first look to the proportionality pool for cases in which the aggravating and mitigating factors are similar. Next, the court might examine cases in the pool of the same general type as the case under review, such as similar domestic relations murder cases or similar struggle cases. Third, the court could compare the case under review with other cases on any variables deemed relevant in the particular case, such as intoxication or age of the defendant. Last, the court could balance these comparisons in a totality of circumstances approach to decide whether the death penalty should be affirmed.

141. Such a framework becomes more critical as the pool, already containing 88 cases, continues to grow, making relevant comparisons absent any analytical framework extremely unwieldy. The court has recognized that "[a]n analysis which involves . . . inquiry into the endless combinations, variations, permutations, and nuances that an indepth review of every case in the pool would yield would be a fruitless endeavor." *State v. Vereen*, 312 N.C. 499, 519, 324 S.E.2d 250, 263 (1985). Thus a framework is imperative to help narrow the pool of cases to be compared and to focus the court's attention on the particular factors relevant to similarity comparisons in each case. Without some method of limiting the number of cases to be compared in the proportionality review, the burden imposed by the ever-growing pool of cases may encourage the court to return to the perfunctory comparative proportionality review that characterized the review of earlier death penalty cases.

of the similarities and dissimilarities between relevant cases. Although there can be "no perfect procedure for deciding in which case governmental authority should be used to impose death,"¹⁴² the court must attempt to strike a balance between unbridled discretion and inflexibility to ensure effective comparative proportionality review.

CAROLYN SIEVERS REED

142. *Pulley v. Harris*, 104 S. Ct. 871, 881 (1984).

APPENDIX

These 88 cases comprise the proportionality pool, *see supra* notes 17-19 and accompanying text. Included are all applicable cases tried under N.C. GEN. STAT. § 15A-2000 (1983) from 1977 to January 30, 1985. Subsequent case histories are omitted in the interest of space.

This pool was compiled in part from records kept in the offices of the North Carolina Supreme Court. The cases are divided into five categories for ease of reference.

I. DEATH SENTENCE AFFIRMED

State v. Vereen, 312 N.C. 499, 324 S.E.2d 250 (1985)
State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984)
State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984)
State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984)
State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984)
State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984)
State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984)
State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983)
State v. Williams, 308 N.C. 47, 301 S.E.2d 335 (1983)
State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983)
State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (1982)
State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982)
State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982)
State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982)
State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981)
State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981)
State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981)
State v. Martin, 303 N.C. 246, 278 S.E.2d 214 (1981)
State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981)
State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980)
State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979)

II. DEATH SENTENCE VACATED ON PROPORTIONALITY GROUNDS

State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985)
State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984)
State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983)
State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983)

III. DEATH SENTENCE VACATED FOR ERROR

State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984)
State v. Beal, 311 N.C. 555, 319 S.E.2d 557 (1984)
State v. Stanley, 310 N.C. 332, 312 S.E.2d 393 (1983)
State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980)

IV. LIFE SENTENCE—JURY RECOMMENDATION

- State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985)
State v. Harold, 312 N.C. 787, 325 S.E.2d 219 (1985)
State v. McCray, 312 N.C. 519, 324 S.E.2d 606 (1985)
State v. Hannah, 312 N.C. 286, 322 S.E.2d 148 (1984)
State v. Withers, 311 N.C. 699, 319 S.E.2d 211 (1984)
State v. Wilson, 311 N.C. 117, 316 S.E.2d 46 (1984)
State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984)
State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984)
State v. Bauguss, 310 N.C. 259, 311 S.E.2d 248 (1984)
State v. Hinson, 310 N.C. 245, 311 S.E.2d 256 (1984)
State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984)
State v. Adcock, 310 N.C. 1, 310 S.E.2d 587 (1983)
State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983)
State v. Booker, 309 N.C. 446, 306 S.E.2d 771 (1983)
State v. Bare, 309 N.C. 122, 305 S.E.2d 513 (1983)
State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983)
State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983)
State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983)
State v. Hill, 308 N.C. 382, 302 S.E.2d 202 (1983)
State v. Tysor, 307 N.C. 679, 300 S.E.2d 366 (1983)
State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983)
State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982)
State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982)
State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982)
State v. Fox, 305 N.C. 280, 287 S.E.2d 887 (1982)
State v. Hunt, 305 N.C. 238, 287 S.E.2d 818 (1982)
State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982)
State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981)
State v. Adcox, 303 N.C. 133, 277 S.E.2d 398 (1981)
State v. Miller, 302 N.C. 572, 276 S.E.2d 417 (1981)
State v. Hawkins, 302 N.C. 364, 275 S.E.2d 172 (1981)
State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981)
State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981)
State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980)
State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980)
State v. King, 301 N.C. 186, 270 S.E.2d 98 (1980)
State v. Crawford, 301 N.C. 212, 270 S.E.2d 102 (1980)
State v. Weimer, 300 N.C. 642, 268 S.E.2d 216 (1980)
State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980)
State v. Franks, 300 N.C. 1, 265 S.E.2d 177 (1980)
State v. Horton, 299 N.C. 690, 263 S.E.2d 745 (1980)
State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980)
State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980)
State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979)

- State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979)
State v. Heavener, 298 N.C. 541, 259 S.E.2d 227 (1979)
State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979)
State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979)

V. LIFE SENTENCE—IMPOSED BY THE TRIAL COURT JUDGE BECAUSE
JURY UNABLE TO AGREE

- State v. McDonald, 312 N.C. 264, 321 S.E.2d 849 (1984)
State v. Jenkins, 311 N.C. 194, 317 S.E.2d 345 (1984)
State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983)
State v. Whisenant, 308 N.C. 791, 303 S.E.2d 784 (1983)
State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983)
State v. Norwood, 303 N.C. 473, 279 S.E.2d 550 (1981)
State v. Oxendine, 303 N.C. 235, 278 S.E.2d 200 (1981)
State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981)
State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980)
State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980)
State v. Carter, 296 N.C. 344, 250 S.E.2d 263 (1979)

Property Settlement or Separation Agreement: Perpetuating the Confusion—*Buffington v. Buffington*

Domestic law in North Carolina has changed dramatically since 1867 when the North Carolina Supreme Court recoiled at the idea of a "separation agreement," which "would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice."¹ Over time, the courts and the legislature have come to accept as valid separation agreements between spouses.² In 1981 North Carolina joined other common-law states by adopting a system for equitable distribution of property upon divorce.³ Equitable distribution statutes reflect the growing view that marriage is a partnership, and that if a marriage ends, a fair and comprehensive system should govern the economic division of property.⁴

In *Buffington v. Buffington*⁵ the North Carolina Court of Appeals tried to continue North Carolina's progression from outdated common law to modern policies governing marriage.⁶ The court interpreted North Carolina General Statutes section 50-20(d)⁷ of the equitable distribution statute to reject the former public policy rule that a property agreement between spouses was invalid unless the parties were actually separated.⁸ In its brief opinion, the *Buffington* court opened a Pandora's box of problems for drafters of marital agreements by committing the common mistake of ignoring the distinction between "property settlements" and "separation agreements."⁹ In addition, the court failed to consider the potential conflict between its holding in *Buffington* and other recent

1. *Collins v. Collins*, 62 N.C. (Phil. Eq.) 153, 159 (1867).

2. See *infra* notes 25-38 and accompanying text.

3. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. § 50-20 (1984)). Mississippi is the only common-law property state that has not yet adopted an equitable distribution system. See Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1423 n.103 (1984). Eight states (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington) have community property laws. See *Family Law I: Property Division upon Divorce*, 1983 ANN. SURV. AM. L. 973, 973-74 n.3 (1984).

4. Sharp, *supra* note 3, at 1455; see also Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247 (1983) (Equitable distribution systems reflect the concept of marriage as "a shared enterprise to which both spouses make valuable contributions.").

5. 69 N.C. App. 483, 317 S.E.2d 97 (1984).

6. *Id.* at 488, 317 S.E.2d at 100. Applying rules of statutory construction, the court held that the legislature had "manifested a clear intent to change the former [common-law] rule." *Id.*

7. N.C. GEN. STAT. § 50-20(d) (1984) provides:

Before, during and after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

8. *Buffington*, 69 N.C. App. at 488, 317 S.E.2d at 100. The court used the term "property settlement" in its discussion of the former common-law rule. For a criticism of this phrasing, see *infra* notes 71-75 and accompanying text.

9. See *infra* notes 39-44 and accompanying text.

North Carolina decisions.¹⁰

The facts of *Buffington* were relatively simple. The Buffingtons were married on June 13, 1970.¹¹ They subsequently experienced marital problems and executed a separation agreement on November 12, 1981.¹² After signing the agreement, both spouses continued to reside in the marital home until November 30, 1981.¹³ Under the terms of the separation agreement, Mrs. Buffington was to convey her rights in five real estate properties to Mr. Buffington in exchange for Mr. Buffington's payment of \$60,000.¹⁴ On December 10, 1982, Mr. Buffington filed suit for divorce and specific performance of the separation agreement.¹⁵ Mrs. Buffington did not contest the divorce, but counterclaimed for equitable distribution under section 50-20, alleging that the separation agreement was void.¹⁶ After obtaining an absolute divorce, both parties moved for summary judgment on defendant wife's counterclaims. The trial court found the agreement valid and denied defendant's motion.¹⁷

On appeal¹⁸ defendant based her argument on long standing public policy that voided a separation agreement unless the parties were separated at the time they executed the agreement or planned to separate immediately after its execution.¹⁹ Defendant argued that by referring to North Carolina General Statutes sections 52-10 and 52-10.1, the requirements in section 50-20(d) implicitly affirmed existing public policy rules governing separation agreements.²⁰ Plaintiff argued that the clear language of section 50-20(d) explicitly approved property

10. See *infra* notes 82-88 and accompanying text.

11. Record at 1.

12. *Id.* The parties captioned their contract of November 12, 1981, as a "Separation Agreement." *Id.* at 4.

13. In the original complaint, Mr. Buffington, plaintiff, alleged that he "allowed" defendant to remain in the house until she made other arrangements. *Id.* at 1. Defendant described the 18-day period between November 12 and November 30, 1981, quite differently. She mentioned common displays of affection and one occasion of sleeping in the same bedroom. Brief for Defendant-Appellant at 14.

14. Record at 4-8. Defendant also waived any rights she might have had for alimony or support payments from plaintiff. *Id.* at 13.

15. In the alternative, plaintiff claimed damages for defendant's breach of the agreement. *Buffington*, 69 N.C. App. at 484, 317 S.E.2d at 98.

16. *Id.*

17. *Id.*

18. Before reaching the merits of the case, the court of appeals first addressed some procedural issues. *Id.* at 485-86, 317 S.E.2d at 98-99. The court noted that the denial of summary judgment was a proper order for appeal because it disposed of an issue that affected defendant's substantial rights. The court also recognized that defendant had failed to compile her record for appeal in the proper form. Because of "the importance of the issues presented," however, the court used its discretionary power to consider the appeal. *Id.*

19. Brief for Defendant-Appellant at 8-11. See 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 4, at 10 (rev. ed. 1983). Defendant also raised the question whether the parties had actually separated before November 30, 1981. Brief for Defendant-Appellant at 11-14. This issue, however, was a question of fact and would not have been properly raised in defendant's summary judgment motion.

20. Brief for Defendant-Appellant at 14-19; see also Note, *The North Carolina Act for Equitable Distribution of Marital Property*, 18 WAKE FOREST L. REV. 735, 738 (1982) (Under N.C. GEN. STAT. § 50-20(d), "the key to establishing a valid separation agreement is physical separation."). N.C. GEN. STAT. § 52-10 (1984) provides, in part, that "contracts between husband and wife not inconsistent with public policy are valid." N.C. GEN. STAT. § 52-10.1 (1984) is a general authorization for married couples to execute separation agreements not inconsistent with public policy.

settlements without requiring immediate separation of the spouses.²¹ Plaintiff also argued that his interpretation of section 50-20(d) was consistent with existing law on property distribution.²² The court of appeals accepted plaintiff's basic interpretation of section 50-20(d) and held that "the public policy of our state, as expressed by G.S. § 50-20(d), permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not."²³ Based on this finding, the court affirmed the denial of defendant's summary judgment motion and barred her from equitable distribution of the marital property.²⁴

The common-law fiction that a wife's identity merged with her husband's and made the couple "one person" initially prevented judicial acceptance of any contract between a husband and wife.²⁵ Although by the late nineteenth century courts generally allowed married parties to contract with each other, a large degree of judicial hostility to separation agreements remained.²⁶ In the 1912 case of *Archbell v. Archbell*,²⁷ the North Carolina Supreme Court finally held that separation agreements between spouses were not void as a matter of law.²⁸ The court held, however, that separation agreements were valid only under certain conditions. The *Archbell* case established the rule that separation of the parties must occur prior to or immediately after the agreement's execution for the agreement to be valid.²⁹ This requirement reflected the widespread disapproval of agreements facilitating divorce and agreements contingent upon divorce.³⁰ This public policy, which voided any agreement made in contemplation of divorce and without separation, prevailed in most states throughout most of

21. Brief for Plaintiff-Appellee at 6-9. Plaintiff argued that the references in § 50-20(d) to §§ 50-10 and 50-10.1 only incorporated technical requirements for properly executed agreements. *Id.* at 8.

22. *Id.* at 9-10. Plaintiff claimed that defendant's argument consistently ignored the distinction between separation agreements and property settlements. *Id.* at 9; see *infra* notes 71-75 and accompanying text.

23. *Buffington*, 69 N.C. App. at 488, 317 S.E.2d at 100.

24. *Id.*

25. See 2 R. LEE, *NORTH CAROLINA FAMILY LAW* § 188, at 465 (4th ed. 1980); Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819, 827 (1981); see also Comment, *An Analysis of the Enforceability of Marital Contracts*, 47 N.C.L. REV. 815, 816-17 (1969) (theory behind unity of married couple was fear that the husband was a dominating influence on the wife).

26. See Sharp, *supra* note 25, at 828.

27. 158 N.C. 409, 74 S.E. 327 (1912).

28. *Id.* at 413, 74 S.E. at 329.

29. *Id.*; see 2 R. LEE, *supra* note 25, § 188, at 469-70. In *Smith v. Smith*, 225 N.C. 189, 194, 34 S.E.2d 148, 151 (1948), the court restated the *Archbell* requirements for a valid separation agreement:

- (1) Existing separation or separation immediately following the execution of the deed,
- (2) Some adequate reason for executing a separation agreement other than the parties' "mere volition,"
- (3) Circumstances surrounding the execution which were fair and reasonable to the wife,
- (4) Statutory formalities.

30. See Sharp, *supra* note 25, at 830-31; 24 AM. JUR. 2D *Divorce and Separation* § 823 (1983); see also *Matthews v. Matthews*, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968) ("[T]he law now looks with disfavor upon an agreement which will encourage or bring about a destruction of the home."). The requirement of immediate separation also meets the need for consideration in a valid separation agreement. 1 A. LINDEY, *supra* note 19, § 4, at 6.

the twentieth century.³¹ Following a 1970 Florida case,³² courts in many jurisdictions began to apply the "contemplating divorce" standard more loosely to antenuptial agreements and to agreements made during the marriage but without immediate separation.³³ In North Carolina, courts tended to invalidate only the more outrageous contracts on the basis of contemplating divorce.³⁴ The policy was not abandoned³⁵ however, and the requirement of immediate separation for a valid separation agreement remained entrenched in North Carolina law.³⁶ Thus, although the law eventually favored separation agreements,³⁷ until *Buffington* it still forbade separation agreements executed without immediate separation.³⁸

Throughout the development of law defining and enforcing marital contracts, courts and advocates have repeatedly confused the terms "separation agreement" and "property settlement."³⁹ The distinctions between a true separation agreement and a true property settlement are simple. A separation agreement is a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately.⁴⁰ A property settlement provides for a division of real and personal property held by the spouses.⁴¹ The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce.⁴² The term "postnuptial agreements" generally is used to describe property division contracts or property transfers executed by spouses who have no intention of separating.⁴³ North Carolina follows the practice of most states and treats "separation agreements" and "property settlements" differently in various

31. See Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397, 397-98 (1977); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1259 (1974).

32. *Posner v. Posner*, 233 So. 2d 381, 384-85 (Fla. 1970).

33. See 2 R. LEE, *supra* note 25, § 183.1, at 446-48; Klarman, *supra* note 31, at 399-402; Note, *supra* note 20, at 737; 24 AM. JUR. 2D *Divorce and Separation* § 825 (1983).

34. Sharp, *supra* note 25, at 831-32; see also *Howland v. Stitzer*, 236 N.C. 230, 72 S.E.2d 583 (1952) (applying New York law, court held that agreement intended to smooth litigation process would not be per se void for contemplating divorce).

35. See, e.g., *Thompson v. Thompson*, 70 N.C. App. 147, 157, 319 S.E.2d 315, 321 (1984) ("It is well established that a promise or contract looking to the future separation of a husband and wife will not be sustained.").

36. See 2 R. LEE, *supra* note 25, § 188, at 470-71; 1 A. LINDEY, *supra* note 19, § 4, at 10-11; Sharp, *supra* note 25, at 831-32; Merritt, *Changing Marital Rights and Duties By Contract: Legal Obstacles in North Carolina*, 13 WAKE FOREST L. REV. 85, 99 (1977).

37. Sharp, *supra* note 25, at 830.

38. See *infra* notes 60-66 and accompanying text.

39. See Sharp, *supra* note 25, at 826-27.

40. See *id.* at 826.

41. *Id.*; 2 R. LEE, *supra* note 25, § 187.

42. See 2 R. LEE, *supra* note 25, § 187, at 463-64; Sharp, *supra* note 25, at 826; 24 AM. JUR. 2D, *Divorce and Separation* § 817 (1983); see also *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E.2d 299 (1977) (lower courts misled by assuming that support payments and property settlement fell into same category); *Stanley v. Cox*, 253 N.C. 620, 117 S.E.2d 826 (1961) (noting clear distinction between consideration of property settlement and alimony provisions).

43. See 2 R. LEE, *supra* note 25, § 186; 1 A. LINDEY, *supra* note 19, §§ 3-4. Antenuptial agreements—agreements in which prospective spouses fix their respective rights in each other's property prior to their marriage—fall under the same policy guidelines as postnuptial agreements. See 2 R. LEE, *supra* note 25, §§ 179, 186; Note, *supra* note 20, at 737.

circumstances.⁴⁴

Although the substance and analysis of a separation agreement and a property settlement should be distinct, the provisions often are confused when contained in a single document.⁴⁵ Usually the parties will refer to the entire document as a "separation agreement," even though its provisions cover both support rights and property rights.⁴⁶ Gradually, North Carolina courts have developed rules distinguishing between the support provisions and the property settlement provisions found in most separation agreements. These distinctions have been particularly important with regard to issues of modification⁴⁷ and reconciliation.⁴⁸ The North Carolina Supreme Court has recently addressed both issues.⁴⁹

Prior to 1983 North Carolina courts had a settled approach to dealing with the modifiability of provisions in a separation agreement.⁵⁰ First, courts distinguished between court-approved agreements, which they treated as contracts, and court-adopted agreements, which they treated as judgments.⁵¹ If a court-

44. See *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E.2d 299 (1972); *Stanley v. Cox*, 253 N.C. 620, 117 S.E.2d 826 (1961). The major technical distinctions between the effect of a separation agreement and a property settlement are as follows: (1) Tax Consequences—support payments made pursuant to a separation agreement are considered as alimony and are deductible for supporting spouse, but payments in property settlement are not; (2) Support payments in separation agreement normally will not survive past the death of either spouse, but payments or conveyances in property settlement usually will survive either party's death; (3) Alimony payments in a separation agreement will not be discharged in bankruptcy but property settlement liabilities may be discharged; (4) Reconciliation and resumed cohabitation of parties will rescind executory provisions of a separation agreement but will have no effect on property settlements. See 1 A. LINDEY, *supra* note 19, § 3, at 15-17; Sharp, *supra* note 25, at 826 n.38; 24 AM. JUR. 2D *Divorce and Separation* § 817 (1983).

45. See Sharp, *supra* note 25, at 826-27; see also 2 R. LEE, *supra* note 25, § 187, at 461 (common practice upon marriage breakup for parties to make contract covering every subject upon which they can agree).

46. 2 R. LEE, *supra* note 25, § 187, at 462. The Buffingtons' agreement covered everything from a waiver of alimony to property division to custody of their golden retriever. Record at 4-14, *Buffington*.

47. See *infra* notes 56-59 and accompanying text.

48. See *infra* notes 60-66 and accompanying text.

49. *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983) (modifiability of separation agreements); *Murphy v. Murphy*, 295 N.C. 390, 245 S.E.2d 693 (1977) (effect of reconciliation on separation agreements).

50. See 2 R. LEE, *supra* note 25, § 187, at 462-63. But cf. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 341-42 (1983) (recognizing "great confusion" in area of family law dealing with separation agreements presented to the court). Until the *Walters* decision, a "consent judgment" in North Carolina was "basically nothing more than a private contract between [spouses] that ha[d] been entered upon the records of, and received the stamp of approval from a court." Sharp, *supra* note 25, at 826.

51. *Rowe v. Rowe*, 305 N.C. 177, 183, 287 S.E.2d 840, 844 (1982); *White v. White*, 296 N.C. 661, 665, 252 S.E.2d 698, 700-01 (1979); *Bunn v. Bunn*, 262 N.C. 67, 69-70, 136 S.E.2d 240, 243 (1964); *Britt v. Britt*, 36 N.C. App. 705, 708, 245 S.E.2d 381, 383 (1978). In general, the relationship between a separation agreement and the divorce decree of a court produces one of three results. First, the agreement may survive the decree as a private contract. The parties can enforce the agreement as they would enforce any contract and can modify the terms of the agreement only if both parties consent. Second, the parties can present their agreement to the court for approval. These court-approved agreements also leave the parties with basic contract rights. The court cannot modify the agreement without consent of both parties, but court approval does have res judicata effect as to the absence of fraud and the fairness of the agreement. Last, the agreement may be adopted by the court so that the parties' contract rights are extinguished and the court replaces the contract provisions with its own judgment. Merger or adoption are the common terms used to describe this relationship. Support provisions that are merged or adopted by the court are subject to modification

adopted agreement contained separable and independent provisions, a court could not modify the property division terms, but could modify the alimony provisions.⁵² If the support provisions and the property distribution provisions constituted reciprocal consideration for each other, the court-adopted agreement became "integrated."⁵³ No provision of an integrated agreement was subject to modification without the parties' consent.⁵⁴ Last, if a court could not determine whether the parties intended that their agreement be integrated, the court would presume that the provisions were separable.⁵⁵

The North Carolina Supreme Court recently modified these well-settled rules. In *Walters v. Walters*⁵⁶ the supreme court turned settled law on its head in an attempt to "simplify" the issues surrounding the modifiability of separation agreements.⁵⁷ The decision in *Walters* established a new rule: Any separation agreement brought before a court loses its status as a private contract and becomes a judgment of the court.⁵⁸ Thus, all provisions of court-approved and court-adopted separation agreements are now subject to modification regardless of whether the support and property division sections are reciprocal.⁵⁹

Another shift in the law governing marital agreements involved the effect of reconciliation and the effect of cohabitation by separated spouses on the validity of separation agreements. The well-established rule in North Carolina had been that "where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is termi-

by the court without the consent of both parties. See W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS 560 (3d ed. 1978); Sharp, *supra* note 25, at 848.

52. *White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979); *Holsomback v. Holsomback*, 273 N.C. 728, 732, 161 S.E.2d 99, 102-03 (1968); *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964); *Britt v. Britt*, 36 N.C. App. 705, 708-09, 245 S.E.2d 381, 383 (1978); 2 R. LEE, *supra* note 25, § 187, at 462-63; Sharp, *supra* note 25, at 863. See *Rowe v. Rowe*, 305 N.C. 177, 183-84, 287 S.E.2d 840, 844 (1982).

53. See Sharp, *supra* note 25, at 851-52.

54. *White v. White*, 296 N.C. 661, 666-67, 252 S.E.2d 698, 701 (1979); *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964); *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E.2d 381, 384 (1978); see Sharp, *supra* note 25, at 851-52, 863.

55. *White v. White*, 296 N.C. 661, 672, 252 S.E.2d 698, 704 (1979); see *Rowe v. Rowe*, 305 N.C. 177, 184, 287 S.E.2d 840, 845 (1982); *Walters v. Walters*, 54 N.C. App. 545, 550, 284 S.E.2d 151, 155 (1981), *rev'd*, 307 N.C. 381, 298 S.E.2d 338 (1983); see also Sharp, *supra* note 25, at 863-64 (Although it is easy to indicate that provisions in a separation agreement are intended to be separable, "[u]nfortunately these distinctions are frequently not made.").

56. 307 N.C. 381, 298 S.E.2d 338 (1983).

57. *Id.* at 386, 298 S.E.2d at 342.

58. *Id.*

59. *Id.* The court explained that this was not a harsh rule because parties could protect the contract status of their separation agreement by not bringing it before the court. *Id.* In a case decided the same day as *Walters*, the supreme court made it clear that the enforceability of a separation agreement through the court's contempt power depended on its inclusion in a court-ordered judgment. *Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E.2d 345, 349 (1983). Even a separation agreement kept out of court initially could become part of a court order for specific performance and could then be enforced by contempt proceedings. *Id.* at 407 n.1, 298 S.E.2d at 350 n.1; see also *Harris v. Harris*, 307 N.C. 684, 300 S.E.2d 369 (1983) (court can hold person in contempt for past violation of specific performance order); *Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979) (wife given remedy of specific performance for husband's failure to make payments required by separation agreement); *Erhart v. Erhart*, 67 N.C. App. 189, 312 S.E.2d 534 (1984) (court cannot alter terms of private agreement between spouses but it can alter amount ordered in specific performance remedy).

nated for every purpose insofar as it remains executory."⁶⁰ In practice, reconciliation affects property settlement provisions differently from support provisions in a separation agreement. Because the parties usually execute a property settlement provision or a conveyance of property shortly after signing the separation agreement, a subsequent reconciliation will not affect such "executed" provisions.⁶¹ In a 1976 case, *In re Estate of Adamee*,⁶² the North Carolina Supreme Court held that "reconciliation" occurred when the couple resumed living together in their marital home and held themselves out as husband and wife.⁶³ Two years after *Adamee*, in *Murphy v. Murphy*,⁶⁴ the supreme court reaffirmed a 1932 case holding that sexual intercourse between separated spouses will have the effect of a reconciliation "whether the resumption of sexual relations was 'casual', 'isolated', or otherwise."⁶⁵ The *Murphy* holding made North Carolina the only state to define reconciliation in terms of either living together or engaging in sex.⁶⁶

While the North Carolina courts struggled to deal with the definition and effects of separation agreement provisions, the North Carolina General Assembly made a major change in property division law by passing an equitable distribution act.⁶⁷ Section (d) of the act allows parties to make their own property distribution agreement "before, during and after marriage."⁶⁸ Such property settlements bar application of the equitable distribution act so long as the parties

60. *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955); see *Murphy v. Murphy*, 295 N.C. 390, 394, 245 S.E.2d 693, 696 (1978); *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976); *Tilley v. Tilley*, 268 N.C. 630, 634, 151 S.E.2d 592, 594 (1966); *Joyner v. Joyner*, 264 N.C. 27, 31, 140 S.E.2d 714, 717-18 (1965); *Archbell v. Archbell*, 158 N.C. 409, 415, 74 S.E. 327, 330 (1912); *Williamson v. Williamson*, 66 N.C. App. 315, 317, 311 S.E.2d 325, 327 (1984); *Whitt v. Whitt*, 32 N.C. App. 125, 129, 230 S.E.2d 793, 796 (1977); *Potts v. Potts*, 24 N.C. App. 673, 674, 211 S.E.2d 815, 816 (1975); 2 R. LEE, *supra* note 25, § 200; Sharp, *supra* note 25, at 839.

61. See *Tilley v. Tilley*, 268 N.C. 630, 634, 151 S.E.2d 592, 594 (1966); *Joyner v. Joyner*, 264 N.C. 27, 31, 140 S.E.2d 714, 718 (1965); *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955); *Whitt v. Whitt*, 32 N.C. App. 125, 129, 230 S.E.2d 793, 795-96 (1977); *Potts v. Potts*, 24 N.C. App. 673, 674, 211 S.E.2d 815, 816 (1975); 2 R. LEE, *supra* note 25, § 200, at 518. The court of appeals has held that a spouse cannot change an otherwise fully executed property provision into an executory provision simply by avoiding compliance with the executed agreement. *Whitt v. Whitt*, 32 N.C. App. 125, 130, 230 S.E.2d 793, 796 (1977).

62. 291 N.C. 386, 230 S.E.2d 541 (1976).

63. *Id.* at 392-93, 230 S.E.2d at 546. The wife had returned to the home and lived there continuously from January through August 1974. *Id.*; see also *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945) (no separation occurred when spouses ceased sexual relations but continued to live together in the same house for two years).

64. 295 N.C. 390, 245 S.E.2d 693 (1978).

65. *Id.* at 397, 245 S.E.2d at 698. In support of its ruling, the court stated, "'otherwise, the separation agreement would degenerate into a mere cloak or device by means of which the husband would escape the responsibilities imposed by the marital status and yet be free to partake of such privileges as he chose to enjoy.'" *Id.* at 396-97, 245 S.E.2d at 698 (quoting *State v. Gossett*, 203 N.C. 641, 644, 166 S.E. 754, 755 (1932)).

66. Sharp, *supra* note 25, at 842. Professor Sharp points out that the result of North Carolina's unique "either/or" standard is to discourage attempted reconciliation and to raise suspicions that such an attempt is a pretext for trying to terminate the agreement. *Id.* at 842 & n.129.

67. See *supra* notes 3-4 and accompanying text.

68. The original draft of this section read "[b]efore and during marriage." Act of July 3, 1981, ch. 815, § 1, 1981 N.C. Sess. Laws 1184, 1185. The change may indicate the general assembly's intent to protect property settlements made after separation or divorce.

deem that the agreement is equitable.⁶⁹ Integrating this breakthrough in statutory law⁷⁰ with the ever shifting case law on property settlements and separation agreements was the task faced by the court of appeals in *Buffington*.

The most critical mistake made by the court in *Buffington* was perpetuating the semantic confusion that has plagued domestic law for some time.⁷¹ The opinion repeatedly interchanged the terms "property settlement" and "separation agreement" without distinguishing between them.⁷² Through its casual use of language, the court misstated the common-law rule as requiring "actual separation of the parties to a marriage in order for a *property settlement* to be effective."⁷³ The rule actually applies to separation agreements which may or may not include property settlement provisions.⁷⁴ In addition, the court failed to address how the equitable distribution statute, governing "property distribution" agreements, affected *Buffington*, which involved a "separation agreement."⁷⁵

Assuming that the court of appeals meant to apply its holding only to pure property settlements or to independent property settlement provisions within a separation agreement, the *Buffington* decision makes sense.⁷⁶ By interpreting section 50-20(d) as not requiring immediate separation for a property settlement agreement to be valid, the court complied with several well-known common-law principles. These principles—upholding postnuptial settlements without a separation,⁷⁷ upholding property division provisions in separation agreements as nonmodifiable without the consent of both parties,⁷⁸ and upholding executed property division provisions after the parties have reconciled⁷⁹—reflect the more modern policy in favor of allowing parties to determine their property rights without court intervention. The court's interpretation also was consistent with the basic purpose of equitable distribution—to recognize marriage as a partnership.⁸⁰ Absent any requirement of immediate separation, section 50-20(d) simply gives spouses the freedom to make property division contracts as equal partners at any point in their relationship. Thus, under a generous reading, the

69. N.C. GEN. STAT. § 50-20(d) (1984). The section made no allowance for judicial review of the parties' agreement. See *infra* notes 93-97 and accompanying text.

70. Before the advent of equitable distribution statutes, common-law states simply divided property based on which spouse held the title. This title system completely ignored contributions made by the homemaker. 24 AM. JUR. 2D *Divorce and Separation* § 870 (1983).

71. See *supra* notes 39-44 and accompanying text.

72. *Buffington*, 69 N.C. App. at 486-88, 317 S.E.2d at 99-100.

73. *Id.* at 455, 317 S.E.2d at 100 (emphasis added).

74. See *supra* note 29 and accompanying text.

75. The court consistently referred to "property settlements" when discussing the statute or the common law and to "separation agreement[s]" when discussing the facts of the case. *Buffington*, 69 N.C. App. at 486-88, 317 S.E.2d at 99-100.

76. In *McArthur v. McArthur*, 68 N.C. App. 484, 487, 315 S.E.2d 344, 346 (1984), the court of appeals held that the equitable distribution act "did not purport to change the general validity of separation agreements."

77. See *supra* note 43 and accompanying text.

78. This was the understanding prior to 1983. See *supra* notes 51-54 and accompanying text. But cf. *supra* notes 56-59 and accompanying text (*Walters* decision leaves all provisions in court-approved separation agreement open to modification.).

79. See *supra* notes 60-61 and accompanying text.

80. See *supra* note 4 and accompanying text.

Buffington case holds that a separation agreement not followed by actual separation is valid only to the extent that its provisions qualify as a property settlement.⁸¹

Unfortunately, the *Buffington* decision was not clearly articulated. A literal interpretation of the inaccurate language used by the court, combined with recent North Carolina case law on separation agreements, only confuses this area of domestic law. Major problems surface as possible consequences of a strict reading of *Buffington*.

Given the court's loose terminology, one could interpret *Buffington* as removing the immediate separation requirement from both property settlements and separation agreements.⁸² The court refused to void a separation agreement even though the parties had continued to live together for eighteen days. This holding conflicts with the North Carolina definition of "reconciliation" and its effect on separated parties.⁸³ Under *Buffington*, a court would enforce a separation agreement despite the continued cohabitation of the parties. Under *Murphy*, however, a court would void a separation agreement if the parties lived apart but engaged in occasional sexual relations,⁸⁴ and under *Adamee*, a court would strike a separation agreement if the parties held themselves out as married even if they never engaged in sex.⁸⁵ Such absurd results probably cut directly against the parties' intentions.⁸⁶ The *Murphy* decision has prompted criticism for discouraging attempted reconciliations between separated parties.⁸⁷ By following *Buffington*, an attorney might advise parties who actually intend to separate and want an agreement enforceable if attempts at reconciliation fail to continue living together for a few weeks after signing the agreement.⁸⁸ The *Buffington* opinion leaves unanswered the question of when North Carolina law requires separation for a valid separation agreement.

The *Buffington* decision, combined with the *Walters* rule,⁸⁹ encourages parties to keep their property distribution agreements out of the court's reach.⁹⁰ As

81. See 24 AM. JUR. 2D *Divorce and Separation* § 817 (1983); see also *Cator v. Cator*, 70 N.C. App. 719, 321 S.E.2d 36 (1984) (equitable distribution act will not modify binding separation agreement).

82. Both parties raised the issue and argued against this result. Brief for Defendant-Appellant at 18; Brief for Plaintiff-Appellee at 9-10.

83. See *supra* notes 60-66 and accompanying text.

84. See *supra* notes 64-66 and accompanying text.

85. See *supra* note 63 and accompanying text.

86. In *Buffington*, defendant argued that she and her husband did not intend to separate immediately and permanently, despite the language in the agreement. Brief for Defendant-Appellant at 11. In *Murphy*, plaintiff claimed that he never agreed to a resumption of marital relations although he did have occasional sex with the defendant. *Murphy*, 295 N.C. at 393-94, 245 S.E.2d at 695-96.

87. See Sharp, *supra* note 25, at 842.

88. On the other hand, the same attorney would advise a separated client to stay away from his or her spouse to avoid any encounter that might lead to an absolutely void separation agreement under the *Murphy* rule. See *supra* note 66.

89. See *supra* note 58 and accompanying text.

90. The *Walters* court stated that parties could keep a property settlement enforceable and modifiable under traditional contract methods by not presenting it to a court for approval. *Walters*, 307 N.C. at 387, 298 S.E.2d at 342. Judge Copeland writing for the majority in *Walters* clearly intended to encourage parties to contract outside the courtroom. See *id.* at 386-87, 298 S.E.2d at 342; see also *Rowe v. Rowe*, 305 N.C. 177, 190-92, 287 S.E.2d 840, 848-49 (1982) (Copeland, J.,

a private contract, the terms of the property settlement would be modifiable only by the parties⁹¹ and enforceable by contract remedies, including specific performance.⁹² So long as the parties agree that the property settlement is equitable, North Carolina General Statutes section 50-20(d) will operate to bar equitable distribution by the court.⁹³ This process, however, ignores the potential for overreaching and unfairness in marital contracts negotiated wholly outside the courtroom.⁹⁴ Despite occasional references in cases to a fairness standard for separation agreements,⁹⁵ North Carolina courts rarely have given more than perfunctory review to marital agreements.⁹⁶ *Walters, Buffington*, and North Carolina General Statutes section 50-20(d) all encourage freedom of contract between spouses for both property settlement and support provisions in a separation agreement. Simultaneously, these decisions limit judicial review of the agreement's ultimate fairness. At some point, North Carolina courts must consider whether contract remedies alone provide sufficient protection for spouses negotiating a separation agreement or whether some type of judicial review is necessary to ensure fair terms for spousal support.⁹⁷

In its efforts to clarify North Carolina domestic law, the court of appeals produced even more confusion with its *Buffington* decision. Confined to its specific holding that section 50-20(d) "permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not,"⁹⁸ the *Buffington* case advances the concept of marriage as a partnership⁹⁹ and retreats further from archaic rules against agreements contemplating divorce.¹⁰⁰ The ambiguous language used throughout the opinion, however, only contributes to the list of unanswered questions presently facing the drafter of separation agreements. For instance, when, if at all, are parties required to live

dissenting in part) (parties should be able to agree on final alimony settlement without interference by court).

91. See *Walters*, 307 N.C. at 387, 298 S.E.2d at 342.

92. See *supra* note 59.

93. See *supra* notes 68-69 and accompanying text.

94. See Sharp, *supra* note 3, at 1405-07. Professor Sharp argues that separation agreements are fundamentally different from other contracts because they deal with issues of highest personal significance, such as child custody and support rights. Thus, conditions for negotiating separation agreements are highly stressful. *Id.*

95. See, e.g., *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E.2d 562, 567 (1968) (separation agreement must be fair, reasonable, and just and must be untainted by fraud or undue influence); *Archbell v. Archbell*, 158 N.C. 409, 415, 74 S.E. 2d 327, 330 (1912) (separation agreement must be fair and reasonable to the wife in light of all circumstances of execution); *Johnson v. Johnson*, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984) ("[R]elief will be granted if the [separation agreement] is manifestly unfair to a spouse because of the other's overreaching.").

96. Sharp, *supra* note 3, at 1409. Until 1977, North Carolina required a private examination of the wife to ensure the fairness of the separation agreement. These "privy exams," however, were little more than rubber stamps of the parties' agreement. See Sharp, *supra* note 25, at 828-29, 833-34.

97. "Husbands and wives are not strangers, and to subject them to contract principles governing negotiations between strangers undermines the very heart of the concept of marriage as a sharing enterprise and ignores the psychological and economic realities of most spousal relationships." Sharp, *supra* note 3, at 1459.

98. *Buffington*, 69 N.C. App. at 488, 317 S.E.2d at 100.

99. See *supra* note 4 and accompanying text.

100. See *supra* notes 29-37 and accompanying text.

separate and apart for a court to consider their separation agreement valid? When, if ever, will North Carolina courts recognize the danger of blindly moving toward total contractual freedom for spouses without some concern for the ultimate fairness of the agreement? If nothing more, North Carolina courts must explicitly distinguish between a "property settlement" and a "separation agreement." Otherwise, the equitable distribution statute will become hopelessly entangled in the semantic web of domestic case law.

KATHERINE MARTIN ALLEN

Termination of Parental Rights: Putting Love in Its Place

Parentage is a very important profession; but no test of fitness for it is ever imposed in the interest of the children.

— George Bernard Shaw¹

Shaw may have been an uncommonly perceptive social critic, but in this case he was only half right. Although men and women generally are not told whether they are fit to have children, courts often decide whether they are fit to keep them.² Statutes in almost every state permit courts to terminate the parental rights of individuals who abandon, abuse, or otherwise neglect their children.³ North Carolina district courts⁴ may “completely and permanently”⁵ sever the parent-child relationship in such cases,⁶ unless the judge specifically finds that termination of parental rights would not be in “the best interests of the

1. G. SHAW, EVERYBODY'S POLITICAL WHAT'S WHAT 74 (1944).

2. Removal of children from a dangerous environment is justified by the doctrine of *parens patriae* (literally, parent of the country). *Parens patriae* “traces back to the English Court of Chancery's recognition that the throne had a duty to protect every subject incapable of protecting himself, including children.” Note, *Termination of Parental Rights: The Substantive Due Process Issue*, 26 ST. LOUIS U.L.J. 915, 917 (1982) (citing *Eyre v. Shaftsbury*, 24 Eng. Rep. 659, 664 (Ch. 1722)); see also Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971) (history of the *parens patriae* doctrine).

Shaw knew that courts sometimes take children away from their parents, but attributed the practice to something other than pure benevolence: “In certain rare cases like those of the poet Shelley and Annie Besant the State may take the children out of their parents' hands and make them wards in Chancery lest they should be brought up as atheists.” G. SHAW, *supra* note 1, at 74.

3. See Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1067 (1981).

4. “The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights” N.C. GEN. STAT. § 7A-289.23 (Cum. Supp. 1983). The district courts' jurisdiction, however, is not in fact exclusive. Superior court clerks may terminate parental rights during an adoption proceeding if the child has been abandoned. See *id.* § 48-5 (1984). The North Carolina General Statutes Commission has proposed legislation that would end this practice and give genuinely exclusive jurisdiction over termination cases to the district courts. Letter from Floyd M. Lewis, Assistant Attorney General, to the Honorable Abner Alexander, Chief District Court Judge, 21st Judicial District (Jan. 11, 1985) (available at Institute of Government, University of North Carolina at Chapel Hill).

5. N.C. GEN. STAT. § 7A-289.33 (Cum. Supp. 1983). “Following an order of termination, the parent has no right to contact the child or to be notified of the child's location, welfare, or adoption by a third party.” Bell, *supra* note 3, at 1068. Courts frequently have remarked on the severity of this action. See, e.g., *Davis v. Page*, 618 F.2d 374, 379 (1980) (“[I]t is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children.”), *aff'd in part, vacated and rev'd in part on reh'g*, 640 F.2d 599 (5th Cir. 1981) (en banc); *In re William L.*, 477 Pa. 322, 370, 383 A.2d 1228, 1252 (Manderino, J., dissenting) (“[T]he child is dead so far as that parent is concerned.”), *cert. denied*, 439 U.S. 880 (1978); *In re Gibson*, 4 Wash. App. 372, 379, 483 P.2d 131, 135 (1971) (Termination cuts off rights “more precious to many people than the right to life itself.”).

Neglected children may be—and usually are—temporarily removed from their parents' homes before termination proceedings are initiated. During this period the children may be returned to the parents if the situation improves. See *infra* text accompanying notes 35-39.

6. Grounds for termination in North Carolina are set forth in N.C. GEN. STAT. § 7A-289.32 (1981 & Cum. Supp. 1983), which states in part:

child."⁷ Unfortunately, there may be considerable disagreement about what constitutes neglect,⁸ or what is in a child's best interests.⁹ A recent North Carolina Supreme Court decision, *In re Montgomery*,¹⁰ illustrates the difficulties inherent in using such ill-defined standards to justify breaking up a family.

David Maxwell and Geraldine Montgomery were the parents of four minor children.¹¹ The couple was not married,¹² and both individuals were mentally retarded.¹³ Maxwell earned about \$120 a week as a welder and handyman on a farm in Harnett County, North Carolina.¹⁴ The family's small house "was sparsely furnished, having a single bed on which the parents slept and a mattress on the floor on which the four children slept."¹⁵ In September 1980 the children were adjudged neglected¹⁶ and temporary custody was awarded to the Harnett County Department of Social Services.¹⁷ Maxwell later was ordered to pay thirty dollars a week for the support of his children while they were in foster

The court may terminate the parental rights upon a finding of one or more of the following:

.....
(2) The parent has abused or neglected the child. . . .

.....
(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

.....
(7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child . . . and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

7. N.C. GEN. STAT. § 7A-289.31(a) (1981); *cf. id.* § 7A-289.22(3) (1981) ("Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his parents or other persons are in conflict.").

8. *See infra* note 67. In North Carolina a child "who does not receive proper care, supervision, or discipline from his parent" is said to be neglected. N.C. GEN. STAT. § 7A-517(21) (1981). The full text of this minimally helpful definition is reproduced *infra* at note 23.

9. *See infra* text accompanying notes 51-55 and 95-99.

10. 311 N.C. 101, 316 S.E.2d 246 (1984).

11. *Montgomery*, 311 N.C. at 102, 316 S.E.2d at 248. The children, three girls and a boy, ranged in age from five to ten at the time of the termination hearing. *Id.* at 101-02, 316 S.E.2d at 246-48.

12. *Id.* at 103, 316 S.E.2d at 248. Maxwell testified that he and Montgomery had considered marriage but felt that they got along better without it. *See* Transcript of Termination Hearing at 15. The couple still lives together and they remain unmarried. Telephone interview with O. Henry Willis, attorney for Maxwell and Montgomery (Jan. 24, 1985).

13. *Montgomery*, 311 N.C. at 103, 316 S.E.2d at 248. Maxwell scored 54 on the Wechsler Adult Intelligence Test, which places him in the moderately retarded category. Montgomery scored 55, which is considered mildly retarded. Petition for Termination of Parental Rights at 4 (D. Montgomery). In addition to being retarded, Montgomery frequently insisted that "someone was looking in the windows of her house and also that someone was trying to get inside her mind. She continuously claimed, for a period of about 14 months, that she was pregnant, when in fact she had had a hysterectomy." *Montgomery*, 311 N.C. at 103, 316 S.E.2d at 248.

14. *Montgomery*, 311 N.C. at 103, 316 S.E.2d at 248.

15. *Id.* Other evidence of neglect included the older children's poor school attendance record and a lack of food in the house. *Id.* at 103, 316 S.E.2d at 248-49.

16. Neglect proceedings typically precede—and are distinct from—actions for termination of parental rights. *See infra* text accompanying notes 35-40.

17. *Montgomery*, 311 N.C. at 104, 316 S.E.2d at 249.

care, but during the next forty-five weeks only three payments were made.¹⁸ The county Department of Social Services filed a petition for termination of parental rights, and the district court entered an order against Maxwell and Montgomery in January 1982,¹⁹ "citing as grounds neglect by the mother and both neglect and a failure to pay a reasonable [portion of the] cost of care by the father."²⁰

The North Carolina Court of Appeals overturned the trial court's termination order.²¹ A three-judge panel²² in *In re Montgomery* held that the statutory definition of child neglect²³ "is sufficiently broad to allow interpretation by the courts and the engrafting of some requirement that due consideration be given to non-economic or non-physical indicia."²⁴ Therefore, the court concluded that before terminating parental rights because of neglect, trial courts must "determine whether love, affection, and the other intangible qualities to be found in a family relationship actually exist"²⁵ The district court had made no such findings, and consequently its decision in *Montgomery* was vacated.²⁶

The North Carolina Supreme Court unanimously reversed the court of appeals and substantially reinstated the judgment of the trial court.²⁷ In a wide-ranging opinion by Justice Copeland, the supreme court held that "the Termination of Parental Rights statute as drafted provides an appropriate forum to address the 'intangible needs' issue, as well as protects a parent's interest in preserving the family."²⁸ Thus, it concluded that the court of appeals' requirement of "a separate and distinct finding regarding the adequate fulfillment of a

18. *Id.* Maxwell attributed his nonpayment to a failed hog farming venture. Transcript of Termination Hearing at 18.

19. See *Montgomery*, 311 N.C. at 104, 316 S.E.2d at 249.

20. *Id.* at 102, 316 S.E.2d at 248; see also *supra* note 6 (grounds for terminating parental rights). The trial court held N.C. GEN. STAT. § 7A-289.32(7) (1981), which permits termination based on a parent's mental incapacity, to be unconstitutional. See *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 256. This decision later was reversed by the North Carolina Supreme Court. See *infra* note 29.

21. *In re Montgomery*, 62 N.C. App. 343, 303 S.E.2d 324 (1983), *rev'd*, 311 N.C. 101, 316 S.E.2d 246 (1984).

22. The panel included Judge Hill, who wrote the opinion, and Judges Johnson and Phillips.

23. N.C. GEN. STAT. § 7A-517(21) (1981) defines a neglected juvenile as an individual who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

N.C. GEN. STAT. § 7A-517(21) was held constitutional in *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).

24. *In re Montgomery*, 62 N.C. App. 343, 349, 303 S.E.2d 324, 327 (1983), *rev'd*, 311 N.C. 101, 316 S.E.2d 246 (1984).

25. *Id.* at 353, 303 S.E.2d at 330. The court of appeals also held that the trial judge's findings of fact did not support his conclusion that Maxwell had failed to pay a reasonable portion of the cost of caring for his children while they were in the custody of the Department of Social Services. *Id.* at 354-55, 303 S.E.2d at 330. This portion of the court of appeals' opinion, in addition to the portion discussed in the text of this Note, was reversed by the supreme court. See *Montgomery*, 311 N.C. at 113-14, 316 S.E.2d at 253-54; *infra* note 29.

26. *Montgomery*, 62 N.C. App. at 355, 303 S.E.2d at 330.

27. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984).

28. *Id.* at 108, 316 S.E.2d at 251.

child's intangible and non-economic needs . . . is not justified."²⁹ This Note first examines the supreme court's treatment of the intangible needs issue, and then suggests three ways in which North Carolina's procedures for termination of parental rights should be clarified to better protect the interests of both children and their parents.

Child abuse and neglect are among the oldest and most intractable problems facing our society.³⁰ Nationwide, more than half a million children are wards of the state.³¹ As of September 1984, North Carolina county departments of social services had custody of 6853 children, most of whom had been abused, abandoned, or neglected by their parents or guardians.³² During fiscal year 1983-84 there were 6642 confirmed cases of child abuse and neglect in North Carolina; another 9901 cases were reported but not confirmed.³³ Although relatively few of these cases end up in juvenile court, and fewer still lead to termination of parental rights,³⁴ the magnitude of the problem is readily apparent.

Given the severe consequences of an order terminating parental rights,³⁵

29. *Id.* Regarding Maxwell's failure to pay a reasonable portion of the cost of foster care for his children, see *supra* note 25, the supreme court determined that,

A parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of [the] cost of foster care. . . . A parent is required to pay that portion of the cost of foster care. . . . that is fair, just, and equitable based upon the parent's ability or means to pay.

Id. at 113, 316 S.E.2d at 254 (quoting *In re Clark*, 303 N.C. 592, 603-04, 28 S.E.2d 47, 55 (1981)). The court stated further that "[w]e believe there was ample evidence from which the trial court could conclude that respondent Maxwell failed to pay a reasonable portion of the costs of care of the children." *Id.* at 114, 316 S.E.2d at 254.

Although the trial court had declared N.C. GEN. STAT. § 7A-289.32(7) (1981)—which permits termination of parental rights in cases of mental incapacity—to be unconstitutional, see *supra* note 20, the issue was not raised by either party in the court of appeals. See *Montgomery*, 311 N.C. at 114, 316 S.E.2d at 254. It was raised in the supreme court, however, and the judgment of the trial court was reversed. *Id.* at 114-16, 316 S.E.2d at 254-56. The court held that termination of parental rights for reasons of long-term mental incapacity does not violate either the due process or the equal protection provisions of the fourteenth amendment. *Id.* The supreme court thus followed the example of several other states. See, e.g., *In re Appeal in Maricopa County Juvenile Action*, 27 Ariz. App. 420, 555 P.2d 679 (1976); *In re David B.*, 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979); *In re J.C.*, 242 Ga. 737, 251 S.E.2d 299 (1978), *appeal dismissed sub nom.* Crane v. Carroll County Dep't of Family and Children Servs., 441 U.S. 929 (1979); *People ex rel. Nabstedt v. Barger*, 3 Ill. 2d 511, 121 N.E.2d 781 (1954); *In re Atkins*, 112 Mich. App. 528, 316 N.W.2d 477 (1982); *In re Sylvia M.*, 82 A.D.2d 217, 443 N.Y.S.2d 214 (1981), *aff'd*, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982); *Department of Human Servs. v. Ogle*, 617 S.W.2d 652 (Tenn. App. 1980).

30. See Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293 (1972).

31. See Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

32. Memorandum from Sue Glasby, Head, Children's Services Branch, N.C. Division of Social Services, to Permanent Families Task Force, Attachment A (Oct. 23, 1984) (available at Institute of Government, University of North Carolina at Chapel Hill) [hereinafter cited as Memorandum]. Of the 6853 children in Department of Social Services custody, 822 had been abused, 129 had been abandoned, and 3413 had been neglected. *Id.*

33. *Id.* at Attachment D. These figures break down to 11,181 reports of neglect (4980 confirmed) and 5362 reports of abuse (1662 confirmed). *Id.* The major contributing factors in confirmed abuse and neglect reports were the parents' lack of child development knowledge, mental retardation and emotional disturbance, and alcohol abuse. *Id.*

34. Interview with Janet Mason, Institute of Government, University of North Carolina at Chapel Hill (Feb. 18, 1985). Exact figures are unavailable. See *infra* note 41 and accompanying text.

35. See *supra* note 5.

the State typically begins action against parents in juvenile cases by petitioning for an adjudication of neglect, abuse, or dependency.³⁶ If the court finds the complaint valid, it may award custody of the children involved to the State or to some other foster care provider,³⁷ subject to periodic review.³⁸ Although an award of custody in these cases permits the reunification of parents and children if conditions in the home improve,³⁹ an initial judgment of neglect often results in permanent separation.⁴⁰

Because North Carolina only recently began keeping track of termination petitions,⁴¹ little is known about how often or how quickly the State cuts off parental rights in cases of child abuse and neglect.⁴² Termination procedures

36. See N.C. GEN. STAT. § 7A-561(b) (1981); 4 R. LEE, NORTH CAROLINA FAMILY LAW § 292 (1979) (quoting H. KRAUSE, FAMILY LAW IN A NUTSHELL § 20.7 (1977)).

37. See N.C. GEN. STAT. § 7A-647(2) (1981).

38. See *id.* § 7A-657 (1981). "[T]he judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter." *Id.*

39. See *id.*

40. As of September 1984, only about one-third of the 6853 children in the custody of the North Carolina Division of Social Services placement authority were expected to return home. See Memorandum, *supra* note 32, at Attachment A.

41. Telephone interview with Virginia Weisz, Administrator, Guardian Ad Litem Program, N.C. Administrative Office of the Courts (Jan. 24, 1985). Record-keeping began in the summer of 1984 and should be reflected in the Administrative Office of the Courts' next annual report. *Id.*

42. Cases reaching the appellate level indicate that in many instances termination of parental rights is not only justifiable, but arguably overdue. See, e.g., *In re Adcock*, 69 N.C. App. 222, 316 S.E.2d 347 (1984) (child beaten; parents failed to provide adequate food and clothing); *In re Pierce*, 67 N.C. App. 257, 312 S.E.2d 900 (1984) (child born with fetal alcohol syndrome; mother convicted of heroin possession and prostitution); *In re Apa*, 59 N.C. App. 322, 296 S.E.2d 811 (1982) (father's only contribution to child's support in 11 years was gift of bicycle); *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982) (children frequently dirty, unfed, and urine soaked; parents failed to provide medical care); *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440 (mother with tuberculosis refused to arrange separate living quarters for infant and later abandoned children), *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982); *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981) (mother had severe drug and alcohol problems; home infested with pests due to debris and garbage). These extreme examples of neglect and abuse make the evidence against the parents in *Montgomery* seem rather weak by comparison. See *supra* notes 12-20 and accompanying text.

The hair-raising nature of so many published cases also seems to contribute to the failure of most constitutionally based attacks on termination statutes. See generally Annot., 22 A.L.R.4th 774 (1983) (compilation of cases discussing constitutionality of state termination statutes). Courts frequently have rejected claims that the provisions of termination statutes are impermissibly vague. See, e.g., *In re Ladewig*, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1975); *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed sub nom.* *Moore v. Guilford County Dep't of Social Servs.*, 459 U.S. 1139 (1983); *In re J.Z.*, 190 N.W.2d 27 (N.D. 1971); *State v. McMaster*, 259 Ore. 291, 486 P.2d 567 (1971); *In re D.T.*, 89 S.D. 590, 237 N.W.2d 166 (1975); *D—F— v. State*, 525 S.W.2d 933 (Tex. Civ. App. 1975). *Contra* *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd in part per curiam*, 545 F.2d 1137 (8th Cir. 1976); *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979).

Some state courts have applied strict scrutiny when examining the constitutionality of termination statutes, see, e.g., *In re David B.*, 91 Cal. App. 3d 184, 192-93, 154 Cal. Rptr. 63, 68-69 (1979), although this does not appear to be the practice in North Carolina. See *Montgomery*, 311 N.C. at 115, 316 S.E.2d at 255 (statute merely required to have "rational relation" to state interests). The United States Supreme Court has recognized "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child," *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), but has gone only so far as to say that "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54; see also *Montgomery*, 311 N.C. at 106, 316 S.E.2d at 250 (asserting that *Santosky* holding confined to consideration of procedural due process claims).

Courts often reject equal protection challenges to termination statutes. See *In re Appeal in Maricopa County Juvenile Action*, 27 Ariz. App. 420, 555 P.2d 679 (1976); *In re Adoption of Ah-*

begin when a qualified party,⁴³ frequently a county department of social services, files a petition in district court alleging one or more of the grounds set forth in North Carolina General Statutes section 7A-289.32.⁴⁴ A formal hearing is conducted,⁴⁵ at which the petitioner must prove by "clear, cogent, and convincing evidence"⁴⁶ that at least one of the alleged grounds for termination exists.⁴⁷ If the petitioner satisfies this burden, the court is required to issue an order terminating parental rights unless it specifically finds that such action would not be in the best interests of the child.⁴⁸

Termination of parental rights is the method by which the State frees children for adoption without the consent of their parents.⁴⁹ Thus, the termination statute ostensibly furthers the State's policy of providing abused and neglected children "a permanent plan of care at the earliest possible age."⁵⁰ The permanence and stability envisioned by the statute are largely illusory, however, because relatively few children removed from their parents ever get adopted.⁵¹ "[E]xisting evidence suggests that children removed by the state from the home of their parents are often destined to remain in limbo until adulthood, wards of a

med, 44 Cal. App. 3d 810, 118 Cal. Rptr. 853 (1975); *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23, cert. denied, 454 U.S. 872 (1981); *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982); *In re Atkins*, 112 Mich. App. 528, 316 N.W.2d 477 (1982); *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 255-56. *Contra Miller v. Miller*, 504 F.2d 1067 (9th Cir. 1974); *Helvey v. Rednour*, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980); *In re Miller*, 105 Misc. 2d 41, 430 N.Y.S.2d 1007 (Fam. Ct. 1980); *In re Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976).

43. Termination petitions may be filed by either parent against the other, by a child's judicially appointed guardian, by a county department of social services or licensed child placing agency that has custody of the child, by anyone with whom the child has resided for the immediately preceding two years, or by the child's guardian ad litem. See N.C. GEN. STAT. § 7A-289.24 (1981 & Cum. Supp. 1983).

44. See *id.* §§ 7A-289.25(6), -32 (1981); see also *supra* note 6 (list of grounds for termination).

45. The hearing is conducted by a judge, sitting without a jury. N.C. GEN. STAT. § 7A-289.30(a) (1981). Indigent parents have a right to state appointed counsel in termination proceedings. *Id.* § 7A-289.30(al) (1981). But see *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 26-27 (1981) (no absolute right to counsel in termination cases).

46. N.C. GEN. STAT. § 7A-289.30(e) (1981); see also *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (constitutional requirement of clear and convincing evidence to establish grounds for termination).

47. Any one of the grounds stated in N.C. GEN. STAT. § 7A-289.32 (1981) is sufficient to support an order terminating parental rights. See *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252; *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E.2d 347, 349 (1984).

48. N.C. GEN. STAT. § 7A-289.31(a) (1981); see *supra* text accompanying note 7. The theoretically bifurcated nature of this proceeding—an adjudicatory hearing followed by a dispositional phase—was crucial to the supreme court's decision in *Montgomery*. See *infra* text accompanying notes 76-83. Bifurcation in theory, however, may not be bifurcation in fact. See *infra* text accompanying notes 85-86.

49. See N.C. GEN. STAT. § 7A-289.33 (1981 & Cum. Supp. 1983).

50. *Id.* § 7A-289.22(2) (1981).

51. The North Carolina Division of Social Services found adoptive parents for 732 children in fiscal year 1983-84. Memorandum, *supra* note 32. This was a considerable improvement over the year before, when 460 were placed, *id.*, but still represents only a small fraction of the total number of children in Department of Social Services custody. The difficulty in placing children whose parents' rights have been terminated can be especially acute: "Almost all these children, by the time you get around to terminating parental rights, are older or handicapped in some way. So many of them have special problems that make them hard to place." Telephone interview with Sue Glasby, Head, Children's Services Branch, N.C. Division of Social Services (Jan. 24, 1985) [hereinafter cited as Telephone interview with Sue Glasby]; see also *Santosky v. Kramer*, 455 U.S. 745, 765 n. 15 (1982) (termination of parental rights does not ensure adoption).

largely indifferent state.”⁵² Children in foster care tend to bounce from one placement to another,⁵³ a phenomenon known as “foster care drift.”⁵⁴ Termination of parental rights, in other words, is no panacea. If the only thing most neglected children have to look forward to is a bureaucratic journey toward emancipation, one might reasonably ask how often termination orders actually are in the children’s best interests.⁵⁵

The court of appeals may have had the inadequacies of the child welfare system in mind when it made its unique⁵⁶ and ultimately short-lived decision in *In re Montgomery*.⁵⁷ In addition, the panel was required to consider the due process rights of the parents,⁵⁸ as well as the state’s interest in its role as *parens patriae*.⁵⁹ The court began by acknowledging “the due process evolution that has taken place in the area of parental rights.”⁶⁰ According to Judge Hill, this evolution began in 1972, when the United States Supreme Court recognized the “essential” right to “conceive and raise one’s children.”⁶¹ It culminated in the case of *Santosky v. Kramer*,⁶² in which the Court held that the due process rights of parents required petitioners to prove grounds for termination of parental rights by clear and convincing evidence.⁶³ The court of appeals acknowledged that the *Santosky* holding had been limited to “matters of procedural due process,”⁶⁴ but nonetheless focused on the case’s supposed “substantive importance”.⁶⁵

Santosky did not attempt to state specifically what must be shown and what quantum of proof must exist to justify a termination of parental

52. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 273 (Summer 1975). As of Dec. 31, 1984, children in the placement authority of the Division of Social Services had been there an average of 3 years for white children, 4.1 years for black children, and 5 years for Indian children. Telephone interview with Sue Glasby, *supra* note 51; see also Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 833-38 (1977) (describing the “limbo” of the New York foster care system).

53. Telephone interview with Sue Glasby, *supra* note 51; see Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 994 (1975).

54. See Garrison, *supra* note 31, at 426.

55. See *In re Moore*, 306 N.C. 394, 413-15, 293 S.E.2d 127, 138-39 (1982) (Carlton, J., dissenting). One might argue that termination of parental rights, which at least opens up the possibility of adoption, is preferable to leaving children in the limbo of permanent foster care. See, e.g., *In re Biggers*, 50 N.C. App. 332, 343, 274 S.E.2d 236, 243 (1981). On the other hand, “[t]ermination of parental rights . . . should look . . . to the likelihood that the child in question will find suitable adoptive parents. Except in unusual circumstances, there is nothing to be gained by terminating parental rights where no effective parental substitute can be provided by way of adoption.” H. KRAUSE, FAMILY LAW IN A NUTSHELL §20.7 (1977).

56. “The Court of Appeals ruling is believed to be the first to instruct judges specifically to consider parental love.” Charlotte Observer, Jun. 9, 1983, at 1B, col. 2. The holding caused “an uproar” among North Carolina child welfare officials. Interview with Janet Mason, Institute of Government, University of North Carolina at Chapel Hill (Jan. 24, 1985).

57. 62 N.C. App. 343, 303 S.E.2d 324 (1983), *rev’d*, 311 N.C. 101, 316 S.E.2d 246 (1984).

58. See *supra* note 42.

59. See *supra* note 2 and accompanying text.

60. *Montgomery*, 62 N.C. App. at 347, 303 S.E.2d at 326.

61. *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

62. 455 U.S. 745 (1982).

63. *Id.* at 769.

64. *Montgomery*, 62 N.C. App. at 348, 303 S.E.2d at 326.

65. *Id.* at 348, 303 S.E.2d at 327.

rights. Nevertheless, the Court appeared to endorse an approach that would take into account more than physical or economic factors; an approach that would reflect some consideration by the trial judge of all the circumstances of the parent-child relationship in each individual case. The Court noted that termination proceedings "often required the fact finder to . . . decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress."⁶⁶

The words "absence of affection" must have hit a responsive chord in the court's collective mind, because Judge Hill devoted a great deal of his opinion to that subject. Taking advantage of the vague statutory definition of child neglect,⁶⁷ the court held that trial courts must consider noneconomic and nonphysical indications of parental fitness in termination cases.⁶⁸ Before terminating parental rights on the basis of neglect, trial courts were required to supplement the statutorily mandated findings of fact⁶⁹ with evidence concerning the parents' love and affection for their children.⁷⁰

The supreme court reversed,⁷¹ stating that "the Court of Appeals, in contravention of our Legislature's intent, erroneously elevated the burden of proof required in proceedings terminating parental rights."⁷² Due process, according

66. *Id.* (quoting *Santosky*, 455 U.S. at 769).

67. See *supra* notes 23-24 and accompanying text. Although the statutory definition of neglect has survived constitutional challenges based on vagueness, see *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982); *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982), phrases such as "proper care, supervision, and discipline" are nonetheless subject to a wide range of interpretations. The court of appeals has ruled that the terms used in the statutory definition "are given a precise and understandable meaning by the normative standards imposed upon parents by our society," *In re Biggers*, 50 N.C. App. 332, 341, 274 S.E.2d 236, 241 (1981), but this kind of precision is not very useful in a difficult case such as *Montgomery*. It has been argued, however, that the statutory definition of neglect must be rather vague if it is to protect the interests of children in a wide variety of circumstances. See *Biggers*, 50 N.C. App. at 342, 274 S.E.2d at 242 ("This context requires flexibility in the weighing of each case's facts in order to give the child, as well as the parent, the highest form of due process."); H. KRAUSE, *supra* note 55, § 20.3, at 236 ("Statutes need to be flexible to provide the necessary broad discretion to the courts."); Note, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights*, 1980 DUKE L.J. 336, 355.

68. See *Montgomery*, 62 N.C. App. at 349, 303 S.E.2d at 327.

69. See N.C. GEN. STAT. § 7A-289.30(d) (1981).

70. See *Montgomery*, 62 N.C. App. at 353, 303 S.E.2d at 330.

71. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984).

72. *Id.* at 106, 316 S.E.2d at 250. The supreme court arguably misinterpreted the court of appeals' opinion on this point. The lower court, according to Justice Copeland:

held that the clear, cogent, and convincing evidence standard of proof requires the party seeking termination of parental rights for neglect to prove not only that the physical and economic needs of the child are not adequately met, but also that the intangible non-economic needs of a child are not adequately met.

Id. at 104-05, 316 S.E.2d at 249. This is not quite what the court of appeals held. It merely required the trial court in termination cases to make specific findings regarding love and affection, and to take them into consideration. *Montgomery*, 62 N.C. App. at 353-54, 303 S.E.2d at 329-30. Judge Hill's opinion clearly indicated that whatever the weight of nonphysical, noneconomic indicia, evidence of physical and financial neglect could be controlling in a given case. *Id.* at 353, 303 S.E.2d at 329.

Even though the supreme court seems to have misinterpreted the court of appeals' ruling, the ultimate holding can be justified as an exercise of judicial restraint. See *infra* text following note 99. The lower court's opinion clearly engrafted an extra procedural requirement onto the termination statute, see *Montgomery*, 62 N.C. App. at 349, 303 S.E.2d at 327, and therefore increased the burden

to Justice Copeland, is satisfied when the petitioner has proved grounds for termination as they are set forth in the termination statute.⁷³ Therefore, the court held that the lower court had erred in requiring separate findings concerning the fulfillment of a child's intangible, noneconomic needs.⁷⁴

Where the evidence shows that a parent has failed or is unable to adequately provide for his child's physical and economic needs . . . and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. . . . [T]he fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected.⁷⁵

The supreme court did not dispute the importance of love and affection in family relationships.⁷⁶ Rather, it held that these intangible factors should be taken into consideration at the *dispositional* stage of a termination proceeding—not during the adjudicatory phase.⁷⁷ The purpose of the adjudicatory hearing⁷⁸ is to determine whether grounds for termination exist under section 7A-289.32, which says nothing about love or affection.⁷⁹ The dispositional phase,⁸⁰ on the other hand, is relatively open-ended. Even if grounds for termination have been established, "the [trial] court's decision to terminate parental rights is discretionary."⁸¹ The trial judge may dismiss a petition for termination if, in his opinion, termination of parental rights would not be in the best interests of the child.⁸² Thus, intangibles such as love and affection not only are relevant at the dispositional phase—they may be controlling.⁸³

The *Montgomery* holding, while seemingly straightforward, raises at least three important questions. First, what exactly did the supreme court mean by its bifurcated approach to termination hearings? The court of appeals seems to have envisioned a unitary proceeding in which the adjudicatory and dispositional phases are merged for all practical purposes.⁸⁴ North Carolina's termination statute does not explicitly require separate hearings,⁸⁵ and common practice

on petitioners beyond what was intended by the legislature. *Montgomery*, 311 N.C. at 106, 316 S.E.2d at 250. Moreover, the supreme court made room for consideration of the intangibles during the dispositional phase of termination proceedings. See *infra* text accompanying notes 76-83.

73. See *Montgomery*, 311 N.C. at 108-09, 316 S.E.2d at 251; see also *supra* note 6 (text of statute setting forth neglect grounds for termination).

74. See *Montgomery*, 311 N.C. at 108, 316 S.E.2d at 251.

75. *Id.* at 109, 316 S.E.2d at 252. The supreme court, again overruling the court of appeals, determined that there was substantial evidence supporting a determination of neglect on the part of Maxwell and Montgomery. See *id.* at 111, 316 S.E.2d at 253. Therefore the judgment of the trial court was reinstated.

76. *Id.* at 107, 316 S.E.2d at 250.

77. See *id.* at 107-08, 316 S.E.2d at 251; see also *supra* text accompanying notes 43-48 (synopsis of termination procedure).

78. See N.C. GEN. STAT. § 7A-289.30 (1981).

79. See *supra* note 6.

80. See N.C. GEN. STAT. § 7A-289.31 (1981 & Supp. 1983).

81. *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252.

82. *Id.* at 107, 316 S.E.2d at 251.

83. See *id.*

84. See *Montgomery*, 62 N.C. App. at 353-54, 303 S.E.2d at 329-30.

85. See N.C. GEN. STAT. §§ 7A-289.30 to .31 (1981 & Supp. 1983).

seems to favor a unitary approach.⁸⁶ The supreme court's opinion in *Montgomery* makes little sense, however, unless there is some clear distinction between the adjudicatory and dispositional stages of a termination proceeding.⁸⁷

Second, what is the proper burden of proof in the dispositional phase, and who should bear it? Although the petitioner must prove grounds for termination by "clear, cogent, and convincing evidence,"⁸⁸ the statute is silent as to the evidentiary standard governing disposition; nothing is said about which party must prove what is in the child's best interests, or what the quantum of that proof must be.⁸⁹ Some have suggested that once grounds for termination have been established, the parents should bear the burden of proving that termination would not benefit the child.⁹⁰ The supreme court in *Montgomery* simply stated that disposition is "discretionary,"⁹¹ and strongly implied that the trial judge at this point is on his own.⁹² Given that termination of parental rights often results in no demonstrable benefit to the children involved,⁹³ the best practice in these cases would be to make petitioners prove by at least a preponderance of the evidence that termination would be in the best interests of the children.⁹⁴

Third, what besides love and affection should trial courts consider at the

86. Appellate records filed in *Montgomery* and other termination cases indicate that evidence typically is taken at a single hearing, after which the judge issues an order that combines his findings concerning grounds for termination and his disposition of the case. See Records on Appeal for *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984); *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982); and *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

87. Some states permit, but do not require, separate adjudicatory and dispositional hearings in termination cases. See, e.g., MONT. CODE ANN. § 41-3-607 (1983); WIS. STAT. ANN. § 48.424 (West Supp. 1984). Separate hearings often are required, however, in an initial neglect proceeding, when the petitioner seeks removal of a child from its parents' custody. See IOWA CODE ANN. §§ 232.96, -.99 (West 1985); MONT. CODE ANN. § 41-3-404 (1983); N.C. GEN. STAT. §§ 7A-639 to -640 (1981); WASH. REV. CODE ANN. § 13.34.110 (Supp. 1985); Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1077 (1975); see also *supra* text accompanying notes 35-40 (describing typical pretermination actions taken by state in cases of neglect).

88. N.C. GEN. STAT. § 7A-289.30(e) (1981); *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252.

89. See N.C. GEN. STAT. § 7A-289.31 (1981 & Supp. 1983). The statute, however, does state that when grounds for termination have been proved, "the court shall issue an order terminating . . . parental rights . . . unless the court shall further determine that the best interests of the child require that . . . parental rights . . . not be terminated." *Id.* (emphasis added). Thus, it can be argued that the burden of proving that termination would not benefit the child is on the parents at this point. See *infra* note 90 and accompanying text. But cf. *infra* text accompanying notes 91-92 (supreme court does not seem to accept this view).

90. This position was argued by the *Montgomery* appellants and their allies before the supreme court. They contended that "at the dispositional stage of a termination case there is a presumption or inference in favor of termination; and . . . the parent should bear the burden of establishing by a preponderance of the evidence that the best interests of the child require that rights not be terminated." Brief for *Amicus Curiae* Mecklenburg County Department of Social Services at 5; see also Brief for Appellants at 14-15 (making similar assertions).

91. *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252.

92. See *id.*

93. See *supra* text accompanying notes 51-55.

94. In some states the court is required to find by clear and convincing evidence that termination would be in the child's best interests. See, e.g., ME. REV. STAT. ANN., tit. 22, § 4055(1)(B)(2)(a) (Supp. 1984); TENN. CODE ANN. § 37-1-147(d) (1984). In addition to protecting children from unwarranted state action, such a rule acknowledges the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky*, 455 U.S. at 753; see *supra* note 42.

dispositional stage of a termination hearing? Both the statute and the *Montgomery* opinion state that termination decisions are controlled by the best interests of the child.⁹⁵ Neither authority, however, spells out how those interests are defined.⁹⁶ A comprehensive list of relevant factors probably would be endless, but the trial court should be required to enter at least some findings of fact in support of its disposition.⁹⁷ For example, a child's adoptability surely is relevant to whether termination of parental rights would be in his best interests;⁹⁸ if a child cannot be placed, termination of parental rights can do him little good.⁹⁹

The North Carolina legislature's definition of child neglect may be vague, but that does not justify the court of appeals' attempt to increase the statutory burden on petitioners in termination cases. Thus, the supreme court's reversal in *Montgomery* was an appropriate exercise of judicial restraint. The court should be commended, moreover, for recognizing the importance of love and affection in termination cases and for putting such considerations in their proper place. Nevertheless, questions and concerns about North Carolina's termination procedures persist in the wake of *Montgomery*. The supreme court should clarify the extent to which termination hearings must be bifurcated, so that proper consideration can be given to the different issues at stake in the adjudicatory and dispositional phases. The burden of proving that termination is in the best interests of the child should be placed squarely on the petitioner in order to protect

95. N.C. GEN. STAT. § 7A-289.22(3) (1981 & Supp. 1983); *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 256.

96. Wisconsin courts, by way of contrast, have been given explicit guidance by the legislature: In considering the best interests of the child . . . the court shall consider but not be limited to the following:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

Wis. STAT. ANN. § 48.426(3) (West Supp.1984).

97. Termination orders typically make a conclusory statement to the effect that termination of parental rights is in the child's best interests. Findings of fact supporting grounds for termination are included in the order, but there generally are no *separate* findings demonstrating why termination is in the best interests of the child. See Records on Appeal for *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984), *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982), and *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981). Much of the evidence will support both conclusions, of course, but there also may be situations in which the proof establishing grounds for termination is not sufficient to prove that termination is in the best interests of the child. See *Montgomery*, 311 N.C. at 107, 316 S.E.2d at 251.

98. See *supra* note 96.

99. See *V. DeFRANCIS, TERMINATION OF PARENTAL RIGHTS* 15 (1971); *supra* note 55. The court of appeals has ruled that trial judges need not find that a child is highly adoptable before terminating parental rights, *In re Norris*, 65 N.C. App. 269, 310 S.E.2d 25 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984), but some district court judges reportedly consider adoptability to be a key factor in their termination decisions: "Some judges think there should be a home waiting before parental rights are terminated. Some [child care] professionals feel that way too." Telephone interview with Sue Glasby, *supra* note 51.

the due process rights of both children and their parents. The factors to be considered in determining a child's best interests should be elucidated. Courts may be justified in deferring to the legislature on some of these matters, but judicial restraint should not be an excuse for inaction when such vital relationships hang in the balance.

GARY R. GOVERT

Mayer v. Mayer: Estoppel and Foreign Divorce

A suitor persuades a married woman to obtain an invalid divorce from her husband and actively helps her procure that decree so that they may marry. When their marriage turns sour and the wife sues for divorce and alimony, can the husband defend on the ground that they are not married because her former divorce was invalid? In *Mayer v. Mayer*,¹ the North Carolina Court of Appeals held that "a husband, who actively participates in his wife's procurement of an invalid divorce from her prior husband, is estopped from denying the validity of that divorce."² The court's decision was particularly significant because in estopping the husband from attacking the validity of his wife's divorce, the court gave practical effect to a "quickie" foreign divorce, which the court considered invalid on both jurisdictional and public policy grounds.³

The *Mayer* decision is important for two reasons. First, the court addressed "[f]or the benefit of the bar"⁴ a question of first impression in North Carolina⁵—whether recognition should be given to a divorce obtained in a foreign country in which neither party was domiciled. Second, the court applied the equitable doctrine of estoppel⁶ to prevent a husband, not a party to his wife's prior di-

1. 66 N.C. App. 522, 311 S.E.2d 659, *disc. rev. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984).

2. *Id.* at 531, 311 S.E.2d at 666.

3. *See id.* at 527-30, 311 S.E.2d at 663-65. Although divorces granted in sister states often are called foreign divorces, this Note reserves the term "foreign divorce" for divorces granted by a foreign nation.

4. *Id.* at 530, 311 S.E.2d at 665. The court stressed the narrowness of its holding: "Much of what we have said impels us to reject Doris Mayer's argument that her Dominican divorce was valid. Our narrow holding, however, must be emphasized—considering the circumstances of this case, Victor Mayer can neither assert the invalidity of Doris Mayer's Dominican divorce nor the invalidity of his subsequent marriage to Doris Mayer." *Id.* at 536, 311 S.E.2d at 669. The finding that the husband was estopped disposed of the case; it was not necessary to determine the validity of the divorce.

5. *See infra* notes 63-65 and accompanying text.

6. The court explained that "[u]nder quasi-estoppel doctrine, one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct." *Mayer*, 66 N.C. App. at 532, 311 S.E.2d at 666. This doctrine is to be distinguished from "true" or "technical" estoppel. "True estoppel results from representations made or other conduct performed for the consumption of another who relies thereon to his damage in ignorance of the truth." Weiss, *A Flight on the Fantasy of Estoppel in Foreign Divorce*, 50 COLUM. L. REV. 409, 414 (1950); *see also* Rosenberg, *How Void is a Void Decree, or The Estoppel Effect of Invalid Divorce Decrees*, 8 FAM. L.Q. 207, 208 (1974) (quasi-estoppel broader than traditional estoppel theory because no need for reliance on factual representations by other party).

The Supreme Court of New Jersey discussed the type of estoppel under consideration in this Note, stating that it is applied to prevent a person from "taking a position inconsistent with prior conduct, if this would injure another, regardless of whether that person has actually relied thereon." *Kazin v. Kazin*, 81 N.J. 85, 94, 405 A.2d 360, 365 (1979). Professor Clark described this doctrine of estoppel as the "principle, that one who obtains a judgment cannot later collaterally attack it upon jurisdictional grounds." Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L.J. 45, 45 (1960). According to Professor Clark, it has long been applied to divorce decrees, and recently has been "broadly extended." *Id.* at 45 & n.7. Professor Rosenberg has defined this type of estoppel as follows: "When someone is barred from attacking a divorce decree of questionable validity because such an attack would produce an unfair result, the concept of equitable estoppel has been applied." Rosenberg, *supra*, at 207. This form of estoppel has been referred to as the "'equitable principle of estoppel,' 'so-called estoppel,' 'quasi-estoppel,' 'somewhat similar to estoppel,' [and] 'res judicata.'" 1 R. LEE, NORTH CAROLINA FAMILY LAW § 98, at 446 (4th ed. 1979); *see* Weiss, *supra*, at 414. The *Mayer* court referred to this doctrine as "quasi-estoppel," "estoppel,"

vorced, from attacking the validity of that decree on the ground that the granting court lacked jurisdiction.⁷ Although North Carolina courts have estopped parties to a divorce from attacking the decree on grounds of subject matter jurisdiction,⁸ they had never similarly estopped a second spouse of one of the parties to the original divorce.⁹ This Note analyzes the *Mayer* decision and concludes that the invocation of estoppel was justified and consistent with the policy considerations supporting the doctrine.

In the summer of 1980, Doris Crumpler and Victor Mayer decided to marry,¹⁰ but they faced the obstacle of Mrs. Crumpler's marriage to Fred Crumpler. Under North Carolina law¹¹ at the time, Doris Crumpler had a choice between absolute divorce¹² based on a variety of fault grounds¹³ or absolute divorce based on one year's separation.¹⁴ Victor Mayer insisted on a "quickie" divorce¹⁵ and promised Mrs. Crumpler that he would support her in a manner better than that to which she was accustomed.¹⁶ As a result, on October 17, 1980, Doris Crumpler and Fred Crumpler executed a separation agreement, according to which she relinquished any right she might have had to alimony or support.¹⁷

Subsequently, in February 1981, Doris Crumpler traveled to the Dominican

and "equitable estoppel." *Mayer*, 66 N.C. App. at 523-25, 530-36, 311 S.E.2d at 661-62, 665-69. This Note adopts the term "estoppel."

For an overview of the application of estoppel to divorce cases, see Clark, *supra*; Phillips, *Equitable Preclusion of Jurisdictional Attacks on Void Divorces*, 37 FORDHAM L. REV. 355 (1969); Rosenberg, *supra*; Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. FAM. L. 9, 37-48 (1982-83); Weiss, *supra*.

7. *Mayer*, 66 N.C. App. at 530-36, 311 S.E.2d at 665-69.

8. See, e.g., *McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E.2d 507 (1937); *Watson v. Watson*, 49 N.C. App. 58, 270 S.E.2d 542 (1980). Unless otherwise indicated, the term "jurisdiction" will be used throughout this Note to refer to subject matter jurisdiction rather than to personal jurisdiction.

9. See *infra* notes 89-107 and accompanying text.

10. Record at 44.

11. Both the Crumplers were domiciled in North Carolina. *Mayer*, 66 N.C. App. at 528, 311 S.E.2d at 664.

12. In North Carolina there are two kinds of divorce, divorce from the bond of matrimony (*a vinculo matrimonii*) or absolute divorce, and divorce from bed and board (*mensa et thoro*). 1 R. LEE, *supra* note 6, § 33. The former completely dissolves the marriage, and the parties are free to remarry. *Id.* at 168; N.C. GEN. STAT. § 50-11(a) (1984). The latter does not end the marriage but "merely suspends the effect of marriage as to cohabitation," 1 R. LEE, *supra* note 6, § 33, and "effects an authorized separation of the husband and wife." *Schlagel v. Schlagel*, 253 N.C. 787, 790, 117 S.E.2d 790, 793 (1961).

13. N.C. GEN. STAT. § 50-5 (1976) (adultery, impotence, pregnancy by another at time of marriage, criminal act and two years' separation, unnatural sex, incurable insanity), *repealed by Act of June 24, 1983, ch. 613, 1983 N.C. Sess. Laws 548*; see 1 R. LEE, *supra* note 6, § 64. Under § 50-5 the application for divorce had to be made by the injured party. *Id.* at 310. Doris Crumpler may not have been able to prove any of these fault grounds.

14. N.C. GEN. STAT. § 50-6 (1984); see 1 R. LEE, *supra* note 6, § 64, at 310.

15. *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668; Record at 44-45. The court of appeals referred to this proposition as a "fact" and stated that the record "suggest[ed]" that it was so. *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668. The district court's findings of fact stated that "defendant was aware of the arrangements for plaintiff to obtain a divorce from Mr. Crumpler in the Dominican Republic." Record at 96.

16. *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668; Record at 45.

17. *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668; Record at 96.

Republic,¹⁸ where she obtained a divorce on the ground of irreconcilable differences.¹⁹ Although the trial court found that Mr. Crumpler "acquiesced" in the divorce,²⁰ he did not appear in the action either in person or through counsel.²¹ Rather, Mr. Crumpler expressed an intention to obtain a divorce in North Carolina after one year's separation; at the time of the district court judgment Mr. Crumpler had neither obtained a divorce nor remarried.²²

Victor Mayer accompanied Doris Crumpler to the Dominican Republic and paid for all expenses except the filing fees of the divorce.²³ After returning to North Carolina, Doris Crumpler signed, at Mr. Mayer's request,²⁴ an antenuptial agreement limiting her right to alimony to \$1,000 per month for every month their marriage lasted.²⁵ Following the couple's marriage on March 6, 1981, they lived together in Doris Mayer's house until July 1981, when Mr. Mayer, without provocation, left his new wife.²⁶ Significantly, the district court found that during the period the Mayers lived together, they "held themselves out as husband and wife, and neither questioned the validity of their marriage until after the separation."²⁷

After the separation, Doris Mayer filed a complaint seeking divorce from bed and board,²⁸ permanent alimony, and alimony pendente lite.²⁹ Defendant Victor Mayer counterclaimed for an annulment and asserted as a defense the invalidity of his wife's prior divorce and the resulting invalidity of his marriage.³⁰ Plaintiff contended that since defendant had participated in obtaining the Dominican divorce and had held himself out as her husband, he was estopped to deny the validity of that divorce.³¹

The district court denied plaintiff's motions for alimony pendente lite and

18. *Id.* Doris Crumpler remained in the Dominican Republic for five days. *Id.*

19. *Mayer*, 66 N.C. App. at 526, 311 S.E.2d at 663; Plaintiff Appellant's Brief at 15. In 1971 the divorce law respecting foreigners in the Dominican Republic was liberalized to attract the migratory divorce trade. Note, *Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution?*, 10 CORNELL INT'L L.J. 116, 116 (1976); see 7 MARTINDALE-HUBBELL LAW DIRECTORY, *Dominican Republic Law Digest* 3-4 (1985) (law of Dominican Republic permits nonresidents to obtain mutual consent divorce if one spouse is present and the other is represented by an attorney).

20. Record at 96.

21. *Mayer*, 66 N.C. App. at 528, 311 S.E.2d at 664; see Record at 96. The court of appeals noted that the district court had not found as a fact that Mr. Crumpler had made either an actual or a constructive appearance in the Dominican proceeding. *Mayer*, 66 N.C. App. at 528, 311 S.E.2d at 664.

22. Record at 96.

23. *Id.*

24. *Id.* at 32-33, 48-49.

25. *Id.* at 96-97 (agreement signed March 4, 1981). For example, if the marriage lasted for 12 months, Doris Mayer would be entitled to alimony of \$1,000 per month for a period of 12 months.

26. *Id.* at 97.

27. *Id.*

28. See N.C. GEN. STAT. § 50-7 (1984) (grounds for divorce from bed and board); *supra* note 12 (discussion of divorce from bed and board).

29. Record at 5-6 (complaint filed October 15, 1981). See N.C. GEN. STAT. §§ 50-16.2, -16.3 (1984) (grounds for alimony and alimony pendente lite).

30. Record at 8; see N.C. GEN. STAT. § 51.3 (1984) ("All marriages between . . . persons either of whom has a husband or wife living at the time of such marriage . . . shall be void.").

31. Record at 16.

attorney's fees.³² Although the court determined that plaintiff would have satisfied the grounds for alimony and alimony pendente lite if the parties had been married,³³ it concluded that plaintiff's Dominican divorce was invalid due to lack of jurisdiction in the granting court, and that therefore her subsequent marriage was void.³⁴ Further, the court concluded that Victor Mayer was not estopped from asserting the invalidity of the divorce.³⁵ It found estoppel inapplicable to a foreign divorce that the state deemed invalid, inapplicable to a person not a party to the divorce, and inapplicable to the facts of the case.³⁶

On appeal the court of appeals rejected Doris Mayer's contention that her foreign divorce should be recognized in North Carolina.³⁷ The court concluded that comity³⁸ should not be extended to the foreign divorce because there was not an adequate basis for jurisdiction—either domicile or some other sufficient relationship.³⁹ In addition, the Dominican decree was denied recognition because it was offensive to North Carolina's public policy against the "hasty dissolution of marriages."⁴⁰

The court of appeals reversed the district court on the estoppel issue.⁴¹ Balancing conflicting public policies, the court noted that estoppel allows circumvention of a state's divorce law by giving practical effect to invalid divorces obtained elsewhere.⁴² It observed, however, that it would be even more contrary to public policy to allow Victor Mayer to avoid his marital obligations by denying the validity of the divorce.⁴³ The court concluded that application of estoppel is not necessarily precluded when the party to be estopped is a second spouse rather than one of the parties to the original divorce.⁴⁴

Generally, a state has jurisdiction to grant a divorce when one of the spouses is domiciled in that state.⁴⁵ As the Supreme Court stated in *Williams v.*

32. *Id.* at 100.

33. *Id.* at 98; see also N.C. GEN. STAT. § 50-16.2(4) (1984) (grounds for alimony include supporting spouse's abandonment of dependent spouse).

34. Record at 98.

35. *Id.* at 99.

36. *Id.* at 99-100.

37. *Mayer*, 66 N.C. App. at 525-30, 311 S.E.2d at 662-65. The court of appeals first had to dispose of a procedural issue. The court determined that an immediate appeal was possible despite prior decisions holding that an order of alimony pendente lite is interlocutory and not immediately appealable. *Id.* at 525, 311 S.E.2d at 662.

38. Comity is the recognition granted by one nation to legislative, executive, or judicial acts of another nation. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). For further discussion of comity, see *infra* notes 56-65 and accompanying text.

39. *Mayer*, 66 N.C. App. at 527-28, 311 S.E.2d at 663-64.

40. *Id.* at 529-30, 311 S.E.2d at 664-65.

41. *Id.* at 536, 311 S.E.2d at 669.

42. *Id.* at 532, 311 S.E.2d at 666.

43. *Id.*

44. *Id.* at 534-36, 311 S.E.2d at 667-68.

45. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 71, at 218 (1971) provides: "A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state." This rule is not absolute; jurisdiction sometimes is predicated on a different requirement. See *id.* § 72, at 219 ("A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses, neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage."). North Carolina generally has required domicile as a minimum requirement for jurisdiction to grant a divorce.

North Carolina (Williams II),⁴⁶ "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile."⁴⁷ Domicile is the place where one is physically present or living with the intent of making that place his home.⁴⁸ Because of the domicile requirement, the parties to a divorce proceeding cannot confer jurisdiction on a court.⁴⁹ The rationale underlying this restriction on the parties' choice of forum is that the domiciliary state is a third party to the marriage, and thus has an interest in the marital relationship.⁵⁰

Recognition of a divorce granted in a sister state is governed by the full faith and credit clause of the United States Constitution.⁵¹ The Supreme Court held in *Williams v. North Carolina (Williams I)*⁵² that domicile of one of the parties to a divorce is a sufficient jurisdictional basis to entitle the divorce decree to full faith and credit in every other state.⁵³ The scope of this entitlement to full faith and credit was narrowed somewhat by *Williams II*, which held that the recognizing state can deny full faith and credit to a divorce if the rendering sister state lacked jurisdiction—that is, if neither party was domiciled in the rendering state.⁵⁴ This freedom of the recognizing state to inquire into domicile and jurisdiction was thereafter limited by Supreme Court decisions holding that if the res judicata rules of the rendering state would bar collateral attack on the issue of domicile and jurisdiction when both parties participated (bilateral divorce), the full faith and credit clause bars attack on this ground in other states as well.⁵⁵

Recognition of foreign divorces, however, is not governed by the full faith and credit clause,⁵⁶ but instead is dependent on the doctrine of comity.⁵⁷ Com-

Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. REV. 243, 293 (1970). In addition, jurisdiction is dependent upon residence in the state for the length of time required by statute. 3 W. NELSON, NELSON ON DIVORCE AND ANNULMENT 489 (2d ed. 1945). North Carolina has a durational residency requirement of six months. N.C. GEN. STAT. § 50-8 (1984); see 1 R. LEE, *supra* note 6, § 98, at 452.

46. 325 U.S. 226 (1945).

47. *Id.* at 229.

48. *State v. Williams*, 224 N.C. 183, 191, 29 S.E.2d 744, 749-50 (1944), *aff'd*, 325 U.S. 226 (1945); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 286 (1968).

49. See, e.g., *Golden v. Golden*, 41 N.M. 356, 370, 68 P.2d 928, 936 (1937); Weiss, *supra* note 6, at 412.

50. *Williams II*, 325 U.S. at 230; Weiss, *supra* note 6, at 412. In *Williams II* the North Carolina Supreme Court stated: "The marriage relation is interwoven with public policy to such an extent that it is dissolvable only by the law of the domicile." *State v. Williams*, 224 N.C. 183, 192, 29 S.E.2d 744, 750 (1944), *aff'd*, 325 U.S. 226 (1945). See generally Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819 (1981) (interests of state and parties in separation agreements).

51. U.S. CONST. art. IV, § 1; see *Williams v. North Carolina*, 317 U.S. 287, 299-304 (1942); 3 W. NELSON, *supra* note 45, § 33.2, at 451.

52. 317 U.S. 287 (1942).

53. *Id.* at 298-302.

54. *Williams II*, 325 U.S. at 229.

55. *Sherrer v. Sherrer*, 334 U.S. 343, 350-52 (1948); *Coe v. Coe*, 334 U.S. 378, 384 (1948); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 73 & comment b (1971). In other words, the res judicata rules of the state rendering the divorce are entitled to full faith and credit in all other states.

56. 3 W. NELSON, *supra* note 45, § 13.11, at 439; Annot., 13 A.L.R.3d 1419, 1423-24 (1967).

57. See, e.g., *Warrender v. Warrender*, 79 N.J. Super. 114, 119, 190 A.2d 684, 687 (App. Div. 1963), *aff'd*, 42 N.J. 287, 195 A.2d 16 (1964); *Southern v. Southern*, 43 N.C. App. 159, 161-62, 258

ity has been described as being "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows . . . [to decrees of another] having due regard both to international duty and convenience, and to the rights of its own citizens" ⁵⁸ Thus, the extension of comity to a foreign divorce is discretionary. ⁵⁹ It may be denied, for example, when the foreign court lacked jurisdiction or when the foreign divorce is contrary to the recognizing state's public policy. ⁶⁰

The overwhelming majority of states withhold comity from a foreign divorce in cases in which the foreign court lacked jurisdiction because neither party was domiciled in the foreign nation. ⁶¹ A minority of states, however, has extended comity to bilateral foreign divorces in which neither party was domiciled in the foreign nation. ⁶²

Prior to the *Mayer* decision, no North Carolina cases had dealt with the recognition of a foreign divorce, nor had any cases dealt with the recognition of a divorce granted in a foreign nation where neither party was domiciled. ⁶³ The trial judge remarked at the close of the *Mayer* trial that this issue was "new ground in North Carolina." ⁶⁴ Professor Lee had reasoned in 1979 that since North Carolina would not recognize an *ex parte* sister-state decree granted without domicile, it was unlikely that the State would recognize a similar foreign divorce. ⁶⁵

Some background on the doctrine of estoppel is necessary to an understanding of the *Mayer* decision. Estoppel may be applied to prevent attack on both sister-state ⁶⁶ and foreign divorces. ⁶⁷ This doctrine—that one who obtains or

S.E.2d 422, 424 (1979); 1 R. LEE, *supra* note 6, § 104, at 487; 3 W. NELSON, *supra* note 45, § 33.11, at 440; Annot., *supra* note 56, at 1423-24. See generally Swisher, *supra* note 6, at 14-17 (comity as applied to foreign divorces).

58. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

59. Swisher, *supra* note 6, at 14.

60. 1 R. LEE, *supra* note 6, § 104, at 487; 3 W. NELSON, *supra* note 45, § 33.11, at 440-42 (comity denied if divorce granted for cause not available under local law). The jurisdictional standards of the United States are used, rather than those of the foreign country. Annot., *supra* note 56, at 1424. Comity may be denied when the grounds upon which the divorce was granted are not available in and are contrary to the public policy of the state. *E.g.*, *Everett v. Everett*, 345 So. 2d 586, 588 (La. Ct. App. 1977); *cf.* *Hilton v. Guyot*, 159 U.S. 113, 165 (1895) (Comity is extended voluntarily and only when extension of it is not contrary to a nation's policies).

61. 1 R. LEE, *supra* note 6, § 104, at 488; Swisher, *supra* note 6, at 25-26; Note, *Extension of Comity to Foreign-Nation Divorce*, 46 TENN. L. REV. 238, 242 (1978).

62. Swisher, *supra* note 6, at 34-37; see *Perrin v. Perrin*, 408 F.2d 107 (3d Cir. 1969) (Virgin Islands); *Yoder v. Yoder*, 31 Conn. Supp. 345, 330 A.2d 825 (Conn. Super. Ct. 1974); *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966); *Hyde v. Hyde*, 562 S.W.2d 194 (Tenn. 1978); Weiss, *supra* note 6, at 426-27 (discussing factors the New York courts consider when deciding whether to grant comity to a foreign divorce).

63. See 1 R. LEE, *supra* note 6, § 104, at 488. *Southern v. Southern*, 43 N.C. App. 159, 258 S.E.2d 422 (1979), dealt not with the extension of comity to a divorce decree but with the extension of comity to an in personam judgment for alimony and child support. The judgment was rendered in England, where the plaintiff was domiciled, but North Carolina's requirements for personal jurisdiction were not satisfied.

64. Record at 94.

65. 1 R. LEE, *supra* note 6, § 104, at 488-89.

66. *E.g.*, *In re Marriage of Winegard*, 278 N.W.2d 505, 509-10 (Iowa), *cert. denied*, 444 U.S. 951 (1979). In cases involving a bilateral sister-state divorce, attack on the divorce may be prevented

relies on a judgment may not later collaterally attack that judgment for lack of jurisdiction⁶⁸—is an exception to the general principle that a judgment rendered without jurisdiction is void and subject to collateral attack.⁶⁹ Estoppel, however, is not applied in every case.⁷⁰ Whether estoppel will be applied depends upon the facts of a particular case.⁷¹ Application of estoppel does not validate an invalid divorce decree, but rather silences a collateral attack.⁷² The practical effect is to give the invalid divorce decree some legal force,⁷³ and to allow parties to confer jurisdiction for a divorce by their conduct.⁷⁴ The result may be to allow an evasion of the recognizing domiciliary state's divorce laws.⁷⁵

To assess the *Mayer* court's application of estoppel, one must first consider the general level of acceptance accorded the doctrine, the factors that govern its application, and its use against third-party second spouses. Although some jurisdictions reject estoppel,⁷⁶ the doctrine has been accorded "broad acceptance" by the courts.⁷⁷ Among the factors that militate in favor of estoppel are procurement of the divorce by the party to be estopped, participation of the defendant in the invalid divorce, remarriage by either party, receipt of benefit such as alimony as a result of the divorce, and knowledge of and acquiescence in the questionable validity of the divorce.⁷⁸ Professor Clark has abstracted the basic components of a factual situation suitable for application of estoppel: "(1) the

by application of full faith and credit and res judicata. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 73 & comment (1971); see *supra* notes 51-55 and accompanying text. Although such a bilateral sister-state divorce would be protected from attack under the rule of *Sherrer v. Sherrer*, 334 U.S. 343 (1948), courts sometimes discuss such cases in terms of estoppel. Clark, *supra* note 6, at 48.

67. Annot., *supra* note 56, at 1452. See generally Swisher, *supra* note 6, at 37-45 (overview of application of estoppel to prevent attack on foreign divorces).

68. Clark, *supra* note 6, at 45.

69. *Id.*

70. See *Kazin v. Kazin*, 81 N.J. 85, 94, 405 A.2d 360, 365 (1979).

71. *Id.*; see Rosenberg, *supra* note 6, at 207-08. Estoppel "is an equity principle dependent upon events which may have occurred after the divorce was granted or apart from the divorce action. It is not a function of the decree but a personal disability of the party attacking the decree." Clark, *supra* note 6, at 47.

72. *Packer v. Packer*, 6 A.D.2d 464, 468, 179 N.Y.S.2d 801, 805 (1958); Clark, *supra* note 6, at 55.

73. Rosenberg, *supra* note 6, at 207.

74. Phillips, *supra* note 6, at 364 & n.48.

75. *Id.* at 364.

76. See, e.g., *Everett v. Everett*, 345 So. 2d 586 (La. Ct. App.), cert. denied, 349 So. 2d 329 (La. 1977); *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978).

77. Clark, *supra* note 6, at 49; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 & comment b (1971). Rejection of estoppel has been termed the "traditional theory," Swisher, *supra* note 6, at 40, while acceptance has been described as a sociological approach, since estoppel has been viewed as consistent with sociological theories of divorce. See Clark, *supra* note 6, at 56. This sociological approach was expressed succinctly by the court in *Kazin v. Kazin*, 81 N.J. 85, 98, 405 A.2d 360, 367 (1979) ("There remains little, if any, interest in encouraging the resurrection of deceased marriages, even if pronounced dead by other tribunals whose processes are not completely consistent with our own.").

78. E.g., *Dietrich v. Dietrich*, 41 Cal. 2d 497, 505, 261 P.2d 269, 273 (1953) (remarriage), cert. denied, 346 U.S. 938 (1954); *In re Marriage of Winegard*, 278 N.W.2d 505, 509 (Iowa) (acquiescence), cert. denied, 444 U.S. 951 (1979); *Norris v. Norris*, 342 Mich. 83, 87, 69 N.W.2d 208, 210 (alimony), cert. denied, 350 U.S. 903 (1955); *Rosen v. Sitner*, 274 Pa. Super. 445, 451-52, 418 A.2d 490, 493 (1980) (benefit of marrying a party to invalid divorce); Rosenberg, *supra* note 6, at 210-11, 220; Weiss, *supra* note 6, at 415-16; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 comment b (1971).

attack on the divorce is inconsistent with prior conduct of the attacking party; (2) the party upholding the divorce has relied upon it, or has formed expectations based on it; (3) these relations or expectations will be upset if the divorce is held invalid."⁷⁹ The broad scope of estoppel is illustrated by section 74 of the *Restatement (Second) of Conflict of Laws*: "A person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him to do so."⁸⁰

Courts historically have been more hesitant to apply estoppel to a third party than to a party to an invalid divorce.⁸¹ The issue of estopping a third party most often arises with respect to a second spouse, usually a second husband, of a party to the invalid divorce.⁸² The second husband may be estopped from attacking the validity of his wife's divorce if he married with knowledge of the nature of her prior divorce, and thus received benefits from that divorce through his marriage.⁸³ He also may be estopped if he persuaded his future wife to obtain the invalid divorce, financed or arranged the divorce,⁸⁴ or promised support.⁸⁵

Some courts and commentators have argued the equity of estopping a second spouse from attacking the validity of a divorce he has participated in procuring.⁸⁶ Since such a person, although technically not a party, stands in the same position as the plaintiff in the divorce proceeding, the same reasons for applying estoppel to a party to the divorce also apply to him.⁸⁷ Further, it has been argued that application of estoppel to the parties to an invalid divorce but not to a second spouse "creates the impossible situation of wife or husband 'at will,' where the divorced party who remarried cannot avoid the obligation of his remarriage, while his second spouse could at any time seek and obtain an annulment."⁸⁸

79. Clark, *supra* note 6, at 56-57.

80. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 (1971). "Foreign" as used in the Restatement means both sister-state and foreign country.

81. Rosen v. Sitner, 274 Pa. Super. 445, 451, 418 A.2d 490, 492-93 (1980). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 comment b (1971); RESTATEMENT OF CONFLICT OF LAWS § 112 (1934) ("nor is any opinion expressed as to whether . . . a third person may be precluded from questioning the validity of a divorce decree").

82. Clark, *supra* note 6, at 66; see, e.g., Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957); Poor v. Poor, 381 Mass. 392, 409 N.E.2d 758 (1980).

83. See, e.g., Zirkalos v. Zirkalos, 326 Mich. 420, 427, 40 N.W.2d 313, 316 (1949); Rosen v. Sitner, 274 Pa. Super. 445, 451-52, 418 A.2d 490, 493 (1980).

84. See, e.g., Harlan v. Harlan, 70 Cal. App. 2d 657, 161 P.2d 490 (1945) (financed and arranged divorce); *In re Marriage of Winegard*, 278 N.W.2d 505 (Iowa) (acquiescence, encouragement and financed divorce), cert. denied, 444 U.S. 951 (1979).

85. See, e.g., Kazin v. Kazin, 81 N.J. 85, 88, 98, 405 A.2d 360, 362, 367 (1979) (promise of support, knowledge, arranged and financed divorce, receipt of benefits).

86. Goodloe v. Hawk, 113 F.2d 753, 756 n.9 (D.C. Cir. 1940) ("Equity has regard for realities . . . [T]he appellant is as responsible for the action of the Virginia court, in a real sense, as the appellee."); Harlan v. Harlan, 70 Cal. App. 2d 657, 661, 161 P.2d 490, 493 (1945) ("[the second spouse is] as much as any other . . . responsible for . . . the suit"); Rosenberg, *supra* note 6, at 217; Weiss, *supra* note 6, at 425.

87. Clark, *supra* note 6, at 66-67.

88. Note, *Enforcement by Estoppel of Divorces Without Domicil: Toward a Uniform Divorce Recognition Act*, 61 HARV. L. REV. 326, 333 (1948); see Weiss, *supra* note 6, at 425.

Prior to *Mayer*, North Carolina courts had estopped attacks on divorce decrees for lack of jurisdiction to prevent a person from asserting that the divorce to which he was a party was invalid.⁸⁹ In *McIntyre v. McIntyre*⁹⁰ the North Carolina Supreme Court estopped defendant in a suit for alimony from asserting as a defense the invalidity for lack of jurisdiction of a divorce decree he had obtained in Nevada from his first wife.⁹¹ The court concluded that "reason and justice" required this result because defendant had invoked the jurisdiction of the Nevada court, and thereby had been able to remarry.⁹² The court also stressed that his remarriage had created new expectations on the part of his second wife.⁹³ In *Watson v. Watson*⁹⁴ defendant in the original divorce sought to have a Florida divorce her husband had obtained declared void for lack of jurisdiction because he was not domiciled there. The court applied estoppel to defendant as one alternative ground of its decision.⁹⁵ Even if the divorce were invalid, the wife would have been estopped because she had received benefits from the divorce by entering into a settlement agreement and receiving "valuable consideration."⁹⁶

The husband in *Redfern v. Redfern*⁹⁷ did not attack the validity of his divorce per se, but rather its validity at the date of his marriage to his second wife. The fact setting thus differed from the typical estoppel situation.⁹⁸ Although the court in *Redfern* found the divorce valid at the date of the second marriage, the opinion also contained language suggesting a decision based on estoppel. In *Redfern*, defendant had instituted the divorce proceeding and had continued to live with his second wife after discovering that the divorce judgment was not signed until after the date of the second marriage. He failed to tell his second wife of this flaw; therefore, the court noted he "should be equitably estopped" from asserting this defense to his second wife's action for alimony.⁹⁹

Parties guilty of culpable conduct sometimes have not been allowed to invoke the doctrine of estoppel. Estoppel was denied in *Donnell v. Howell*,¹⁰⁰ a case upholding an Alabama divorce, in which the wife stipulated that she had obtained the divorce by fraud as to domicile. The court did not discuss the case in terms of "clean hands"—the principle that one seeking the protection of eq-

89. See *McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980) (estoppel not explicitly relied on); *Watson v. Watson*, 49 N.C. App. 58, 270 S.E.2d 542 (1980) (alternate ground).

90. 211 N.C. 698, 191 S.E. 507 (1937).

91. *Id.* at 699, 191 S.E. at 507.

92. *Id.* at 699, 191 S.E. at 508.

93. *Id.*

94. 49 N.C. App. 58, 61, 270 S.E.2d 542, 544 (1980).

95. *Id.*

96. *Id.* at 64, 270 S.E.2d at 546; see 1 R. LEE *supra* note 6, § 98, at 463 ("A person cannot attack a divorce decree after using the benefits which it confers.").

97. 49 N.C. App. 94, 270 S.E.2d 606 (1980).

98. See Note, *supra* note 88, at 327 (divorce usually attacked for lack of "jurisdiction over the subject matter or domicile").

99. *Redfern*, 49 N.C. App. at 95-97, 270 S.E.2d at 608-09.

100. 257 N.C. 175, 125 S.E.2d 448 (1962).

uity must have a clear conscience¹⁰¹—but stated that estopping the husband (who also had made the fraudulent allegations) would, due to the joint stipulation of fraud, be an “offense against public morals.”¹⁰²

Thus, prior to *Mayer* North Carolina courts had estopped either the plaintiff or the defendant in the original divorce proceeding based on the following factors: procurement of the divorce (invocation of jurisdiction), remarriage, new expectations upset by invalidating the divorce, receipt of benefit, and knowledge of and acquiescence in the invalid divorce.

Two cases in which a third party was not estopped involved culpable conduct by the party seeking estoppel or lack of participation in the divorce by the third party. In *Cunningham v. Brigman*¹⁰³ a wife asserted estoppel against the children of her second husband. She alleged that after her remarriage her second husband had learned that her divorce was of questionable validity, but nonetheless continued to live with her. The court stated that estoppel is for the protection of innocent persons. Because the wife had procured her divorce based on a false affidavit, she could not invoke the doctrine of estoppel.¹⁰⁴ In an earlier case, *Pridgen v. Pridgen*,¹⁰⁵ the court had allowed a second husband to annul his marriage on the ground that his wife had been divorced by her first husband in an invalid proceeding. The court did not discuss the possibility of estopping the second husband based on benefit to him from marriage, his wife's remarriage, or the expectations that would be upset by invalidating the divorce.¹⁰⁶ On the facts in these cases—when the conduct of the wife claiming estoppel was not innocent or when the second husband had not been involved in the prior decree—North Carolina courts had declined to estop the third-party second spouse.¹⁰⁷

The *Mayer* court was eager to reach questions concerning the recognition of “quickie” foreign divorces in North Carolina.¹⁰⁸ Although the court could have avoided the issue altogether,¹⁰⁹ it analyzed in some detail the jurisdictional and public policy issues bearing on the recognition of the Dominican divorce. The court also resolved the question of appealability so as to permit immediate appeal of the validity of the Dominican divorce, further evidence of its desire to

101. For a discussion of “clean hands” as applied in estoppel cases, see Rosenberg, *supra* note 6, at 221.

102. *Donnell*, 257 N.C. at 185, 125 S.E.2d at 455.

103. 263 N.C. 208, 139 S.E.2d 353 (1964) (will contest).

104. *Id.* at 211, 139 S.E.2d at 355.

105. 203 N.C. 533, 166 S.E. 591 (1932).

106. A case peripherally related to the question at hand is *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1956), in which the court held the decree at most voidable, not void. *Id.* at 295, 93 S.E.2d at 626. The court did not allow collateral attack by a second husband on the ground for divorce alleged in his wife's prior divorce. *Id.* at 289, 93 S.E.2d at 622. The court carefully limited the question before it to collateral attack on the ground for divorce alleged rather than collateral attack on jurisdiction.

107. *Cunningham* concerned refusal to estop those whose claim was derived from a third-party second spouse. See generally Clark, *supra* note 6, at 67 (person whose claim is derived from one who would have been estopped is also estopped).

108. *Mayer*, 66 N.C. App. at 523-24, 311 S.E.2d at 661-62.

109. *Id.* at 523, 311 S.E.2d at 661; see *supra* note 4.

address the foreign divorce issue.¹¹⁰ The court's refusal to extend comity to a foreign divorce granted without domicile (or other sufficient relationship between the parties and the forum), and its refusal to extend comity to a foreign divorce contrary to the state's public policy against hasty divorce, shut off the "quickie" foreign divorce as a viable alternative for North Carolinians.

The court in *Mayer* preserved the legal distinction between sister-state and foreign divorce decrees. Briefly stated, the court's reasoning regarding the jurisdictional prerequisites for recognition of the Dominican divorce was: since comity requires domicile and there was no domicile in this case,¹¹¹ comity will not be extended.¹¹² Doris Mayer had argued that the standards by which North Carolina extends comity to foreign divorces should mirror those by which the state recognizes sister state divorces.¹¹³ Those standards include the rule that full faith and credit must be granted to bilateral divorces when the rendering state's rules of res judicata preclude collateral attack on the issues of domicile and jurisdiction.¹¹⁴ This rule has the effect of protecting divorces granted without domicile from collateral attack on jurisdictional grounds.¹¹⁵ The *Mayer* court maintained the distinction between recognition of sister-state and foreign divorces, thus recognizing that this particular loophole is not available for foreign divorces.¹¹⁶

The court's holding in *Mayer* brings North Carolina in line with the majority of states that have considered the foreign divorce issue. The court observed that the majority of American jurisdictions will not recognize a foreign divorce if the parties were not domiciled in the granting nation.¹¹⁷ Doris Mayer had urged the court to join the "growing minority of jurisdictions" that have extended comity to bilateral foreign divorces without the domicile of either party in the foreign nation.¹¹⁸ The Tennessee Supreme Court recently joined this minority in *Hyde v. Hyde*.¹¹⁹ In *Hyde* the court upheld a divorce obtained in the Dominican Republic by nondomiciliaries of that country, one of whom was present in person and the other represented by an attorney. It has been noted

110. See *Mayer*, 66 N.C. App. at 525, 311 S.E.2d at 662. The court reasoned that cases holding that orders for alimony are interlocutory and not immediately appealable are based on a desire to prevent delay in the execution of orders for alimony. *Id.*; see *Flihr v. Flihr*, 56 N.C. App. 465, 289 S.E.2d 105 (1982); *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981). Such cases, therefore, did not bar appeal in *Mayer* since the appeal was from a denial of alimony. *Mayer*, 66 N.C. App. at 525, 311 S.E.2d at 662.

111. *Id.* at 528, 311 S.E.2d at 664; see *supra* note 45.

112. *Mayer*, 66 N.C. App. at 528-29, 311 S.E.2d at 664.

113. Plaintiff-Appellant's Brief at 5-8.

114. See *supra* notes 51-55 and accompanying text.

115. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 73 comment d (1971).

116. *Mayer*, 66 N.C. App. at 528-29, 311 S.E.2d at 664. The court reasoned that even if Doris Mayer's divorce had been obtained in a sister state, the *Sherrer* holding would not apply since her divorce was not bilateral. Under *Williams II* the court would be free to inquire into the jurisdiction of a sister state. Thus, North Carolina also could inquire into the jurisdiction of the Dominican court. If Doris Mayer's divorce had been bilateral, domicile still would have been required because the divorce was foreign. *Id.*

117. *Id.* at 529, 311 S.E.2d at 664; see *supra* note 61 and accompanying text.

118. Record at 9-11; see *supra* note 62 and accompanying text.

119. 562 S.W.2d 194 (Tenn. 1978).

that the *Hyde* court's concern with possible prejudice to the parties rather than to the State resulting from the foreign nation's failure to require domicile for jurisdiction is unusual.¹²⁰ The *Mayer* court, on the other hand, sided with the majority of jurisdictions.¹²¹ In effect, the court reasserted the validity of domicile as the basis for divorce jurisdiction, a requirement that flows from the state's interest in the marital relationship.¹²²

On the question of public policy, the court concluded that the Dominican Republic's immediate¹²³ no-fault divorce was contrary to North Carolina's policy against hasty divorce.¹²⁴ The court pointed out by reference to the State's statutes that North Carolina has a public policy against "the hasty dissolution of marriages."¹²⁵ Until 1983 State law permitted immediate divorce, but only on proof of fault.¹²⁶ At present the only ground for absolute divorce is separation for one year.¹²⁷ The court rejected an argument that the ground of irreconcilable differences, upon which the Dominican divorce had been granted, was "substantially equivalent" to one year's separation.¹²⁸ The distinction relied on by the court was that the Dominican divorce could be obtained at once—a clear conflict with the State's asserted public policy against hasty divorce. The *Mayer* court's holding on this point differs from the Tennessee court in *Hyde v. Hyde*.¹²⁹ The *Hyde* court considered the grounds for the Dominican divorce comparable to grounds available in Tennessee, since both were no-fault grounds.¹³⁰ The Tennessee court so found despite the fact that the Tennessee no-fault statute required a cooling-off period,¹³¹ which one commentator viewed as evidence of a state public policy against hasty divorce.¹³²

120. Note, *supra* note 61, at 247 n.59.

121. *Mayer*, 66 N.C. App. at 529, 311 S.E.2d at 664.

122. See *supra* notes 45-50 and accompanying text. It is significant that the court's discussion of jurisdiction opened with, "[T]he Dominican Republic had no interest in the marriage of the two North Carolinians." *Mayer*, 66 N.C. App. at 528, 311 S.E.2d at 664.

123. The Dominican divorce for foreigners does not have a durational residence requirement. See 7 MARTINDALE-HUBBELL LAW DIRECTORY, *Dominican Republic Law Digest* 3-4 (1985); Swisher, *supra* note 6, at 10 n.4. Dominican officials have announced that foreigners can have access to the courts within 72 hours. Note, *Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution?*, 10 CORNELL INT'L L.J. 116, 124 (1976).

124. *Mayer*, 66 N.C. App. at 529-30, 311 S.E.2d at 664-65.

125. *Id.* at 529, 311 S.E.2d at 664-65.

126. *Id.*; N.C. GEN. STAT. § 50-5 (1976) (various fault grounds), *repealed by* Act of June 24, 1983, ch. 613, 1983 N.C. Sess. Laws 42. For a discussion of no-fault and fault grounds for divorce available in the United States, see Note, *supra* note 123, at 119-20.

127. See N.C. GEN. STAT. § 50-6 (1984). The court noted that efforts to shorten the one-year period in § 50-6 to six months had failed. *Mayer*, 66 N.C. App. at 529, 311 S.E.2d at 665. The act repealing N.C. GEN. STAT. § 50-5 was entitled "An Act to Abolish All Grounds for Absolute Divorce Except Separation." Act of June 24, 1983, ch. 613, 1983 N.C. Sess. Laws 42.

128. *Mayer*, 66 N.C. App. at 529-30, 311 S.E.2d at 665.

129. 562 S.W.2d 194 (Tenn. 1978).

130. *Id.* at 197.

131. Note, *supra* note 61, at 248-49; see TENN. CODE ANN. § 36-4-103(c) (1984). The Tennessee statute requires that bills for divorce on the ground of irreconcilable differences be on file for 60 (no minor child) or 90 (minor child) days before being heard. *Id.* This requirement is distinct from the durational residency requirement. *Id.* § 36-4-104.

132. Note, *supra* note 61, at 249. The commentator further noted that in *Hyde* neither party challenged the validity of the Dominican decree, and that the court might not have upheld the divorce had there been such a challenge. *Id.* at 250.

The court of appeals in *Mayer* concluded that the trial court had correctly refused to recognize the Dominican decree.¹³³ The court thus rejected the "sociological" view,¹³⁴ urged by Doris Mayer, that every divorce decree should be recognized since there is nothing to be gained by denying divorce when the marriage has in fact ended.¹³⁵ The court appeared to endorse the realism of the sociological view but was not prepared to recognize a divorce granted on grounds that did not guarantee the marriage was ended, a fact that one year's delay would tend to confirm.

The court's refusal to recognize the Dominican decree was intended to force North Carolinians to submit their marital difficulties to the "legislature's judgments on the question of divorce."¹³⁶ The effect of this refusal will be limited because the expense¹³⁷ of a foreign divorce would have prevented many couples from even considering one. After *Mayer*, what will happen to North Carolina couples who want absolute divorce but are unwilling to wait a year? The couples' options include committing perjury in a North Carolina court as to the duration of their separation.¹³⁸ Another option would be for one spouse to transfer domicile to a sister state with shorter durational residency or cooling off period requirements.¹³⁹ Alternatively, the couple may obtain a bilateral divorce in a sister state so as to take advantage of the rule that full faith and credit bars attack on the issue of domicile and jurisdiction when the res judicata rules of the rendering sister state would bar such attack.¹⁴⁰ The *Mayer* decision thus has undermined only one method of evading North Carolina's divorce law.

The *Mayer* decision demonstrates that even a foreign divorce decree that lacks jurisdiction and is substantively contrary to public policy may be given limited practical effect through the application of estoppel.¹⁴¹ The court deter-

133. See *Mayer*, 66 N.C. App. at 530, 311 S.E.2d at 665. The court limited the holding to the issue of estoppel. *Id.*; see *supra* note 4.

134. See *Clark*, *supra* note 6, at 52-53; *supra* note 77.

135. See Plaintiff-Appellant's Brief at 15-16. These arguments were summarized by the *Mayer* court. *Mayer*, 66 N.C. App. at 526, 311 S.E.2d at 663. The sociological view of divorce has been described as seeing "divorce as a regrettable but necessary legal recognition of marital failure." *Clark*, *supra* note 6, at 54. The court noted that passage of N.C. GEN. STAT. § 50-6 (1984) (grounds of one year's separation) represented a concession to or partial acceptance of the sociological view of divorce. *Mayer*, 66 N.C. App. at 529, 311 S.E.2d at 665.

136. *Mayer*, 66 N.C. App. at 530, 311 S.E.2d at 665.

137. When travel and lodging are taken into account, it has been estimated that the cost of a Caribbean divorce generally exceeds that of an American divorce. Note, *supra* note 123, at 126.

138. Perjury has been said to be widespread in American divorce proceedings. M. WHEELER, NO-FAULT DIVORCE 5 (1974).

139. Domicile of one of the parties to a divorce is a sufficient jurisdictional basis to entitle the divorce decree to full faith and credit in every other state. *Williams v. North Carolina*, 317 U.S. 287, 298-302 (1942).

A durational residency requirement for divorce is a statutory requirement that a party to the divorce have been a resident of the state for a certain length of time prior to the filing of the action for divorce. N.C. GEN. STAT. § 50-8 (1984) requires residence of six months. Such a residence requirement is a jurisdictional requirement, see *Eudy v. Eudy*, 24 N.C. App. 516, 211 S.E.2d 536, *aff'd*, 288 N.C. 71, 215 S.E.2d 782 (1975), but is distinct from the domicile requirement. Swisher, *supra* note 6, at 22-23; see *supra* note 45.

140. See *supra* note 55 and accompanying text.

141. For the practical effect that estoppel gives to an invalid divorce decree, see *supra* notes 73-75 and accompanying text.

mined that allowing an evasion of the State's divorce law was preferable to allowing Victor Mayer to deny the validity of his wife's prior divorce, which he had actively participated in procuring.¹⁴²

The *Mayer* decision opens the door to further applications of estoppel to prevent a second husband from attacking his wife's prior divorce on grounds of jurisdiction. Two arguments adduced by the court¹⁴³ offer strong support for the application of estoppel to third-party second spouses like Victor Mayer. First, one who procures a divorce, though not technically a party to the action, has invoked the jurisdiction of the court to the same extent as the plaintiff and is equally responsible for the decision.¹⁴⁴ To apply estoppel to a divorce plaintiff but not to the second spouse who actively induced the invalid divorce would be to value form over substance. Second, failure to estop a third-party second spouse would allow him to induce reliance on the second marriage and escape at will any obligation of support.¹⁴⁵ Escape from a failed marriage is, of course, sanctioned by the state in the form of divorce, but escape from support obligations is not permitted.

The *Mayer* court assembled a list of factors favoring application of estoppel that will help guide lower courts in future cases involving possible estoppel of a third-party second spouse. The factors present in *Mayer* were (1) persuasion to obtain the divorce, (2) promise of support, (3) reliance on this promise (by signing away alimony rights from first husband), (4) escort to the site of the divorce, (5) financing the divorce, (6) reliance on the divorce by marriage and remarriage, (7) receipt of benefits (by marriage, living in his wife's house, borrowing money), and (8) acceptance of the marriage as valid until after separation.¹⁴⁶ Additional factors—such as the presence of a child from the second marriage or a marriage that had been long in duration—would have strengthened the case for estoppel. The case for estoppel may be further strengthened when the party seeking estoppel has not taken the risk of a new marriage while aware of the possible consequences.¹⁴⁷

North Carolina's public policy, as enunciated in *Mayer*, against hasty divorce is buttressed by the *Mayer* court's determination that domicile be the jurisdictional basis for foreign divorce. The court thus sought to prevent interference by foreign nations in the marital status of the state's domiciliaries. The *Mayer* case illustrates, however, that the state's control over the marriage of its domiciliaries, and its substantive public policy, sometimes may be overridden. The

142. *Mayer*, 66 N.C. App. at 531, 311 S.E.2d at 666.

143. The court also noted that estoppel previously had been applied by North Carolina courts. It downplayed the factual distinctions between *Mayer* and the prior cases, since estoppel depends on the facts of each case, rather than on general rules. *Id.* at 533-34, 311 S.E.2d at 667. The court also noted the broad language of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 (1971) and the expansion from earlier versions. *Mayer*, 66 N.C. App. at 532 & n.4, 311 S.E.2d at 666 & n.4.

144. *Id.* at 534, 536, 311 S.E.2d at 666, 667-68; *supra* notes 86-87 and accompanying text.

145. See *Mayer*, 66 N.C. App. at 532, 534, 311 S.E.2d at 666, 667-68.

146. *Id.* at 535, 311 S.E.2d at 668.

147. *Id.* at 531-32, 311 S.E.2d at 666. The district court stated in its order that "plaintiff knew or should have known that the Dominican Republic divorce might not be recognized in North Carolina." Record at 100.

court's will to effectuate state divorce policy was properly tempered in *Mayer* by considerations of equity. The court's use of estoppel against a third-party second spouse expands the use of estoppel in North Carolina in a fashion consistent with the basic doctrine.

LAURA GOLDBERG LAPE

***Hinton v. Hinton*: Equitable Distribution Without Consideration Of Marital Fault**

In 1981 North Carolina modernized its laws on the distribution of property upon divorce.¹ The adoption of North Carolina General Statutes section 50-20 changed North Carolina law from the common-law approach, in which property division focused primarily on legal title,² to an equitable distribution system, in which marriage is viewed as an economic partnership.³ This change brought North Carolina in line with most other jurisdictions⁴ and generally has been seen as desirable,⁵ but it also left unanswered questions. For example, if a husband beats his wife, or if a wife abandons her husband, should a court consider such conduct in distributing the couple's property on divorce?

In *Hinton v. Hinton*⁶ the North Carolina Court of Appeals addressed for the first time whether marital fault should be a consideration in equitable distribution. The court concluded that marital fault is irrelevant in making an equitable distribution of property.⁷ This Note examines the implications of the court's decision and concludes that, although marital fault generally should not be a consideration, other types of fault may be relevant in equitable distribution. If confronted with this issue, the North Carolina Supreme Court should reach the same holding as the *Hinton* court, but also should recognize those situations in which fault may be relevant.

The parties in *Hinton* filed for equitable distribution of their property under section 50-20.⁸ The trial court awarded a greater share of the property to the wife, partly because the husband had physically abused the wife throughout their marriage.⁹ Among other incidents of abuse,¹⁰ the husband had struck his wife, causing a detached retina and scarring the tissue of her eye.¹¹ At the time

1. Act of July 3, 1981, ch. 815, 1981 N.C. SESS. LAWS 1184 (codified at N.C. GEN. STAT. § 50-20 (1984)).

2. Marschall, *Proposed Reforms in North Carolina Divorce Law*, 8 N.C. CENT. L.J. 35, 45 (1976); see *infra* notes 40-41 and accompanying text.

3. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247 (1983); see *infra* notes 42-45 and accompanying text.

4. There are at least forty-one states with equitable distribution systems. Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 379 (1984).

5. See, e.g., Sharp, *supra* note 3; *Survey of Developments in North Carolina Law, 1981—Family Law*, 60 N.C.L. REV. 1379, 1396 (1982) [hereinafter cited as *Survey*].

6. 70 N.C. App. 665, 321 S.E.2d 161 (1984).

7. *Id.*

8. *Id.* at 666, 321 S.E.2d at 161-62.

9. *Id.* at 666, 321 S.E.2d at 162.

10. The evidence showed that the husband was argumentative, threatened his wife, repeatedly physically abused her, chased her around the house with a loaded shotgun and told her he was going to blow her head off, held a loaded shotgun to his wife's head for 30 minutes and told her to "say your prayers because it will be the last time you see daylight," beat her with his shoe, ripped the phone out of the wall and chased her with a butcher knife, beat one of their daughters, spanked his wife over his knee, and contracted venereal disease and gave it to his wife. *Id.* at 670-71, 321 S.E.2d at 164.

11. *Id.*

of trial, these injuries still impaired her ability to work.¹² The trial court found that an equal distribution of property would not be equitable,¹³ citing as one reason that "injuries from the beatings . . . have affected her employability."¹⁴ On appeal, the court interpreted this finding to mean that "because it is the husband's fault that his wife's future earning ability is limited, his share of the marital property should be reduced."¹⁵ Although it is questionable whether the trial court's distribution actually reflected fault considerations,¹⁶ the court of appeals used *Hinton* as a vehicle to consider the relevance of fault under North Carolina's equitable distribution statute.

In rejecting fault as a consideration, the court of appeals examined the approach taken in other states, particularly New York,¹⁷ and focused on the policies and legislative intent behind North Carolina's statute. Other jurisdictions take varying approaches to the issue of fault in equitable distribution. Some states expressly include fault as a relevant consideration in their statutes; others reject it.¹⁸ In states with statutes that do not expressly mention fault, courts have reached different conclusions on whether to consider fault in the distribution of property.¹⁹

In *Hinton* the court began its discussion by stating that the North Carolina equitable distribution statute was enacted to recognize marriage as an economic partnership.²⁰ The purpose of equitable distribution is to effect "a return to each party of that which he or she contributed to the marriage."²¹ The court discussed the difficulty in determining fault²² and expressed its view that considera-

12. *Id.*

13. See *infra* notes 33-34 and accompanying text.

14. *Hinton*, 70 N.C. App. at 671, 321 S.E.2d at 164. The court also based its conclusion that an equal distribution would not be equitable on the disparity in the parties' incomes, the duration of the marriage, the disparity between their retirement rights, and the wife's indirect contribution to the husband's career potential. *Id.*

15. *Id.* at 672, 321 S.E.2d at 165.

16. Judge Becton, in his dissent, contended that the trial court's decision was not based on fault. See *infra* note 75 and accompanying text.

17. The court's reliance on New York's approach was appropriate because North Carolina's equitable distribution statute closely resembles and was modeled after the New York statute. See *Survey*, *supra* note 5, at 1399; *infra* notes 48-50 and accompanying text (discussion of similarities between the two statutes). The court paid particular attention to a recent New York decision, *Blickstein v. Blickstein*, 99 A.D.2d 287, 472 N.Y.S.2d 110 (1984). See *infra* notes 51-56 and accompanying text.

18. See *Hinton*, 70 N.C. App. at 667, 321 S.E.2d at 162. The court lists the following state statutes as among those that expressly include fault: CONN. GEN. STAT. ANN. § 46b-81(c) (West 1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1984); MO. ANN. STAT. § 452.330.1(4) (Vernon 1984). The following statutes expressly exclude fault from consideration: DEL. CODE ANN. tit. 13, § 1513(a) (1981); ILL. ANN. STAT. ch.40, § 503(d) (Smith-Hurd 1984); MINN. STAT. ANN. § 518.58 (West 1984). *Hinton*, 70 N.C. App. at 667, 321 S.E.2d at 162. Fault is a factor to be considered at the trial court's discretion in at least two states: ALA. CODE § 30-2-52 (1983); VT. STAT. ANN. tit. 15, § 751 (Equity 1984). See also *infra* notes 57-64 and accompanying text (discussion of different states' approaches to consideration of fault).

19. *Hinton*, 70 N.C. App. at 667, 321 S.E.2d at 162; see also *infra* note 59 (list of representative state decisions); *infra* notes 57-64 and accompanying text (discussion of different states' approaches to consideration of fault).

20. *Hinton*, 70 N.C. App. at 668, 321 S.E.2d at 163.

21. *Id.* at 669, 321 S.E.2d at 163.

22. *Id.*

tion of fault serves only one purpose—punishment of the “guilty” spouse by the courts.²³ The court asserted that the general assembly did not intend the statute to fulfill this purpose.²⁴ Last, the court considered the relationship between the equitable distribution statute and other North Carolina divorce statutes. The general assembly has instituted “no fault” divorce.²⁵ Fault, however, is a relevant consideration in awarding alimony.²⁶ These facts led the court to conclude that the general assembly intended fault to be considered in making alimony awards, but not in equitable distribution.²⁷

The policies underlying North Carolina’s equitable distribution statute and the cases cited in *Hinton* support the conclusion that marital fault²⁸ is not an appropriate consideration under the statute. Although equitable distribution should not be based on marital fault, other types of fault should be considered.²⁹ An examination of the North Carolina statute and the approach taken in other jurisdictions will illuminate this distinction.

The North Carolina equitable distribution statute³⁰ provides that on divorce, the court shall make an equitable distribution³¹ of a couple’s marital property.³² The court must make an equal division³³ of marital property unless it determines that an equal distribution would not be equitable.³⁴ The court

23. *Id.*

24. *Id.*

25. N.C. GEN. STAT. § 50-6 (1984) (provides for divorce based on one-year separation without showing that plaintiff is injured party).

26. See *infra* note 31.

27. *Hinton*, 70 N.C. App. at 670, 321 S.E.2d at 164.

28. The term “fault” is used here to refer to conduct leading to the dissolution of the marriage. Economic fault, usually consisting of dissipating joint assets, involves different considerations and is discussed *infra* in notes 73-74 and accompanying text.

29. See *infra* notes 73-79 and accompanying text.

30. N.C. GEN. STAT. § 50-20 (1984).

31. The distribution of property on divorce differs from the awarding of alimony. Property distribution is a one-time division of marital assets between husband and wife; alimony involves ongoing payments from one spouse to the other. In North Carolina, alimony is paid to a dependent spouse by a supporting spouse, N.C. GEN. STAT. § 50-16.1 (1984), and is awarded only if the supporting spouse has committed one of the wrongs listed in N.C. GEN. STAT. § 50-16.2 (1984). Two of the grounds for alimony are particularly relevant to the *Hinton* case: “The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse [and] [t]he supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.” *Id.* § 50-16.2 (6), (7).

Misconduct by the dependent spouse prevents him or her from receiving alimony. N.C. GEN. STAT. § 50-16.5 (1984). Thus, in North Carolina alimony awards clearly are fault-based. See Williams v. Williams, 299 N.C. 174, 188, 261 S.E.2d 849, 858 (1980) (general assembly intended that fault be a factor in alimony awards).

32. Only marital property is subject to distribution—separate property is excluded. N.C. GEN. STAT. § 50-20 (1984). The definition of marital property in North Carolina is relatively narrow; thus, the reach of the statute is less extensive than that of other states’ statutes. See Sharp, *supra* note 3, at 253. For an example of the effect of this provision, see Crumbley v. Crumbley, 70 N.C. App. 143, 318 S.E.2d 525 (1984) (lot held to be husband’s separate property even though deeded to husband and wife, because it was received by husband from his mother in exchange for a separately owned lot conveyed earlier to his mother).

33. See Alexander v. Alexander, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775 (1985) (statute creates presumption of equal division “in the absence of some reason(s) compelling a contrary result”); White v. White, 64 N.C. App. 432, 435, 308 S.E.2d 68, 71 (1983) (statute creates presumption of equal division), *aff’d as modified*, 312 N.C. 770, 324 S.E.2d 829 (1985).

34. N.C. GEN. STAT. § 50-20(c) (1984).

must consider specific factors in determining what division is equitable.³⁵ The final listed factor is a "catch-all" provision,³⁶ which permits consideration of "[a]ny other factor which the court finds to be just and proper."³⁷ It is under this factor that fault could be considered.³⁸

The significance of the court of appeals' decision not to consider fault is apparent only when the decision is contrasted with the fault-ridden backdrop of earlier divorce law.³⁹ Before the adoption of section 50-20, North Carolina courts distributed property on divorce under the common-law system. Under this system, property followed legal title on divorce, unless a constructive trust or gift could be established.⁴⁰ This approach produced inequitable results when one spouse had performed housekeeping and child-rearing services, but property was held in the name of the other spouse.⁴¹ To remedy this inequity⁴² and to

35. N.C. GEN. STAT. § 50-20(c) (1984) lists the following factors:

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
- (2) Any obligation for support arising out of a prior marriage;
- (3) The duration of the marriage and the age and physical and mental health of both parties;
- (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
- (5) Vested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property;
- (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
- (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
- (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
- (9) The liquid or nonliquid character of all marital property;
- (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
- (11) The tax consequences to each party; and
- (12) Any other factor which the court finds to be just and proper.

36. See *Survey*, *supra* note 5, at 1399.

37. N.C. GEN. STAT. § 50-20(c)(12) (1984).

38. See *Survey*, *supra* note 5, at 1403-07 (pre-Hinton discussion of whether North Carolina courts would be likely to consider fault under catch-all factor).

39. For a discussion of the role of fault in North Carolina family law, see Marschall, *supra* note 2, at 38-39; Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819, 822-25 (1981) [hereinafter cited as *Divorce*]. But cf. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1454-55 (1984) (suggesting that the role of fault in alimony awards and property distribution may have been overestimated).

40. Marschall, *supra* note 2, at 45; *Survey*, *supra* note 5, at 1396 (property follows title on divorce).

41. See Marschall, *supra* note 2, at 45; Sharp, *supra* note 3, at 247; *Survey*, *supra* note 5, at 1396; see also Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 23 UCLA L. REV. 1181, 1241-53 (1980-81) (demonstrating empirically that men are financially better-off than women after divorce).

42. The North Carolina Court of Appeals stated in *White v. White*, 64 N.C. App. 432, 433, 308 S.E.2d 68, 69 (1983) that "[e]quitable distribution . . . gives recognition to the essential supportive

recognize marriage as an economic partnership,⁴³ the general assembly enacted section 50-20.⁴⁴ Under this statute, marital property is distributed equitably upon divorce based on factors enumerated in the statute,⁴⁵ which do not include marital fault. In contrast, fault is crucial in determining *alimony* awards; a dependent spouse is entitled to alimony only if the supporting spouse is "guilty" and the dependent spouse is "innocent."⁴⁶

The North Carolina General Assembly borrowed heavily from New York's equitable distribution statute,⁴⁷ therefore, an examination of that state's statute is helpful.⁴⁸ The New York statute was enacted in 1980 to reflect the "modern view of marriage as a partnership of equals and of divorce as the dissolution of such a partnership."⁴⁹ The New York equitable distribution statute contains a catch-all provision almost identical to North Carolina's, which allows consideration of "any other factor which the court shall expressly find to be just and proper."⁵⁰ In *Blickstein v. Blickstein*⁵¹, a recent New York case relied on by the

role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of the assets accumulated during the marriage."

Furthermore, the North Carolina Supreme Court has described § 50-20 as part of "the ongoing march of the law to place men and women generally and husbands and wives particularly on an equal legal footing." *Mims v. Mims*, 305 N.C. 41, 56, 286 S.E.2d 779, 789 (1982). *But cf.* Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 2 (1977-78) (suggesting that "the marital property policy debate has become distorted by the focus on equality" and emphasizing the importance of "sharing behavior" in marriage).

43. *Hinton*, 70 N.C. App. at 668, 321 S.E.2d at 163; *White v. White*, 64 N.C. App. 432, 432, 308 S.E.2d 68, 69 (1983).

44. Since § 50-20 was enacted, the North Carolina courts have resolved many controversies in connection with the statute in addition to the fault issue. The statute has survived a charge of unconstitutional vagueness. *Ellis v. Ellis*, 68 N.C. App. 634, 315 S.E.2d 526 (1984). Also, the courts have determined that the statute does not affect the validity of separation agreements, *McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E.2d 344 (1984), although it does permit parties to execute a property settlement without a separation. *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984). Furthermore, a valid property settlement precludes the parties from requesting equitable distribution of their property. *Id.* In addition, the court of appeals has determined that equitable distribution must occur *before* alimony and child support are awarded. *Capps v. Capps*, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

It is clear that only marital property is subject to equitable distribution. The court must determine what the marital property is, ascertain its net value, and *then* proceed with the distribution. *Turner v. Turner*, 64 N.C. App. 342, 307 S.E.2d 407 (1983). If the trial court concludes that an equal distribution is not equitable, it is required to enter findings of fact to support its conclusion. The trial court's order will not be disturbed on appeal unless it has resulted in "an obvious miscarriage of justice." *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984).

45. *See supra* note 35.

46. *See supra* note 31.

47. North Carolina was relatively late in enacting its equitable distribution statute. *See* Marshall, *supra* note 2, at 45 (at the time of enactment, only fourteen United States jurisdictions, including North Carolina, still adhered to common-law marital property systems). *See also* Freed & Foster, *supra* note 4, at 379 (at least forty-one states have equitable distribution systems).

48. *See supra* note 17.

49. *Recent Developments—Equitable Distribution in New York*, 45 ALB. L. REV. 483, 488 (1980-81) [hereinafter cited as *Recent Developments*]; *see also* Forcucci v. Forcucci, 83 A.D.2d 169, 171, 443 N.Y.S.2d 1013, 1015 (1981) (statute enacted as a result of realization that marriage is an economic partnership).

50. N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney Supp. 1985). This provision was controversial. Opponents of the statute thought the catch-all factor gave the courts too much latitude. *Recent Developments*, *supra* note 49, at 504. The factor apparently was included, both in the New York and North Carolina statutes, as a compromise between those who wanted fault to be considered and those who did not. *Survey*, *supra* note 5, at 1403 n.191. *See Recent Developments*,

court in *Hinton*, the New York Supreme Court determined that marital fault generally is not a relevant factor under the statute.⁵² The court's holding was based on its view of marriage as an economic partnership and on the idea that upon dissolution of the partnership, property should be distributed according to economic need.⁵³ In addition, the court reasoned that fault may be difficult to evaluate and that both parties actually may be responsible for the breakup of a marriage.⁵⁴ The court did note, however, that fault may be relevant in extraordinary situations—those in which marital misconduct “shocks the conscience.”⁵⁵ The court also stated that economic fault—in most cases dissipation of assets—is a relevant consideration.⁵⁶

Legislative and judicial resolutions of the fault issue in other jurisdictions further illustrate the policy considerations in this area. The Uniform Marriage and Divorce Act expressly precludes consideration of fault in distribution of property.⁵⁷ Some states have enacted statutes providing that fault may not be considered, whereas others have statutes listing fault as a factor that must be considered.⁵⁸ Still other states' statutes do not mention fault; in these states the

supra note 49, at 506 n.116, for a discussion of the omission of fault from the New York statute (commentary was written prior to any New York court decisions on the fault issue).

51. 99 A.D.2d 287, 472 N.Y.S.2d 110 (1984).

52. *Id.* Before *Blickstein*, lower courts in New York had reached varying conclusions on whether fault was a proper consideration in equitable distribution of marital property. In *Giannola v. Giannola*, 109 Misc. 2d 985, 441 N.Y.S.2d 341 (Sup. Ct. 1981), the court held that marital fault, consisting of alleged adultery, constructive abandonment, and cruel and inhuman treatment by the husband, was relevant to equitable distribution. The court held, however, that marital fault would not preclude an award of equitable distribution. *Id.* at 987, 441 N.Y.S.2d at 341.

This approach was developed further in *Kobylack v. Kobylack*, 110 Misc. 2d 402, 442 N.Y.S.2d 392 (Sup. Ct. 1981), modified on other grounds, 96 A.D.2d 831, 465 N.Y.S.2d 581 (1983) (mem.), *rev'd per curiam on other grounds*, 62 N.Y.2d 399, 477 N.Y.S.2d 109 (1984). The *Kobylack* court agreed with the *Giannola* court that fault is a proper consideration, but found it not relevant in the case before it because the assets could be equitably distributed without economic harm to either party. *Kobylack*, 110 Misc. 2d at 408, 442 N.Y.S.2d at 395. The *Kobylack* court set forth the general rule that “fault should not be used as a punishment but only as a consideration to tilt the balance where there are insufficient assets to make the parties economically ‘whole.’” *Id.*

In a later decision, *M.V.R. v. T.M.R.*, 115 Misc. 2d 674, 454 N.Y.S.2d 779 (Sup. Ct. 1982), another trial court concluded that fault (in this case the husband's alleged homosexuality) should not be considered in equitable distribution of marital assets. The court based its holding on an analogy to dissolution of a commercial partnership, in which fault is irrelevant, *id.* at 678, 454 N.Y.S.2d at 782, on the difficulty in determining marital fault, *id.* at 679, 454 N.Y.S.2d at 782, and on the potential for discrimination by the courts (against homosexuals in this case and against women in other cases). *Id.* at 680, 454 N.Y.S.2d at 783.

53. *Blickstein*, 99 A.D.2d at 291, 472 N.Y.S.2d at 113.

54. *Id.* at 292, 472 N.Y.S.2d at 113.

55. *Id.* at 292, 472 N.Y.S.2d at 113-14; see *infra* text accompanying notes 77-79.

56. *Id.* at 293, 472 N.Y.S.2d at 114; see *supra* note 28; *infra* notes 73-74 and accompanying text.

57. UNIFORM MARRIAGE AND DIVORCE ACT, 201 FAM. L. REP. (BNA) § 307 (1974). This section contains two alternatives. Alternative A provides that “the court, without regard to marital misconduct, shall . . . equitably apportion between the parties the property and assets belonging to either or both . . .” Alternative B states that the court “shall divide community property, without regard to marital misconduct, in just proportions . . .” Both alternatives list factors for the court to consider in making the distribution. *Id.*

The New York statute was modeled on Alternative A. *Recent Developments*, *supra* note 49, at 492. The language regarding marital misconduct, however, was omitted. See *supra* note 50 and accompanying text.

58. See *supra* note 18 and accompanying text.

courts have decided whether fault should be considered.⁵⁹ New Jersey's equitable distribution statute, for example, does not address the question of fault.⁶⁰ In the landmark case of *Chalmers v. Chalmers*⁶¹ the New Jersey Supreme Court held that marital fault could not be considered in equitable distribution.⁶² The court based its decision on the difficulty of assessing fault, noting that "fault may be merely a manifestation of a sick marriage."⁶³ In addition, the court found the concept of fault irrelevant in equitable distribution "since all that is being effected is the allocation to each party of what really belongs to him or her."⁶⁴

The *Hinton* court's holding appears to reflect properly the policies underlying equitable distribution. If the purpose of equitable distribution is to effect the dissolution of an economic partnership, marital fault is irrelevant. Misconduct that leads to divorce may not be related to the economic contributions of the parties or to their financial needs after divorce.⁶⁵

If the court does consider marital fault, it faces the difficult task of determining which spouse's conduct precipitated the collapse of the marriage.⁶⁶ Some courts have taken the position that fault is relevant, but when both spouses are equally at fault, the parties' misconduct will be disregarded.⁶⁷ This position affords a partial solution to the problem of assessing fault. On the other hand, courts may not wish to inquire into marital fault at all to avoid the

melancholy history of feigned grounds, strident name-calling and finger-pointing and mutually destructive charges of crime and misconduct which have turned our courts all too often into battle grounds in which reputations are destroyed along with marriages, and children are made spectators to mutual character-assassination by their parents.⁶⁸

Refusal to consider fault on dissolution, however, may have drawbacks. The court in *Hinton* pointed out that the trial court might reach the same result

59. Representative state decisions include: *Cooper v. Cooper*, 382 So. 2d 569 (Ala. Civ. App. 1980) (fault relevant despite availability of no-fault divorce); *Peters v. Peters*, 248 Ga. 490, 283 S.E.2d 454 (1981) (adultery relevant but will not preclude equitable distribution); *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972) (fault irrelevant under catch-all provision); *LaRue v. LaRue*, 216 Kan. 242, 531 P.2d 84 (1975) (fault relevant); *Davey v. Davey*, 106 Mich. App. 579, 308 N.W.2d 468 (1981) (fault relevant despite availability of no-fault divorce); *Simmons v. Simmons*, 275 S.C. 41, 267 S.E.2d 427 (1980) (adultery relevant but will not preclude equitable distribution); *Thorpe v. Thorpe*, 108 Wis. 2d 189, 321 N.W.2d 237 (1982) (fault not proper consideration under catch-all factor of equitable distribution statute).

60. See N.J. STAT. ANN. § 2A:34-23 (West Supp. 1985).

61. 65 N.J. 186, 320 A.2d 478 (1974).

62. *Id.* at 193, 320 A.2d at 482.

63. *Id.*

64. *Id.* at 194, 320 A.2d at 483.

65. Sharp, *Divorce*, *supra* note 39, at 825 n.30.

66. See *supra* notes 22, 54 & 63 and accompanying text.

67. See *Nolen v. Nolen*, 398 So. 2d 712, 717 (Ala. Civ. App. 1981); *Hultberg v. Hultberg*, 259 N.W.2d 41, 45 (N.D.), *appeal after remand*, 281 N.W.2d 569 (N.D. 1977).

68. *Hultberg v. Hultberg*, 259 N.W.2d 41, 46-47 (N.D.), *appeal after remand*, 281 N.W.2d 569 (N.D. 1977) (Vogel, J., dissenting). Justice Vogel pointed out that the purpose of no-fault divorce was to end this "melancholy history," but that the purpose is not achieved if fault enters as a consideration in property division. *Id.* at 47 (Vogel, J., dissenting).

on remand, but must support it with nonfault-related findings.⁶⁹ Given that their orders will not be easily disturbed on appeal,⁷⁰ trial courts may continue to be influenced by fault without expressing it as a factor in their findings. This risk probably will be short lived, however, because over time courts are likely to move away from a fault-oriented approach. Courts historically have considered fault in all aspects of divorce,⁷¹ although recently the trend has been away from fault considerations.⁷² As courts confront more cases under the new laws and become accustomed to making decisions without reference to fault, fault surely will cease to be even an unconscious consideration. In addition, when alimony is not an issue, fault-related evidence will be irrelevant and thus can be excluded entirely.

A general rule against consideration of fault is consistent with the policies behind equitable distribution. Such a rule allows courts to focus on the economic situations of the parties rather than on the marital dispute itself. There are circumstances, however, under which it would be inequitable not to consider certain types of fault. In particular, fault may be relevant when one spouse has dissipated joint assets, when one spouse has engaged in misconduct that decreases the earning capacity of the other spouse, and when marital fault is especially egregious.

Although marital fault usually does not involve the economic contributions of the parties, sometimes the fault of one spouse consists of dissipation of marital assets.⁷³ Even if fault generally is not a relevant factor, economic fault should be considered in equitable distribution. For example, in *In re Marriage of Clark*,⁷⁴ the Washington Court of Appeals held that the husband's dissipation of much of his earnings through drinking could be taken into account in distributing the couple's property.

Misconduct by one spouse that affects the earning capacity of the other spouse should be entitled to similar treatment. In *Hinton* the majority refused to consider that the husband's abuse of his wife affected her ability to work, but Judge Becton, in his dissent, found this fact relevant.⁷⁵ There clearly is a distinction between misconduct that leads to the dissolution of a marriage and mis-

69. *Hinton*, 70 N.C. App. at 672, 321 S.E.2d at 165.

70. *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E.2d 772 (1984).

71. See *supra* notes 39-46 and accompanying text.

72. See *supra* notes 1-5, 39-46 and accompanying text.

73. The *Blickstein* court stated that such economic fault is a relevant consideration. *Blickstein*, 99 A.D.2d at 293, 472 N.Y.S.2d at 114.

74. 13 Wash. App. 805, 538 P.2d 145 (1975). See also *Harrigan v. Harrigan*, 135 Vt. 249, 251, 373 A.2d 550, 552 (1977) (relevant that husband dissipated wife's inheritance).

75. Fault may not have been the appropriate issue on which to resolve *Hinton*. The court of appeals probably was anxious to resolve the issue of fault in the equitable distribution context and thus saw fault as an issue in *Hinton* when it really was not. Mrs. Hinton suffered from a detached retina and scarring of the tissue in her left eye, which affected her ability to work. *Hinton*, 70 N.C. App. at 670-71, 321 S.E.2d at 164. Thus, Judge Becton in his dissent interpreted the trial court's determination as based on the wife's impaired employability and not on fault. *Id.* at 673, 321 S.E.2d at 166 (Becton, J., dissenting). Judge Becton agreed with the majority that fault should not be considered in equitable distribution, but stated that the fact that one spouse has diminished the career potential of the other is a relevant consideration. *Id.* He pointed out that the statute specifically directs courts to consider the parties' relative economic positions, their physical and mental

conduct that leaves a spouse disabled and unemployable. For instance, in an Oregon case, the court found the fact that the husband had fractured his wife's ankle relevant to the issue of her employability, but found that she was able to work.⁷⁶ Misconduct causing a physical disability that affects one spouse's ability to work should be a proper consideration in equitable distribution and should be distinguished from misconduct causing only the deterioration of the marriage.

Finally, in some cases the fault of one spouse may be so egregious that to ignore it would be inequitable. For example, in *D'Arc v. D'Arc*⁷⁷ a husband had offered someone \$50,000 to kill his wife, a wealthy heiress. In this case the court relaxed the New Jersey rule against consideration of fault in equitable distribution⁷⁸ to permit consideration of the husband's fault. The court noted that this was not the usual type of fault, but an attempt to commit a heinous crime and stated, "[W]here a spouse has committed an act that is so evil and outrageous that it must shock the conscience of everyone, it is inconceivable that this court should not consider his conduct when distributing the marital assets equitably."⁷⁹

The adoption of equitable distribution represented a significant change in North Carolina family law. To implement the policies of the equitable distribution statute fully, marital fault clearly cannot be considered in dividing a couple's property on divorce. Equitable distribution is based on a view of marriage as an economic partnership. The parties are entitled to recover what they contributed to the marriage. In addition, the economic future of each spouse is relevant. Fault, however, is not relevant to the dissolution of an economic partnership or to predicting the future needs of the parties. The decision of the North Carolina Court of Appeals in *Hinton* not to consider fault under North Carolina's equitable distribution statute thus is both appropriate and consistent with the purpose of the statute.

If the North Carolina Supreme Court is confronted with this issue, it should reach the same result as the court of appeals, but should provide excep-

health, and any effort by one spouse to develop the career potential of the other spouse. *Id.* at 673, 321 S.E.2d at 165 (Becton, J., dissenting).

Any controversy over whether *Hinton* was the appropriate forum for deciding the role of fault in equitable distribution has since been rendered moot. The court of appeals recently reaffirmed its *Hinton* decision in a case presenting the issue more clearly. In *Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), the wife had engaged in various forms of misconduct, including abandoning her husband and children and drinking alcohol excessively. *Id.* at 245-46, 322 S.E.2d at 396. The court reiterated its holding in *Hinton*: fault is not an appropriate consideration in determining an equitable distribution of property. *Id.* at 249, 322 S.E.2d at 395; see also *Dusenberry v. Dusenberry*, 73 N.C. App. 177, 326 S.E.2d 65 (inappropriate to consider fault consisting of wife's adultery), *disc. rev. granted*, 313 N.C. 598, 330 S.E.2d 608 (1985); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (evidence of misconduct properly excluded), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

76. *In re Marriage of Koch*, 58 Or. App. 252, 255, 648 P.2d 406, 408 (1982). *But cf.* *Myers v. Myers*, 586 S.W.2d 797, 798 (Mo. Ct. App. 1979) (fault is relevant, but husband's misconduct in striking wife was too minor to affect property distribution).

77. 164 N.J. Super. 226, 395 A.2d 1270 (1978), *modified on other grounds*, 175 N.J. Super. 598, 421 A.2d 602 (1980), *cert. denied*, 451 U.S. 971 (1981).

78. *Id.* at 241, 395 A.2d at 1278; see *supra* text accompanying notes 61-64.

79. *D'Arc*, 164 N.J. Super. at 241, 395 A.2d at 1278. The court in *Blickstein* used similar language in stating that certain types of misconduct might be relevant. See *supra* text accompanying note 55.

tions to the general rule against consideration of fault in equitable distribution. A spouse's misconduct that depletes the parties' joint assets should be considered. It would be inequitable to allow one spouse to waste the couple's assets and then to share equally in the property on divorce. In addition, courts should consider any physical disability affecting a spouse's earning capacity, regardless of whether the disability was caused by the misconduct of the other spouse. Finally, some types of misconduct are so egregious that a court would find it difficult to ignore them, even if it were so inclined. Egregious fault thus should be considered by courts making equitable distributions of marital property.

Although the court of appeals did not address these specific issues, the broad policy expressed in *Hinton* is sound. The North Carolina Court of Appeals helped fulfill the purpose of equitable distribution in holding that fault should not enter into the court's division of marital property under section 50-20. The courts now will be free to implement the true purposes of the statute—equitable distribution of marital property based on the parties' contributions and needs.

LESLIE CALKINS O'TOOLE

State v. Thomas: When Is a Confession Coerced and When Is It Voluntary?

The United States Constitution provides a criminal defendant with the right to due process of law,¹ the right to assistance of counsel,² and the privilege against self-incrimination.³ American courts have used all three of these constitutional provisions to refuse to admit into evidence certain confessions made by criminal defendants.⁴ No matter which premise is used to determine whether confessions are admissible, the underlying theme is the same: confessions extracted by unacceptable means will not be used as substantive evidence against a defendant.⁵ There are, however, varying interpretations concerning what are unacceptable means. Some methods of extracting a confession have been found to be clearly unacceptable.⁶ Many questionable methods, however, have been found acceptable.⁷

In *State v. Thomas*⁸ the North Carolina Supreme Court reviewed the admissibility of a defendant's confession in light of two rules of evidence.⁹ One rule arose from the United States Supreme Court's decision in *Edwards v. Arizona*¹⁰ that once an accused invokes his fifth amendment right to counsel, there can be no further police interrogation unless the accused initiates the dialogue.¹¹

1. U.S. CONST. amend. XIV, § 1.

2. U.S. CONST. amend. VI.

3. U.S. CONST. amend. V.

4. C. WHITEBREAD, CRIMINAL PROCEDURE § 15.01 (1980); J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 70 (1974).

5. Although not admitted for substantive purposes, in "some circumstances an improperly obtained confession may be used for impeachment purposes." J. COOK, *supra* note 4, § 70. Also, in *Milton v. Wainwright*, 407 U.S. 371 (1972), the United States Supreme Court upheld the admission into evidence of a confession that arguably resulted from the violation of the defendant's fifth and sixth amendment rights because the admission was shown beyond a reasonable doubt to be harmless error. *Id.* at 372-73. Commenting on the harmless error doctrine, Professor Whitebread observed: "If the primary reason for *Miranda* is to deter coercive methods by the police, then the harmless error doctrine should seldom, if ever, be applicable." C. WHITEBREAD, *supra* note 4, § 15.06, at 322.

6. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (confession obtained during police custodial interrogation from a suspect who was not warned of his fifth amendment right against self-incrimination); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (confession obtained through long-term interrogation of defendant who was deprived of sleep); *Brown v. Mississippi*, 297 U.S. 278 (1936) (confession obtained through the use of physical brutality).

7. See, e.g., *Leuschen v. State*, 41 Md. App. 423, 397 A.2d 622, *cert. denied*, 444 U.S. 933 (1979) (inculpatory statements made by defendant to an undercover officer during the course of general conversation in defendant's cell were not obtained in violation of defendant's *Miranda* rights); *State v. Franklin*, 308 N.C. 682, 687-89, 304 S.E.2d 579, 583-84 (1983) (defendant's sixth amendment right to counsel had not yet arisen while he was in custody on an unrelated charge but before a warrant for his arrest concerning the crime at issue had been executed); *State v. Pacheco*, 481 A.2d 1009, 1022-27 (R.I. 1984) (police officer's promise to help defendant receive sentence to be served at an out-of-state prison and to dismiss charges against defendant's companion did not make defendant's confession involuntary).

8. 310 N.C. 369, 312 S.E.2d 458 (1984).

9. *Id.* at 377-79, 312 S.E.2d at 462-64.

10. 451 U.S. 477 (1981).

11. *Id.* at 484-85. The Court in *Edwards* noted that *Miranda* "declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." *Id.* at 482. For a discussion of the *Edwards* holding, see *infra* text accompanying notes 53-59.

The other rule is a North Carolina requirement that a confession be voluntary to be admissible.¹² This Note discusses the background of both rules and the reasoning used by the court in applying them. This Note also analyzes the ambiguities inherent in both rules but unaddressed by the court. It concludes that although the *Thomas* decision is not a pronounced deviation from existing case law involving either rule,¹³ there are problems with the court's straightforward approach, including the possibility that use of coercive confessions will be less restricted in the future.

At approximately 5:30 a.m. on May 26, 1982, a ten year old boy was sexually assaulted while on his newspaper route in Winston-Salem.¹⁴ The victim described his assailant as a jogger.¹⁵ On August 6, 1982, the victim identified the defendant as his assailant from a group of six photographs.¹⁶ Defendant had been arrested on August 5, 1982, for a different assault, which occurred on August 4, 1982.¹⁷ At the time of his arrest defendant was informed of his *Miranda* rights,¹⁸ and he apparently understood them.¹⁹ The next day, defendant was taken by two police officers from jail to the city hall, where he was again informed of his rights, both orally and in writing.²⁰ After defendant waived his rights,²¹ the two officers began to question him "in very general terms."²² When they began to question him specifically about the assault of May 26, "defendant indicated that he did not want to talk further and that he wanted an attorney."²³ The officers then stopped questioning defendant and took him to the Office of the Clerk of Superior Court, where one of the officers filled out an arrest warrant.²⁴

While filling out the arrest warrant, one of the officers said to defendant: "Be sure to tell your attorney that you had the opportunity to help yourself and didn't."²⁵ Approximately five minutes after the officer made the comment, defendant asked the officer if he still wanted a statement. The officer responded that it was up to defendant.²⁶ Defendant was again taken to the city hall and informed of his rights. Defendant then waived his rights and gave an incrimi-

12. *Thomas*, 310 N.C. at 378-79, 312 S.E.2d at 463-64. For a discussion of North Carolina's voluntariness rule, see *infra* notes 69-74 and accompanying text.

13. See *infra* text following note 74.

14. *Thomas*, 310 N.C. at 370, 312 S.E.2d at 459.

15. *Id.*

16. *Id.*

17. *Id.* at 375, 312 S.E.2d at 462.

18. For a discussion of the holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), see *infra* notes 38-40 and accompanying text.

19. *Thomas*, 310 N.C. at 375, 312 S.E.2d at 462.

20. *Id.* at 376, 312 S.E.2d at 462.

21. Brief for Appellant at 72 app., *Thomas*.

22. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 462.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* During the *voir dire* hearing, see *infra* note 28, defendant gave his version of what took place after he asked for an attorney:

I'm not sure if Mr. Weavil [one of the police officers] got up and left the room or not, but Mr. Dalton [the second police officer] was there, and he was very polite and asked what

nating statement to the officers.²⁷

At trial the court conducted a *voir dire* hearing to determine the admissibility of defendant's confession.²⁸ Finding that the confession was not the result of any questioning or inducement by the officers and that the confession "was made freely, voluntarily, and understandingly,"²⁹ the trial court admitted the confession into evidence over defendant's objection. The jury found Thomas guilty and sentenced him to life imprisonment.³⁰

Thomas came before the North Carolina Supreme Court on an appeal of right.³¹ Defendant assigned as error the admission of his confession, basing his argument on two grounds. First, he claimed that the confession was obtained in violation of the *Edwards* rule because the officer's suggestion that defendant tell his attorney he had been given an opportunity to help himself was interrogation initiated by the officer after defendant had invoked his right to counsel.³² Second, defendant claimed that his confession was involuntary because it was "induced by the suggestion of hope or fear implanted in his mind" by the officer's comment.³³

The North Carolina Supreme Court's rejection of defendant's claims was brief. First, the court held that the officer's comment was not interrogation and therefore did not violate the *Edwards* rule.³⁴ Second, the court held that the confession was not the product of coercion or fear and therefore was made by

religion I was. Said, "You're a reasonable person." And I said I was raised as a Southern Baptist, and he said good morals, that sort of thing.

"You're a smart person. If you had a chance to help yourself, wouldn't you?" And I said, "Yes, I would." And he said, "Well, a statement would help you very much." And I said, "I have nothing further to say."

And then he sat up in his chair and shuffled his papers and he said, "Well, when you do speak to your lawyer, tell him you had a chance to help yourself and you didn't."

Brief for Appellant at 61 app., *Thomas*.

27. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 462.

28. *Id.* When a defendant objects to the admission of his confession into evidence, "the trial judge should then excuse the jury and in the absence of the jury hear the evidence of both State and the defendant upon the question of whether defendant, if he made an admission or confession, voluntarily and understandingly made the admission or confession." *State v. Bishop*, 272 N.C. 283, 291, 158 S.E.2d 511, 516 (1968).

29. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 462.

30. *Id.* at 370, 312 S.E.2d at 459.

31. The appeal as a matter of right was in accordance with N.C. GEN. STAT. § 7A-27 (1981).

32. *Thomas*, 310 N.C. at 375, 312 S.E.2d at 462-63. For a discussion of the holding in *Edwards*, see *infra* text accompanying notes 53-59.

33. *Thomas*, 310 N.C. at 375, 312 S.E.2d at 463. Defendant assigned two other points as error. First, defendant contended that the trial court had admitted evidence which tended to show that defendant had committed a separate offense. The trial court had admitted the evidence on the ground that defendant had put his identity and presence at the crime scene in issue. The court, therefore, permitted the State to present evidence of a second crime by defendant which involved facts sufficiently unusual that they indicated the commission of both crimes by the same person. The North Carolina Supreme Court upheld the admission of this evidence. *Id.* at 371-74, 312 S.E.2d at 459-61.

Second, defendant assigned as error the trial court's denial of defense counsel's motion to withdraw himself from the case because of a potential conflict of interest. The supreme court stated that motions to withdraw generally are left to the trial judge's discretion unless an abuse of discretion is demonstrated. The court found no showing of abuse and therefore upheld the trial court's ruling on the withdrawal motion. *Id.* at 375, 312 S.E.2d at 461.

34. *Id.* at 377-78, 312 S.E.2d at 463.

defendant voluntarily.³⁵ Judge Exum dissented from the affirmance of the trial court's decision, considering the officer's remark to be an interrogation and believing the confession to be involuntary because it was the product of a promise of leniency.³⁶

To thoroughly reanalyze defendant's claims, it is necessary to consider the development of the two admissibility rules from which the claims arose. The *Edwards* rule grew out of *Miranda v. Arizona*.³⁷ The United States Supreme Court in *Miranda* held that certain threshold procedures were necessary to protect a criminal defendant's fifth amendment privilege against self-incrimination.³⁸ The Court held that a person subjected to custodial interrogation must be warned in "clear and unequivocal terms" that he has the right to remain silent; that anything he says may be used against him; that he has the right to speak with an attorney; and that he has the right to have an attorney appointed for him if he is indigent.³⁹ Although noting that a defendant could waive these rights, the Court put a heavy burden on the government to show that any waiver was made knowingly and intelligently.⁴⁰ Following *Miranda*, the United States Supreme Court decided three fifth amendment cases relevant to the issues in *Thomas*:⁴¹ *Edwards*,⁴² *Rhode Island v. Innis*,⁴³ and *Oregon v. Bradshaw*.⁴⁴

In the first case in the trilogy, *Innis*, defendant had been arrested for murder and was being transported in a police wagon by two police officers.⁴⁵ With the defendant listening, the two officers engaged in conversation concerning the location of the gun used in the murder. They expressed great concern over the possibility that the gun might fall into the hands of one of the retarded children

35. *Id.* at 379, 312 S.E.2d at 464.

36. *Id.* at 381-84, 312 S.E.2d at 465-66 (Exum, J., dissenting).

37. 384 U.S. 436 (1966). *Edwards* was based on the statement in *Miranda* that "the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'" *Edwards*, 451 U.S. at 485 (quoting *Miranda*, 384 U.S. at 474).

38. *Miranda*, 384 U.S. at 467-79.

39. *Id.* The Court in *Miranda* stated that it intended to give "concrete constitutional guidelines for law enforcement agencies and courts to follow," *id.* at 441-42, guidelines aimed at ensuring that an accused was given his fifth amendment privilege. *Id.* The Court was concerned with suspects' compulsion to confess during custodial interrogation, even when, "in traditional terms," the suspects' statements were made voluntarily. *Id.* at 457. The Court created procedural "safeguards" which must be observed unless the states devise "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise" that right. *Id.* at 467.

40. *Id.* at 479.

41. Although the court in *Thomas* stated that there was "no violation of defendant's Sixth Amendment right to counsel," *Thomas*, 310 N.C. at 377, 312 S.E.2d at 463, defendant's assignment of error and the court's analysis were based on the *Edwards* rule, which protects the fifth amendment privilege against self-incrimination. Therefore, the part of this Note concerning the interrogation issue is a fifth amendment discussion. The United States Supreme Court noted that "[t]he definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." *Innis*, 446 U.S. at 300 n.4.

42. 451 U.S. 477 (1981).

43. 446 U.S. 291 (1980).

44. 462 U.S. 1039 (1983).

45. *Innis*, 446 U.S. at 293-94.

who attended a nearby school.⁴⁶ The conversation was between the two officers only and did not include defendant. However, defendant spoke up from the back seat and told the officers that he wanted to retrieve the gun because of the children around the school, thereby incriminating himself.⁴⁷

Defendant in *Innis* had been informed of his *Miranda* rights and had invoked his right to counsel before the officers' conversation about the gun took place.⁴⁸ The defendant was clearly in custody at the time he made the inculpatory statement;⁴⁹ therefore, the only question for the Court to decide under the *Miranda* standard was whether the officers' conversation was "interrogation."⁵⁰ Squarely addressing what constitutes interrogation, the Court stated:

[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . . [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect rather than the intent of the police. . . . [T]he *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.⁵¹

The Supreme Court applied this definition to the officers' front seat conversation and found that the conversation was not interrogation.⁵²

A year after *Innis*, the Court decided *Edwards*. In *Edwards* defendant, arrested for robbery, burglary, and first-degree murder, was informed of his *Miranda* rights.⁵³ He invoked his right to counsel, interrogation ceased, and he was jailed.⁵⁴ The next morning he was told that he had to talk with two detectives, although he had not yet seen an attorney. The conversation with the detectives resulted in his confession.⁵⁵ The Supreme Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."⁵⁶ The Court further held that when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject

46. *Id.* at 294-95.

47. *Id.* at 295.

48. *Id.* at 294.

49. *Id.* at 298. The Court in *Miranda* established that "custody," for *Miranda* purposes means that the defendant is either "in custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 445.

50. *Innis*, 446 U.S. at 298.

51. *Id.* at 300-01.

52. *Id.* at 303.

53. *Edwards*, 451 U.S. at 478.

54. *Id.* at 479.

55. *Id.*

56. *Id.* at 484.

to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”⁵⁷ The police had interrogated defendant after he invoked his right to counsel and defendant had not initiated the exchange.⁵⁸ Therefore, his confession was inadmissible.⁵⁹

Edwards established an apparent per se rule which would operate to exclude a confession upon a showing that a defendant did not initiate the dialogue that resulted in the confession.⁶⁰ *Edwards*’ impact was somewhat lessened, however, by the subsequent decision of the Court in *Oregon v. Bradshaw*.⁶¹ Just as the Court defined “interrogation” in *Innis*, the court in *Bradshaw* refined *Edwards*’ reference to “initiation” of communication with the police by an accused.⁶² In *Bradshaw* defendant was arrested for furnishing liquor to a minor and was informed of his *Miranda* rights. When he requested an attorney, interrogation ended and he was transported from the police station to jail.⁶³ During the trip, Bradshaw asked a police officer, “Well, what is going to happen to me now?”⁶⁴ The subsequent discussion eventuated in defendant’s confession.⁶⁵ The Court held that defendant’s question “evinced a willingness and a desire for a generalized discussion about the investigation” and that “[i]t could reasonably have been interpreted by the officer as relating generally to the investigation.”⁶⁶ Therefore, defendant’s question satisfied the *Edwards*’ “initiation” requirement.⁶⁷

57. *Id.* at 484-85. The Court addressed how it would define defendant-initiated dialogue in *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983). See *infra* notes 62-67 and accompanying text.

58. *Edwards*, 451 U.S. at 487.

59. *Id.*

60. Lower courts have interpreted *Edwards* in two different ways. One interpretation views *Edwards* as presenting the initiation requirement as just one factor to be considered in a totality of the circumstances test. The other view of *Edwards* is that it mandates a two-step process in which it is first determined whether defendant initiated the dialogue; then, if defendant did initiate it, a totality of circumstances test is used to determine whether defendant knowingly and intelligently waived his rights. This latter view is really a per se rule because of the requirement that defendant initiate the dialogue before there is waiver. Comment, *Oregon v. Bradshaw: Right to Counsel Under Miranda—The Waiver Standard*, 19 NEW ENG. L. REV. 513, 519-20 (1984). *Oregon v. Bradshaw* made it clear that the latter view is what the *Edwards* Court intended. See *Bradshaw*, 462 U.S. at 1044-45.

61. 462 U.S. 1039 (1983).

62. *Bradshaw*, 462 U.S. at 1045-46. For a discussion of the reference to initiation in *Edwards*, see *supra* text accompanying note 57.

63. *Bradshaw*, 462 U.S. at 1041-42.

64. *Id.* at 1042.

65. *Id.*

66. *Id.* at 1045-46.

67. *Id.* The Court explained its holding:

While we doubt that it would be desirable to build a superstructure of legal refinements around the word “initiate” in this context, there are undoubtedly situations where a bare inquiry by either defendant or by a police officer should not be held to “initiate” any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally “initiate” a conversation in the sense in which that word was used in *Edwards*.

Id. at 1045.

North Carolina, following the United States Supreme Court, adopted the *Edwards* rule.⁶⁸ The definition of interrogation in *Innis* and of defendant-initiated dialogue in *Bradshaw* combine with the basic rule of *Edwards*—that once a defendant requests counsel, interrogation by the police must cease unless the defendant initiates dialogue with the police—to form the framework of analysis for defendant's *Edwards* claim in *Thomas*.

Defendant's claim that his confession was inadmissible because it was involuntary has different origins. North Carolina's voluntariness standard has its origin in the belief that confessions induced by hope or fear are generally unreliable.⁶⁹ Originally, the United States Supreme Court also used a voluntariness standard, but the basis for its use was the due process clause of the fourteenth amendment.⁷⁰ As federal confession law developed, the due process voluntariness test was superseded by modern confession law's emphasis on *Miranda*.⁷¹ North Carolina's confession law, while recognizing the *Miranda* requirements, still incorporates the test of voluntariness.⁷² The North Carolina Supreme Court recently stated that in testing the voluntariness of a confession, "the court looks at the totality of the circumstances of the case."⁷³ Whenever a confession is the product of a threat or a promise of leniency, the confession is considered involuntary and inadmissible.⁷⁴

A survey of the background of both the *Edwards* and the voluntariness claims asserted by defendant in *Thomas* reveals that the North Carolina Supreme Court's decision on both claims is consistent with prior law. The troublesome aspect of *Thomas* is that the *Edwards* rule and the voluntariness test are both surrounded by ambiguity in their application—ambiguity that necessarily permeates *Thomas*.

The ambiguity associated with the *Edwards* rule involves *Miranda*. *Miranda* provided clear-cut procedural protection against the potential for coerced confessions by persons in police custody.⁷⁵ There was speculation after *Miranda*, however, that the Court was moving away from *Miranda* and its empha-

68. See, e.g., *State v. Bagguss*, 310 N.C. 259, 311 S.E.2d 248, cert. denied, 105 S. Ct. 136 (1984) (quoting the *Edwards* rule but finding it inapplicable because defendant never invoked his right to counsel); *State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983) (quoting the *Edwards* rule and determining that defendant initiated dialogue with the police but holding that there was prejudicial error in the trial court's fact-finding effort to establish whether defendant made a "knowing, intelligent and valid" waiver of his right); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983) (quoting the *Edwards* rule but finding it inapplicable because defendant never invoked his right to counsel).

69. See 2 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE, SECOND REVISED EDITION OF STANSBURY'S NORTH CAROLINA EVIDENCE § 183 (1982).

70. See *Spano v. New York*, 360 U.S. 315 (1959); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Brown v. Mississippi*, 297 U.S. 278 (1936); C. WHITEBREAD, *supra* note 4, § 15.02; 2 H. BRANDIS, *supra* note 69, § 183.

71. See C. WHITEBREAD, *supra* note 4, § 15.04.

72. 2 H. BRANDIS, *supra* note 69, § 183.

73. *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983).

74. See, e.g., *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975); *State v. Woodruff*, 259 N.C. 333, 130 S.E.2d 641 (1963); *State v. Livingston*, 202 N.C. 809, 164 S.E. 337 (1932); *State v. Whitfield*, 70 N.C. 356 (1874); *State v. Roberts*, 12 N.C. (1 Dev.) 259 (1827).

75. See *supra* note 39 and accompanying text.

sis on objective procedures.⁷⁶ *Edwards*, with its objective per se test, settled speculation over whether the Court was in the process of abolishing *Miranda*.⁷⁷ A rule can be diminished without being abolished, however, and *Edwards* does not preclude the possible diminution of *Miranda*.⁷⁸ That *Edwards* itself is circumscribed by *Innis* and *Bradshaw* bears out this conclusion. *Innis* defined interrogation as "words or actions . . . the police should know are reasonably likely to elicit an incriminating response from the suspect"⁷⁹ and then applied the term in a relatively conservative manner.⁸⁰ *Bradshaw* determined that a statement from a suspect that "could reasonably have been interpreted by the officer as relating generally to the investigation" is sufficient to meet the *Edwards* provision that there may be further interrogation even after a suspect has requested an attorney if the suspect initiates dialogue with the police.⁸¹ Therefore, although the basic rule of *Edwards* is per se, it is restrained by tests of reasonableness. The questions inherent in a reasonableness approach are twofold: Has the application of the reasonableness standard diminished *Miranda*'s substantive goal of protecting suspects in police custody from the threat of coerced confessions, and does the reasonableness test's influence on *Edwards* diminish the *Miranda* emphasis on objective procedural rules?⁸²

These questions apply to the holding in *Thomas*. In *Thomas*, the North Carolina Supreme Court, with minimal discussion, applied the *Edwards* rule and the test for voluntariness to defendant's confession. The court quoted the *Edwards* rule⁸³ but then unequivocally stated that it was not violated because the police officer's statement at issue was not interrogation.⁸⁴ The court based its decision on the *Innis* definition of "interrogation,"⁸⁵ concluding that it was not true in this case that the officer "should have known that his 'off-hand' remark was reasonably likely to provoke defendant into making an incriminating statement."⁸⁶

The North Carolina Supreme Court's conservative application of the *Innis* definition is in accord with the United States Supreme Court's application of it in *Innis*. Although *Innis* supported *Miranda* by specifying that interrogation

76. See C. WHITEBREAD, *supra* note 4, § 15.08; Comment, *Edwards v. Arizona: The Burger Court Breathes New Life Into Miranda*, 69 CALIF. L. REV. 1734, 1738-40 (1981).

77. *Edwards* has been called "the Burger Court's first clear-cut victory for *Miranda*." Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405, 447 (1982). No dissents were filed in *Edwards*.

78. See Comment, *supra* note 76, at 1748-51.

79. *Innis*, 446 U.S. at 300-01. See also *supra* text accompanying note 51 (setting forth the *Innis* Court's interpretation of "interrogation").

80. See *supra* text accompanying notes 45-52.

81. *Bradshaw*, 462 U.S. at 1046.

82. See Fyfe, *Enforcement Workshop: Oregon v. Bradshaw—What's Happening Here?*, 20 CRIM. L. BULL. 154, 158-60 (1984); Sonenshein, *supra* note 77, at 446; Comment, *supra* note 60, at 527-30.

83. *Thomas*, 310 N.C. at 377, 312 S.E.2d at 462.

84. *Id.* at 377-78, 312 S.E.2d at 463.

85. The court actually cited a North Carolina case that stated the *Innis* definition, noting that "[w]e have recognized that 'interrogation is not limited to express questioning by the police.'" *Id.* at 377, 312 S.E.2d at 463 (quoting *State v. Ladd*, 308 N.C. 272, 280, 302 S.E.2d 164, 170 (1983)).

86. *Id.* at 377-78, 312 S.E.2d at 463.

under *Miranda* could include police activities other than questioning,⁸⁷ it also refused to find that there was interrogation by the police officers during their front seat conversation.⁸⁸ The *Innis* holding—that police officers are not expected to know that a discussion about the danger of a school child finding a missing gun might provoke an incriminating response from a defendant—was reasonable. At least one commentator, however, has questioned whether this application of the reasonableness test in *Innis* undermined *Miranda* by refusing to classify police statements that directly resulted in defendant's incriminating statements as interrogation.⁸⁹ Justice Marshall, in a dissenting opinion in *Innis*, described the majority's "reasonably likely to provoke" definition of interrogation as consistent with *Miranda* but considered the Court's holding on the facts of *Innis* contradictory to that definition.⁹⁰

The North Carolina Supreme Court's holding in *Thomas* is subject to the same criticisms as those aimed at *Innis*. The Supreme Court's holding in *Innis*, however, did not require the result reached by the *Thomas* court. First, *Innis* and *Thomas* are factually distinct. *Innis* involved a conversation between two officers in which neither one spoke to the accused at all.⁹¹ *Thomas*, on the other hand, dealt with a remark made directly to the accused by an officer.⁹² Second, Professor White has suggested that the Court's focus in *Innis* was on an objective standard rather than on the "actual intent" of the police. Professor White has noted that the Court, in footnote seven of the majority opinion, "stated that when 'a police practice is designed to elicit an incriminating response,' it is 'unlikely' that the 'reasonably likely' test will not be met."⁹³ Professor White therefore has proposed:

In order to preserve both the majority's objective approach and a close correlation between the officer's purpose and the "reasonably likely" standard, the best reading of the *Innis* test is that it turns upon the objective purpose manifested by the police. Thus, an officer "should know" that his speech or conduct will be "reasonably likely to elicit an incriminating response" when he should realize that the speech or conduct will probably be viewed by the suspect as designed to achieve this purpose. To ensure that the inquiry is entirely objective, the proposed test could be framed as follows: if an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute "interrogation."⁹⁴

Applying Professor White's interpretation of the *Innis* test to the officer's

87. See White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209, 1223 (1980).

88. See Sonenshein, *supra* note 77, at 446-47.

89. See *id.* at 446 (noting that *Innis* created a "potentially gaping hole in *Miranda*").

90. *Innis*, 446 U.S. at 305 (Marshall, J., dissenting).

91. *Id.* at 294-95.

92. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 463.

93. White, *supra* note 87, at 1231 (quoting *Innis*, 446 U.S. at 302 n.7).

94. *Id.* at 1231-32 (emphasis omitted).

remark in *Thomas*, it is possible to reach a different result than the court in *Thomas* reached. An objective listener probably would infer that the officer told defendant to tell his attorney about the opportunity defendant had been given to help himself in an effort to elicit self-incrimination.

Because the North Carolina Supreme Court in *Thomas* construed the interrogation definition so narrowly, *Edwards'* application in the North Carolina courts is excessively constricted. If the courts continue to follow such a conservative interpretation of the *Innis* definition of interrogation, police may skillfully use manipulative techniques that do not rise to the level of what the North Carolina Supreme Court has perceived as "interrogation" and thus circumvent the *Miranda* goal of minimizing the coercive element of custodial interrogation.⁹⁵ These methods would not violate *Edwards* because technically they would not be interrogation, but they would violate the spirit of *Miranda* by inducing confessions that are the result of subtle compulsion.⁹⁶

It is worth considering, therefore, whether the North Carolina Supreme Court followed the best line of interpretation of *Edwards* in *Thomas*. The United States Supreme Court has indicated that although it might not expand *Miranda* in the future, it will support it.⁹⁷ Given the facts of *Thomas*, it would be criticizing the North Carolina Supreme Court too harshly to say that the court violated the meaning of *Miranda* in *Thomas*. Even if Professor White's interpretation of the *Innis* rule is applied to *Thomas*, the fact situation in *Thomas* is sufficiently ambiguous to allow support for the court's decision. The real problem with *Thomas* is that it may encourage a much looser application of both *Miranda* and *Edwards* in North Carolina courts.

The United States Supreme Court's decision in *Oregon v. Bradshaw* leaves open an issue which the Court may soon have to address—an issue of interest to the North Carolina courts after *Thomas*. That issue concerns the relationship between the threshold at which police comments and activity become interrogation and the threshold at which a suspect's comments are considered to be initiation of dialogue with the police. In *Innis* the officers' comments about the

95. This potential implication reflects Justice Marshall's complaint in his *Bradshaw* dissent concerning the Court's broad interpretation of what is an initiation of dialogue by a defendant. (Justice Marshall was joined in his dissent by Justices Brennan, Blackmun, and Stevens.) He stated that "[t]o allow the authorities to recommence an interrogation based on such a question is to permit them to capitalize on the custodial setting. Yet *Miranda's* procedural protections were adopted precisely in order 'to dispel the compulsion inherent in custodial surroundings.'" *Bradshaw*, 462 U.S. at 1056 (Marshall, J., dissenting) (quoting *Miranda*, 384 U.S. at 458).

96. See *id.* A similar fear has been voiced concerning the *Bradshaw* initiation rule:

By focusing on who initiates the dialogue, the *Edwards-Bradshaw* rule ignores certain coercive aspects of the custodial environment. It would be possible for the police to manipulate the initiation step to their own advantage by subjecting the suspect to more subtle forms of coercion. For example, the police could ignore the suspect until concern about his status, and the coerciveness of the custodial environment generally, induce him to initiate a conversation with the police.

Comment, *supra* note 60, at 527-28.

97. The substance of the *Edwards* decision itself indicates this. It is interesting to note what Chief Justice Burger said in his concurring opinion in *Innis*: "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would never overrule *Miranda*, disparage it, nor extend it at this late date." *Innis*, 446 U.S. at 304 (Burger, J., concurring).

missing gun directly preceded the defendant's self-incrimination; yet, those comments were not considered interrogation by the Court.⁹⁸ But in *Bradshaw* the defendant's question as to what would happen to him next was considered to be an initiation of the dialogue which resulted in a confession.⁹⁹ The level of police activity that is considered interrogation—and therefore a trigger of the *Edwards* requirement that interrogation cease when defendant requests an attorney—is much higher than that at which a defendant's comment or question is considered an initiation of dialogue and therefore sufficient to allow interrogation to begin again. If that difference in thresholds is the rule, the ironic import of *Edwards* is that, while the case purports to further *Miranda*'s goal of protecting a defendant in custody from self-incrimination, it actually diminishes *Miranda*. The Court should consider setting thresholds at more comparable levels.¹⁰⁰

Thomas also raises questions concerning *Miranda*'s procedural goals. One of the primary goals of *Miranda* was to provide clear-cut rules of procedure to help implement the constitutional protections.¹⁰¹ *Edwards* has been greeted as an effort by the Court to again provide a bright-line test.¹⁰² Because the North Carolina Supreme Court in *Thomas* provides little analysis to support its conclusion that the remark at issue in the case was not interrogation,¹⁰³ *Thomas* offers little in the way of guidelines for the police to follow in attempting to obey the dictates of *Edwards*. If the *Edwards* tests for interrogation and initiation are dependent upon a case-by-case analysis, law enforcement officials are left in the position of having to guess in advance what a court will and will not admit into evidence.¹⁰⁴ Lack of procedural guidelines also impedes one of the stated purposes for the *Edwards* rule: "to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was."¹⁰⁵ If police are not fairly certain of what constitutes "badgering" and are only able to find out by a process of "trial and error," the *Edwards* "prophylactic rule" will not be consistently effective.¹⁰⁶

Just as the problems inherent in the *Edwards* rule affect the decision in *Thomas*, the ambiguity inherent in the North Carolina test for voluntariness in confessions also affects the *Thomas* decision. A pure application of the *Edwards*

98. See *id.* at 294-95, 303.

99. See *supra* text accompanying notes 64-67.

100. See generally Fyfe, *supra* note 82, at 159-60 (concluding that "*Bradshaw* represents a serious erosion of *Miranda* and of the *Edwards* test").

101. See *supra* note 39 and accompanying text.

102. See Sonenshein, *supra* note 77, at 447-51.

103. *Thomas*, 310 N.C. at 377-78, 312 S.E.2d at 463.

104. Justice Burger was troubled by this problem when he encountered it in the *Innis* definition. According to the Chief Justice, "It may introduce new elements of uncertainty; under the Court's test, a police officer, in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused." He noted that "[f]ew, if any, police officers are competent enough to have the kind of evaluation seemingly contemplated." 446 U.S. at 304 (Burger, J., concurring).

105. *Bradshaw*, 462 U.S. at 1044.

106. Professor Sonenshein has summed up the significance of guidelines in the *Miranda* area. He concludes, "If there is a *Miranda* theme, it is that abuse of authority thrives on discretion. If there is a legacy in *Miranda*, it is that the privilege against self-incrimination will only be honored in the official interrogation setting when police and judges operate within clearly delineated guidelines." Sonenshein, *supra* note 77, at 462.

rule, after a finding that defendant initiated dialogue, would require the state to prove that any confession resulting from the dialogue was made only after the accused waived his rights. Such waiver must have been made knowingly and intelligently in view of the totality of the circumstances.¹⁰⁷ The *Edwards* requirement that there be a valid waiver, however, apparently is not considered to be the equivalent of the voluntariness requirement in North Carolina.¹⁰⁸ The requirement that a defendant's confession be voluntary in order to be admissible must be satisfied even when the rules of both *Miranda* and *Edwards* have been met.¹⁰⁹ North Carolina's voluntariness test grows out of a long history of case law, much of which is still cited frequently by North Carolina courts.¹¹⁰

While the supreme court in *Thomas* did not specifically discuss waiver, it did discuss the voluntariness of defendant's confession. The court applied a totality of the circumstances test to determine whether the confession in *Thomas* was made voluntarily.¹¹¹ Applying the rule of *State v. Corley*,¹¹² which indicated that involuntariness is not caused by a single factor, the court noted that no attempt was made to frighten or threaten defendant or otherwise coerce him into making a statement.¹¹³ The court concluded that the officer's "off-hand" statement was not a sufficient basis for considering defendant's confession involuntary¹¹⁴ and admitted the confession into evidence.¹¹⁵

The court's "totality of the circumstances" test for voluntariness is somewhat puzzling in light of traditional North Carolina confession law. North Carolina cases repeatedly state that a confession produced by a promise of leniency or by a threat—a confession that is the result of hope or fear induced by the police in a defendant—is not a voluntary confession.¹¹⁶ In *Corley* the court adamantly stated that this standard was not a per se rule,¹¹⁷ finding instead that the totality of the circumstances had to indicate the confession was involuntary.

107. See *supra* note 60.

108. The North Carolina Supreme Court has stated that "in determining whether a defendant's confession was voluntarily and intelligently made . . . [t]he North Carolina rule and the federal rule for determining the admissibility of a confession is [sic] the same." *State v. Corley*, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (quoting *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983)). The court went on to add, however, that "this principle controls 'without regard to whether the claim of inadmissibility rests upon constitutional grounds or rests solely upon our rule of evidence requiring the exclusion of involuntary confessions.'" *Id.* at 48, 311 S.E.2d at 545 (quoting *State v. Branch*, 306 N.C. 101, 108, 291 S.E.2d 653, 658 (1982)) (emphasis added).

Within the *Miranda* context itself, a voluntary confession is not prohibited. The Supreme Court said in *Miranda* that "[a]ny statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478.

109. See *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984).

110. See, e.g., *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983); *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975); *State v. Bishop*, 272 N.C. 283, 158 S.E.2d 511 (1968); *State v. Roberts*, 12 N.C. (1 Dev.) 259 (1827).

111. *Thomas*, 310 N.C. at 378-79, 312 S.E.2d at 463-64.

112. 310 N.C. 40, 47, 311 S.E.2d 540, 547 (1984).

113. *Thomas*, 310 N.C. at 379, 312 S.E.2d at 464.

114. *Id.*

115. *Id.*

116. See *supra* note 74 and accompanying text.

117. 310 N.C. at 48, 311 S.E.2d at 544.

The court in *Corley* implied that it did not overrule prior law.¹¹⁸

The juxtaposition of *Corley* and the existing case law creates confusion regarding the voluntariness test. That *Thomas* restated the totality of circumstances test, while applying it in a situation in which defendant's confession could well have been a product of hope or fear, increases the existing uncertainty surrounding the voluntariness rule.

In a dissent to *Corley*, Justice Exum expressed concern over the ambiguity in the application of the voluntariness standard, stating that the totality of the circumstances rule previously had been used to determine voluntariness only "[i]n the absence of a promise or threat."¹¹⁹ In his dissent in *Thomas*, Exum stated, "When a confession follows a promise of leniency, the confession is inadmissible unless it can be shown that the influence of the promise had been entirely dissipated so that the promise did not in fact induce the confession."¹²⁰ He then explained that "[w]here there is evidence in the case that the influence of a promise of leniency has been dissipated, or 'entirely done away with,' before the confession was made, then the question of whether the confession was a product of the promise is resolved by considering the 'totality of circumstances.'"¹²¹ According to Exum, "[t]here is nothing in the record to indicate that [defendant's confession] could have been the product of anything" other than the officer's statement.¹²²

The most troublesome aspect of the voluntariness issue in *Thomas* is not whether the majority was justified in dismissing the comment as an "off-hand statement of an officer, which is at best ambiguous,"¹²³ but rather is the same problem of uncertainty present in the court's decision concerning defendant's *Edwards* claim. If the application of a totality of circumstances test requires a case-by-case analysis of every confession the voluntariness of which is at issue, the result is a situation in which police have few guidelines.¹²⁴ The same problems, confusions, and abuses that exist in the *Miranda* context when its guidelines are blurred are present in the totality of circumstances interpretation of the voluntariness standard.¹²⁵ Justice Exum's perspective, which incorporates North Carolina's historical test for voluntariness, provides a great deal more objectivity and certainty for the law of confessions than does the majority's approach in *Thomas*.

The court's decision in *Thomas* made no definite changes in the law gov-

118. See *id.*

119. *Id.* at 56-58, 311 S.E.2d at 550 (Exum, J., dissenting).

120. 310 N.C. at 382, 312 S.E.2d at 465 (Exum, J., dissenting).

121. *Id.* at 382, 312 S.E.2d at 466 (Exum, J., dissenting).

122. *Id.* at 382, 312 S.E.2d at 465 (Exum, J., dissenting).

123. *Id.* at 379, 312 S.E.2d at 464.

124. One commentator discussing the *Bradshaw* decision expressed concern over what he referred to as "attempts to individualize justice." He noted that these efforts may please arresting officers, but they also "seriously damage the quality of justice in the great majority of cases." Furthermore, he stated that "[f]ew of us enjoy seeing the factually guilty escape conviction, but the reality is that rules and principles that enhance justice in the general run of cases are certain to enhance opportunities for injustice in some specific cases." Fyfe, *supra* note 82, at 154.

125. See *supra* notes 104-06 and accompanying text.

erning the admission of confessions into evidence and was not overtly inconsistent with United States Supreme Court decisions concerning confessions. The decision, however, might have undercut *Miranda* and *Edwards* unnecessarily and in so doing might have set a hazardous precedent for North Carolina courts to follow. *Thomas* also might have hastened a course of uncertainty in the application of North Carolina's voluntariness standard. Both results of the case might mean future abuse as both courts and law enforcement officials attempt to function with diminishing or minimal guidelines.

SHEILA WHITFIELD RAGLAND

***South Carolina Insurance Co. v. Smith* : Employee Exclusion Clauses in Automobile Liability Insurance Policies**

North Carolina's Motor Vehicle Safety and Financial Responsibility Act¹ was enacted to help ensure that innocent victims of automobile accidents will be able to recover compensation from the driver who caused their injuries.² Together with North Carolina's compulsory insurance law,³ the Financial Responsibility Act requires every owner of a motor vehicle to purchase liability insurance covering the owner and all persons using the vehicle with permission.⁴

The goal behind the Financial Responsibility Act, however, is not always consistent with a vehicle owner's desire to limit his premiums by contracting for exclusions from his automobile insurance coverage. One cost-saving provision commonly included in automobile liability policies excludes the insurer from liability for injuries to employees of the insured. An employee may be without coverage under either workers' compensation or his employer's liability policy if the employer's policy contains a clause excluding all employees rather than only employees who are covered under the state's workers' compensation act.⁵

In *South Carolina Insurance Co. v. Smith*,⁶ the North Carolina Court of Appeals held that an employee exclusion clause is valid only if workers' compensation is available to the employee. This Note examines the issues presented in *Smith* and concludes that the court reached a sound middle ground between the competing goals of compensating victims of highway negligence and maintaining reasonable insurance costs for drivers complying with North Carolina's mandatory automobile insurance laws.

Marvin B. Smith was standing in the back of a truck belonging to his employer, who was at the wheel,⁷ when a freezer in the truck fell on his foot.⁸ He brought suit against his employer, William B. Gore, alleging that Gore's negligence had caused the freezer to fall.⁹ South Carolina Insurance Company, which had issued Gore a liability policy covering the truck, brought a separate action seeking a declaratory judgment that it was not liable for Smith's inju-

1. N.C. GEN. STAT. §§ 20-279.1 to -39 (1983).

2. See, e.g., *Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973) (purpose of the Act is to compensate innocent victims of financially irresponsible motorists); *Allstate Ins. Co. v. Hale*, 270 N.C. 195, 154 S.E.2d 79 (1967); *Howell v. Travelers Indem. Co.*, 237 N.C. 227, 74 S.E.2d 610 (1953).

3. N.C. GEN. STAT. § 20-309 (1983).

4. For a discussion of the history of the two acts, see *infra* notes 37-56 and accompanying text.

5. N.C. GEN. STAT. § 97 (1979 & Cum. Supp. 1983). Workers' compensation acts typically do not include domestic servants, farm laborers, casual employees, and employees who work for an employer with fewer than a statutory minimum number of workers (usually two to six employees). See 1C A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 50.10-52.34 (1982 & Supp. 1984). North Carolina's Workers' Compensation Act does not apply to farm laborers, domestic servants, employees in casual employment, and workers employed by an employer having fewer than four employees. N.C. GEN. STAT. § 97-13(b) (1979).

6. 67 N.C. App. 632, 313 S.E.2d 856 (1984).

7. Plaintiff's Complaint at 2.

8. *Id.*

9. *Id.*

ries.¹⁰ The policy contained a clause providing: "We do not provide Liability Coverage for any person: . . . For bodily injury to an employee of that person during the course of employment."¹¹

The insurance company argued that this exclusion relieved it from liability for Smith's injuries. Smith, defendant in the declaratory judgment proceeding,¹² maintained that the exclusion clause did not relieve the company of liability because the clause conflicted with the Motor Vehicle Safety and Financial Responsibility Act. Smith relied on section 20-279.21(e) of the Act, which provides that a "motor vehicle liability policy" issued in compliance with the Act "need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmens' compensation law."¹³ The trial court granted the insurance company's motion for summary judgment, but the North Carolina Court of Appeals reversed, holding that the exclusion was valid only if workers' compensation benefits were available to Smith.¹⁴

In an opinion by Chief Judge Vaughn,¹⁵ the court agreed that the exclusion clause would be valid as written in the absence of a financial responsibility law.¹⁶ The court, however, accepted Smith's argument that a policy issued under North Carolina's compulsory insurance laws must be construed in light of this law.¹⁷ The court held that section 20-279.21(e) of the Financial Responsibility Act allows an exemption from coverage only insofar as there are benefits available to an employee pursuant to North Carolina's Workers' Compensation Act.¹⁸ The Act thus did not invalidate the exclusion clause completely, but rather made its validity contingent on a showing that the injured employee was covered by workers' compensation.¹⁹

The court reasoned that this result was consistent with the rationale behind the Financial Responsibility Act of compensating victims of "financially irresponsible" drivers: "Were we to accept plaintiff's argument, we would likewise

10. *Smith*, 67 N.C. App. at 632, 313 S.E.2d at 858.

11. *Id.* at 633, 313 S.E.2d at 858.

12. Smith's employer, Gore, was also a defendant in the declaratory judgment proceeding. *See id.* at 632, 313 S.E.2d 858.

13. N.C. GEN. STAT. § 20-279.21(e) (1983). For a discussion of the rest of the statute, see *infra* notes 37-56 and accompanying text.

14. The case was remanded for determination of whether workers' compensation was available to Smith. *Smith*, 67 N.C. App. at 640, 313 S.E.2d at 862. The appellate brief submitted by plaintiff-insurance company indicates that workers' compensation benefits were not available. The brief discussed a case in which an employee was not covered by workers' compensation because his employer had fewer than the statutory minimum number of employees, adding that "[t]his is similar to the situation which is involved in this case." Plaintiff-Appellee's Brief at 5. Under the holding in *Smith*, the insurance company will be liable for damages arising out of Smith's injuries if he in fact was not covered by workers' compensation. *See also supra* note 5 (exclusions from North Carolina's Workers' Compensation Act).

15. Judges Braswell and Eagles concurred but did not write separate opinions. *Smith*, 67 N.C. App. at 640, 313 S.E.2d at 862.

16. "The starting point of our analysis is that nothing else appearing, the exclusionary clause in the policy before us would defeat coverage." *Smith*, 67 N.C. App. at 634, 313 S.E.2d at 859.

17. *Id.* at 635-36, 313 S.E.2d at 859.

18. *Id.* at 634, 313 S.E.2d at 859.

19. *Id.*

be making possible situations wherein an injured employee may be left remediless. Such a result would contravene the established purpose of our Financial Responsibility Act."²⁰ The court added that its holding was in accord with the majority of decisions on this issue in other jurisdictions.²¹

Smith was a case of first impression²² on the validity of an employee exclusion clause in light of North Carolina's Financial Responsibility Act. In deciding the case, the court had to resolve the conflict between the employer's desire to lower premiums by contracting for limits on automobile insurance coverage and the state's policy of assuring compensation of automobile accident victims through a mandatory financial responsibility statute.

As the name implies, financial responsibility acts were developed to address the problem of negligent, uninsured motorists unable to compensate accident victims.²³ Connecticut in 1925 passed a statute that revoked the registration of drivers who committed traffic violations of a certain severity and required proof of financial "responsibility" as a condition to reinstatement of the registration.²⁴ Similar acts were in widespread use by the 1930s.²⁵ These early financial responsibility laws required suspension of the driver's license, registration, or both upon conviction for certain traffic violations.²⁶ To get his license or registration restored, the driver had to offer proof of his ability to compensate future accident victims. This proof generally was in the form of a bond, securities, or, more often, a liability insurance policy.²⁷ These acts were intended to encourage dangerous drivers to get liability insurance or, if they refused, to keep such drivers off the road.²⁸

The early laws, however, had shortcomings. They applied only after a driver had committed a serious offense or had an unsatisfied judgment against him, and even then the acts required only proof of responsibility for future damages. Thus, they did nothing to compensate the victim of the driver's first acci-

20. *Id.* at 637, 313 S.E.2d at 860.

21. *Id.* at 639, 313 S.E.2d at 861-62. The court reviewed decisions from other jurisdictions at length, concluding that the cases holding such a clause valid as written were fewer in number and contained weaker reasoning. *Id.*

22. *Id.* at 634, 313 S.E.2d at 858.

23. See *Kesler v. Department of Public Safety*, 369 U.S. 153, 158-59 (1962); 6B J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4295, at 238 (Buckley ed. 1979); Grad, *Recent Developments in Auto Accident Compensation*, 50 COLUM. L. REV. 300, 308 (1950); Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959); Note, *A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform*, 21 VAND. L. REV. 1050, 1051-52 (1968).

24. Act of June 23, 1925, ch. 183, 1925 Conn. Pub. Acts 3956.

25. In 1936, 30 states had enacted some form of financial responsibility legislation. Brawn, *The Financial Responsibility Law*, 3 LAW & CONTEMP. PROBS. 505, 511 (1936). Most of these statutes were based on one of two model acts: the Uniform Vehicle Code of the National Conference on Street and Highway Safety or the American Automobile Association's Safety-Responsibility Bill. *Id.* at 509. For a discussion of the differences between these model acts, see *id.*

26. See *Kesler v. Department of Public Safety*, 369 U.S. 153, 159 (1962). Apparently the earliest law requiring liability insurance in connection with the operation of a motor vehicle was a 1915 San Francisco ordinance requiring such insurance for all buses. *Id.*

27. Murphy & Netherton, *supra* note 23, at 703-04.

28. *Id.* at 704.

dent.²⁹ These early acts also did not reach many of the drivers who posed the greatest threat to the public. When a driver was unable to compensate his victim, the victim often had little incentive to report the accident or seek a judgment against the driver. Thus, the law often was never called into operation.³⁰

The inadequacies of the early "future proof" financial responsibility laws led to the development of laws designed to provide compensation for all accident victims, rather than merely those injured after a negligent driver had his first reported accident. The first such law was enacted in New Hampshire in 1937³¹ and provided that a driver involved in a serious accident had to deposit "security" with a state agency to be used to pay damages arising out of the past accident.³² Security laws eventually replaced the "future proof" laws; by 1968 every state except Massachusetts had a statute requiring the deposit of security.³³

Typically, security acts require drivers to file a report if involved in accidents causing personal injury or property damage over a certain amount. A state official reviews the report and determines the amount of required security based on the likelihood of damages arising from the accident. If a driver does not provide the required security within a statutory period, his license and registration are revoked. The driver can recover his license and registration by depositing the security, by showing proof of a settlement agreement, or upon the passage of a certain period—usually one year—in which no one files a lawsuit arising from the accident.³⁴ Security laws have been successful in encouraging many drivers to acquire automobile liability insurance,³⁵ but they are not without defects. Like the "future proof" laws, they operate only after an accident has occurred. If, as is often the case, a financially irresponsible driver has caused an accident, then, in the words of one commentator, "the best that the law can do is to force him off the road while his unfortunate victim remains uncompensated."³⁶

North Carolina's first financial responsibility act, a "future proof" statute, was enacted in 1931.³⁷ It provided for revocation of the license and registration

29. This aspect of the "future proof" financial responsibility laws made them vulnerable to the criticism that they were "first bite" laws because they allowed bad drivers, like bad dogs, to get a "first bite" free of consequences. See Murphy & Netherton, *supra* note 23, at 703-04; Note, *supra* note 23, at 1052.

30. Murphy & Netherton, *supra* note 23, at 705; Note, *supra* note 23, at 1052.

31. Act of July 14, 1937, ch. 161, 1937 N.H. LAWS 296-97.

32. Kesler v. Dep't of Public Safety, 369 U.S. 153, 163 (1962); Grad, *supra* note 23, at 705-06.

33. See, Note, *supra* note 23, at 1052. Massachusetts law currently provides that a plaintiff can move for security against a nonresident. See MASS. ANN. LAWS ch. 90, § 3G (Michie/Law. Co-op 1975 & Supp. 1985).

34. See Murphy & Netherton, *supra* note 23, at 706-07; Note, *supra* note 23, at 1052-54.

35. Murphy & Netherton, *supra* note 23, at 706-07.

36. Laufer, *Insurance Against Lack of Insurance? A Dissent From the Uninsured Motorist Endorsement*, 1969 DUKE L.J. 227, 232 (1969). Financial responsibility acts have been upheld against various constitutional challenges. 6B J. APPLEMAN, *supra* note 23, § 4295, at 247; 12A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 45:722, at 362-63 (2d ed. 1971). North Carolina's statute was held not to violate the due process clause of the fourteenth amendment in Jones v. State Farm Mut. Auto. Ins. Co., 370 N.C. 454, 155 S.E.2d 118 (1967).

37. Act of March 16, 1931, ch. 116, 1931 N.C. SESS. LAWS 149 (codified at N.C. GEN. STAT. § 20-201 (1943)). See generally Note, *Survey of Statutory Changes in North Carolina*, 9 N.C.L. REV. 384 (1931) (discussing the operation of the new law).

of any driver with a judgment of \$100 or more outstanding against him.³⁸ The license and registration would not be restored unless the driver paid the judgment or furnished proof of financial responsibility for future liability.³⁹

In 1953 the general assembly modernized its financial responsibility law, and North Carolina became the forty-second state⁴⁰ to adopt a security statute.⁴¹ This law, titled the Motor Vehicle Safety and Financial Responsibility Act of 1953, is still in force. It provides that every owner and operator of a vehicle involved in an accident in which there is personal injury or property damage exceeding \$500 is required to deposit security with the Commissioner of Motor Vehicles.⁴² The Commissioner is directed to determine the required amount of security based on the damages likely to arise out of the accident.⁴³ If the owner or operator fails to post the security within a statutory period, the Commissioner must suspend the license of that driver.⁴⁴

The security provision does not apply to several types of drivers, including those who are covered by a motor vehicle liability policy that meets the statutory limits,⁴⁵ those who were legally parked at the time of the accident, and those involved in an accident in which the other party did not sustain personal injury or property damage.⁴⁶ A license suspended under the Act may not be reinstated unless the driver posts the required security, is adjudged to have no liability, or enters a settlement agreement.⁴⁷ The license also may be reinstated if, after the passage of one year, no litigation has been initiated as a result of the accident.⁴⁸

38. Act of March 16, 1931, ch. 116, 1931 N.C. SESS. LAWS 149, 149.

39. Interestingly, the 1931 statute went into effect four years before drivers' licenses became mandatory in North Carolina. See Note, *supra* note 37, at 384-85.

40. See Note, *Survey of Statutory Changes in North Carolina*, 31 N.C.L. REV. 420, 421 n.20 (1953).

41. Act of April 30, 1953, ch. 1300, 1953 N.C. SESS. LAWS 1262 (codified at N.C. GEN. STAT. § 20-279.1 (1983)).

42. N.C. GEN. STAT. §§ 20-279.4 to -.5 (1983). As originally enacted, the threshold amount for requiring a deposit was \$100. See *supra* note 41. The security may be in the form of a bond, a cash deposit, or, for owners of more than 25 vehicles, proof of self-insurance. See N.C. GEN. STAT. §§ 20-279.18, .33 (1983).

43. N.C. GEN. STAT. § 20-279.5(a) (1983).

44. *Id.* § 20-279.5(b).

45. A driver offering proof of a statutory motor vehicle liability policy must submit a certificate from his insurer that the policy is in effect and includes the coverage required by the statute. When the Act was first enacted, a statutory policy had to provide coverage of \$5,000 for bodily injury to or death of one person; \$10,000 for bodily injury to or death of two or more persons; and \$1,000 for property damage. Act of April 30, 1953, ch. 1300, 1953 N.C. SESS. LAWS 1262, 1263. The statute currently requires liability limits of \$25,000 for bodily injury to or death of one person; \$50,000 for bodily injury to or death of one or more persons; and \$10,000 for property damage. N.C. GEN. STAT. § 20-279.21(b)(2) (1983).

The Act also contains an "assigned risk plan" under which coverage of high risk drivers who otherwise would be unable to obtain coverage is allocated among all insurance carriers licensed to write automobile liability insurance in the state. *Id.* § 20-279.34. Participation in the assigned risk plan is mandatory for insurance carriers who write automobile liability insurance in North Carolina. See *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967). Assigned risk plans are a feature of many financial responsibility laws and help make insurance available to those whom insurance companies would be reluctant to insure otherwise. See 6B J. APPLEMAN, *supra* note 23, § 4295, at 253; Note, *supra* note 23, at 1066.

46. N.C. GEN. STAT. § 20-279.6 (1983).

47. *Id.* § 20-279.7.

48. *Id.*

The operation of these provisions is triggered by filing a mandatory accident report.⁴⁹

The Act defines a "motor vehicle liability policy" in section 20-279.21. That section requires that the policy insure "the person named therein and any other persons, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle."⁵⁰ The section also specifies in detail the requirements a policy must meet in order to exempt the insured from the security requirements of the rest of the Act. The debate in *Smith* turned on the provision that a statutory motor vehicle liability policy "need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured."⁵¹

The state legislature in 1957 strengthened the 1953 Act with the enactment of section 20-309.⁵² This Act, titled the Vehicle Financial Responsibility Act of 1957, provides that no vehicle may be registered in North Carolina unless at the time of registration the owner has proof of "financial responsibility."⁵³ Financial responsibility can be demonstrated by qualifying as a self-insurer or by offering proof of a motor vehicle liability policy or bond as defined in the 1953 Act.⁵⁴

The enactment of the 1957 Act made North Carolina one of only three states to require liability coverage for every vehicle registered in the state.⁵⁵ It also obviated criticism that the financial responsibility legislation operated only after an accident had occurred and thus after a victim may have been injured by a financially irresponsible driver. Ideally, the mandatory registration provisions of the 1957 Act deny financially irresponsible drivers a free "first bite" by denying them access to the road until they prove themselves financially responsible.⁵⁶

In decisions since enactment of the 1953 Financial Responsibility Act, North Carolina courts have indicated their intention to interpret the Act expansively. The North Carolina Supreme Court has held that the statute "will be broadly construed to carry out its beneficial purpose of providing compensation

49. *Id.* § 20-279.4.

50. *Id.* § 20-279.21(b)(2). The "omnibus clause" provision applying to all permissive users was added by amendment in 1967. Act of July 6, 1967, ch. 1162, 1967 N.C. SESS. LAWS 1794, 1795.

51. N.C. GEN. STAT. § 20-279.21(e) (1983).

52. Act of June 12, 1957, c. 1393, 1957 N.C. SESS. LAWS 1586 (codified at N.C. GEN. STAT. § 20-309 (1983)).

53. N.C. GEN. STAT. § 20-309(a) (1983).

54. *Id.* § 20-309(b). The 1953 and 1957 acts are complementary and are to be construed by the courts so as to harmonize the acts and give each full effect. *Faizan v. Grain Dealers Mut. Ins. Co.*, 254 N.C. 47, 53, 118 S.E.2d 303, 307 (1961).

55. Massachusetts was the first state to adopt a compulsory insurance law. Act of May 1, 1925, 1925 Mass. Acts 426. It was followed in 1929 by New York. Vehicle and Traffic Law of 1929, ch. 655, § 2, 1929 N.Y. LAWS 1956. Today about half the states have a compulsory insurance system. See 6B APPLEMAN, *supra* note 23, § 4299, at 300-01.

56. For a general discussion of the 1957 Act, see Montgomery, *North Carolina's New Vehicle Financial Responsibility Act*, 24 POPULAR GOV'T 12 (Dec. 1957).

to those who have been injured by automobiles."⁵⁷ The court also has held that the victim's right to recover against the insurer is not derived through the insured, as it is in cases of voluntary insurance, but rather is governed by the statute.⁵⁸

The court's intention to interpret the Financial Responsibility Act expansively was tested in a 1964 case, *Nationwide Mutual Insurance Co. v. Roberts*.⁵⁹ In that case Roberts and the victim had had a violent fight, after which Roberts pursued the victim by car and drove into him, pinning him against a stone wall.⁶⁰ Roberts' insurance company sued for a declaratory judgment that it was not liable for the injuries to the victim because Roberts' conduct was intentional. The insurance policy had a clause stating that it covered "all sums which Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease . . . sustained by any person, *caused by accident* and arising out of the ownership, maintenance or use of the automobile."⁶¹ The policy also provided that "[a]ssault and battery shall be deemed an accident unless committed by or at the direction of the insured."⁶²

The court noted that such an exclusion was common in the insurance industry and would be valid if the insured had procured the policy voluntarily.⁶³ Roberts, however, had purchased the policy pursuant to the requirements of the state's compulsory insurance laws, and the coverage did not exceed the minimum amounts required under the Financial Responsibility Act.⁶⁴ The court recognized a conflict between the exclusion clause and the statutory goal of providing compensation for victims of traffic accidents.⁶⁵ The clause also conflicted with the express requirement in section 20-279.21 that an automobile liability policy insure against liability "*arising out of the ownership, maintenance or use*" of the automobile.⁶⁶ In such a situation, the court held, the statute must prevail over the terms of the policy:

The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by the negligence of financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover should depend upon whether the conduct of its insured was intentional or negligent. In order to accomplish the objective of the law, the perspective here must be that of the victim and not that of the aggressor [The victim's rights] are statutory and become absolute on the occur-

57. *Moore v. Hartford Fire Ins. Group*, 270 N.C. 532, 155 S.E.2d 128 (1967).

58. *Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

59. 261 N.C. 285, 134 S.E.2d 654 (1964).

60. *Id.* at 286, 134 S.E.2d at 656.

61. *Id.* at 286-87, 134 S.E.2d at 656 (emphasis added).

62. *Id.*

63. *Id.* at 290, 134 S.E.2d at 659.

64. *Id.* at 289, 134 S.E.2d at 658.

65. *Id.* at 290, 134 S.E.2d at 659.

66. *Id.*

rence of an injury covered by the policy.⁶⁷

Twenty years later the court of appeals in *Smith* examined a conflict between another common policy exclusion and the state's financial responsibility law. The challenged clause in *Smith* is known in the insurance industry as an "employee exclusion clause" and typically provides that an insurer shall not be liable for injury to or death of "employees of the insured" who are injured while "engaged in the business of the insured."⁶⁸ The reasoning behind such an exclusion is to permit an employer to avoid the expense of covering his employees under both the mandatory workers' compensation system and an automobile liability policy.⁶⁹ Like the assault and battery clause of the policy in *Roberts*, an employee exclusion clause is a common feature of automobile liability policies⁷⁰ and has been upheld as a valid means for the insurer to limit its liability and for the insured to limit his expense.⁷¹

Just as some employees could be doubly covered—by both workers' compensation and their employer's automobile liability policy—other employees could be excluded from coverage under either kind of insurance. In many states, workers' compensation does not apply to employers with fewer than a certain minimum number of employees, or to farm or domestic laborers.⁷² If an employee is not covered by the state's workers' compensation system and the employer's automobile liability policy contains an employee exclusion clause, the employee potentially is without insurance protection if he is injured through the use of one of his employer's vehicles. In this situation, courts have been called upon to decide whether enforcement of the employee exclusion clause violates the spirit, if not also the letter, of the state's financial responsibility law.

The decisions have not been uniform.⁷³ One line of cases, relied upon by plaintiff-insurance company in *Smith*, holds that the employee exclusion is valid regardless of whether the employee is eligible for workers' compensation.⁷⁴ In some of these cases, the court simply decided the issue without mention of the state's financial responsibility law. An example cited by the *Smith* court is *Em-*

67. *Id.* See *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971) (policy excluded liability for assault and battery committed by insured; court, citing *Roberts*, held that the public policy behind the financial responsibility law rendered the exclusion invalid).

68. Annot., 50 A.L.R.2d 78, 79 (1956).

69. "It is well settled that the primary purpose of an (employee) exclusion clause in a public liability policy . . . is to draw a sharp line between employees who are excluded, and members of the general public." *Travelers Corp. v. Boyer*, 301 F. Supp. 1396, 1405 (D. Md. 1969) (quoting *Lumber Mut. Casualty Co. v. Stukes*, 164 F.2d 571 (4th Cir. 1947)); see also Annot., 45 A.L.R. 3d 288, 295 (1972) (discussing the rationale behind employee exclusion cases). A similar and perhaps more common exclusion clause is the "fellow employee" or "cross-employee" exclusion, which relieves the insurer of liability for injuries to one employee arising out of actions by another employee. See *id.*

70. See 6B J. APPLEMAN, *supra* note 23, § 4297, at 280; 8 D. BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* § 318.6, at 74-81 (3d ed. 1966); Annot., 48 A.L.R.3d 13, 20 (1973).

71. See Annot., 48 A.L.R.3d 13, 30 (1973); Annot., 45 A.L.R.3d 288, 295 (1972).

72. See *supra* note 5.

73. *Preferred Risk Mut. Ins. Co. v. Poole*, 411 F. Supp. 429, 433 (N.D. Miss. 1976) ("treatment of the quoted employee exclusion clause has been far from uniform").

74. The court in *Smith* distinguished cases that discuss the financial responsibility law from those that do not and held that the latter were not precedent for its decision. *Smith*, 67 N.C. App. at 639-40, 313 S.E.2d at 861-62.

ployers Liability Assurance Corp. v. Owens.⁷⁵ In *Owens*, plaintiff was an employee of the insured and was injured while riding as a passenger in a truck driven by his employer.⁷⁶ The Florida Supreme Court upheld a clause in the employer's policy excluding "bodily injury to or sickness, disease or death of any employee of the Insured while engaged in the employment . . . of the Insured."⁷⁷ The majority found this clause to be unambiguous and held that "[t]here are obvious reasons for differentiating between the public as a class and one's own employees."⁷⁸ A dissent argued that the majority had ignored the Florida Financial Responsibility Law⁷⁹ and that the exclusion clause was "repugnant and contrary" to the requirements of that law.⁸⁰

In a subsequent case, the Florida Supreme Court⁸¹ upheld a clause excluding liability for "1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or 2) other employment by the insured."⁸² The court again did not discuss the financial responsibility law, resting its decision solely on construction of the exclusion clause: "The [exclusion] clause under discussion makes specific reference to workmen's compensation relative to domestic employment, but none whatever to nondomestic employment. The conclusion seems inescapable that the intent was to exclude from the policy's coverage all employees, other than domestic, whether or not of a category coming under workmen's compensation."⁸³

Other courts have reached the same result by holding that the financial responsibility act did not compel invalidation of the clause. The Missouri Court of Appeals⁸⁴ recently held that a fellow employee exclusion clause⁸⁵ was a "rational exclusion" even though its enforcement "ultimately excludes the plaintiff from any insurance coverage."⁸⁶

In contrast to the cases upholding employee exclusion clauses, a number of decisions have held that the clause is not valid unless the employee is covered by workers' compensation, and that this result is compelled by the state's financial responsibility law. An early case adopting this view is *Hindel v. State Farm*

75. 78 So. 2d 104 (Fla. 1955).

76. *Id.* at 104.

77. *Id.* at 105.

78. *Id.* at 106.

79. Fla. Stat. Ann. §§ 324.011-.251 (West 1978 & Supp. 1984).

80. *Owens*, 78 So. 2d at 108 (Holt, J., dissenting).

81. *Griffin v. Speidel*, 179 So. 2d 569 (Fla. 1965). *But see Makris v. State Farm Mut. Auto. Ins. Co.*, 267 So. 2d 105 (Fla. Dist. Ct. App. 1972) (holding an employee exclusion clause to be in violation of the state's financial responsibility legislation).

82. *Griffin v. Speidel*, 179 So. 2d 569, 571 (Fla. 1965).

83. *Id.* at 571.

84. *Zink v. Allis*, 650 S.W.2d 320 (Mo. App. 1983).

85. For a discussion of fellow employee exclusion clauses, see *supra* note 69.

86. *Zink v. Allis*, 650 S.W.2d 320, 323 (Mo. App. 1983); see also *Truck Ins. Exch. v. Gilliam*, 659 S.W.2d 16 (Mo. App. 1983) (following *Zink*); *Atkins v. Pacific Indem. Ins. Group*, 125 Ariz. 46, 607 P.2d 29 (Ct. App. 1979) (fellow employee exclusion clause not inconsistent with state's financial responsibility law).

Mutual Automobile Insurance Co.,⁸⁷ a federal diversity case applying Indiana law. In *Hindel*, plaintiff's decedent was killed while operating a vehicle in the course of his employment. Decedent's employer's insurance company alleged that the policy provided for no liability "to any employee of the insured while engaged in the business of the Assured . . . or to any person to whom the Assured may be held liable under any Workmen's Compensation Law."⁸⁸ The United States Court of Appeals for the Seventh Circuit held that the terms of the policy "are merged in and must give way to" the state's financial responsibility law.⁸⁹ The court cited the Indiana Financial Responsibility Law's⁹⁰ requirement that a policy certified under the law be "for the benefit of all persons who may suffer personal injuries or property damage due to any negligence of the Assured"⁹¹ and added that "[i]f it had been the intention of the lawmakers . . . to exclude an employee, it could, without difficulty, have been so provided."⁹²

More recently, the Arizona Court of Appeals held that a policy clause excluding liability for injury caused by a fellow employee was valid, but only because the injured employee was covered by workers' compensation.⁹³ The court wrote that "[t]here is a significant difference between excluding coverage for injuries to a person for whom another remedy has been provided, and an attempt to exclude certain persons as insureds under the policy."⁹⁴

With its decision in *Smith*, the North Carolina Court of Appeals aligned itself with the courts that will not enforce an employee exclusion clause unless workers' compensation is available to the injured employee. This decision has the obvious advantage of avoiding a harsh result. The cases upholding an employee exclusion clause as written leave the injured employee with no coverage under either workers' compensation or his employer's automobile liability policy. If the employer cannot satisfy a tort judgment,⁹⁵ the employee is without recompense. This apparently would have been the result in *Smith* if the exclusion was enforced as written; the court noted that the record contained no evidence whether Smith was covered by workers' compensation,⁹⁶ but the plaintiff's brief indicated that he was not.⁹⁷

The decision also is consistent with the wording of North Carolina's Financial Responsibility Act. Plaintiff argued that the statute did not conflict with the

87. 97 F.2d 777 (7th Cir. 1938).

88. *Id.* at 782.

89. *Id.*

90. IND. CODE ANN. §§ 9-2-1-1 to 9-2-1-45 (Burns 1980 & Supp. 1983).

91. *Hindel*, 97 F.2d at 782.

92. *Id.*

93. *Martinez v. U.S. Fidelity & Guar. Co.*, 119 Ariz. 403, 581 P.2d 248 (Ct. App. 1978).

94. *Id.* at 404, 581 P.2d at 249. See *United States v. Transport Indem. Co.*, 544 F.2d 393 (9th Cir. 1976); *Farmers Ins. Group v. Home Indem. Co.*, 108 Ariz. 125, 493 P.2d 909 (1972); *Paul Masson Co. v. Colonial Ins. Co.*, 14 Cal. App. 3d 265, 92 Cal. Rptr. 463 (1971).

95. If an employee's injury is within the scope of the workers' compensation law, but he is denied recovery under the terms of the statute, the employee is precluded from seeking a tort remedy against his employer. See W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 574 (5th ed. 1984).

96. *Smith*, 67 N.C. App. at 640, 313 S.E.2d at 862.

97. See *supra* note 14.

exclusionary clause in the policy.⁹⁸ The court, however, disagreed and responded that "the plain language of G.S. 20-279.21(e) is alone sufficient to justify our holding."⁹⁹ An argument advanced by defendant but not discussed by the court supports this conclusion. Defendant pointed out that section 20-279.21(e) was amended in 1967¹⁰⁰ and that before amendment the section read: "Such motor vehicle liability policy need not insure any liability under any Workmen's Compensation law *nor liability on account of bodily injury to or death of the insured while engaged in the employment, other than domestic, of the insured . . .*"¹⁰¹ While there is no legislative history on the amendment, the deletion of the italicized part of the section¹⁰² shows an intent to avoid the possibility that a policy qualifying under the statute would exclude coverage of an employee "engaged in" his employer's business but not covered by workers' compensation.

The *Smith* holding also finds support in the public policy behind the state's financial responsibility legislation. Like other financial responsibility acts, section 20-279.1 was enacted to ensure compensation to victims of automobile accidents. Unlike many other states, North Carolina has strengthened its protection for accident victims by requiring liability insurance that meets the specifications of section 20-279.21 as a prerequisite for registration of any vehicle in the state.¹⁰³ Thus, the state's compulsory insurance laws codify a policy of concern for the plight of accident victims, a concern that should send a message to the state's courts to rule accordingly. In *Nationwide Mutual Insurance Co. v. Roberts*,¹⁰⁴ the supreme court indicated its unwillingness to allow a policy exclusion to defeat the purpose of the compulsory insurance laws.¹⁰⁵ With its holding in *Smith*, the court of appeals has taken a consistent stance.

The court of appeals also has succeeded in finding a middle ground between the competing goals of a cost-conscious employer and the financial responsibility law. The decision does not require that an employer's automobile liability policy cover injury to employees who also are covered by workers' compensation. The opinion makes it clear that an exclusion of liability for which workers' compensation benefits are available is valid and enforceable.¹⁰⁶ Thus, the employer does not have to pay for double coverage of his employees, a point often overlooked in the opinions upholding employee exclusion clauses.

Finally, the court's opinion sends a clear message to insurance companies covering vehicles registered in North Carolina that a clause purporting to exclude liability for injuries to employees of the insured regardless of whether they

98. Plaintiff-Appellee's Brief at 4.

99. *Smith*, 67 N.C. App. at 639, 313 S.E.2d at 861.

100. Defendant-Appellant's Brief at 4-5. Section 20-279.21(e) was amended by Act of June 21, 1967, ch. 854, 1967 N.C. SESS. LAWS 1099.

101. Act of April 30, 1953, ch. 1300 § 21(e), 1953 N.C. SESS. LAWS 1262, 1272 (emphasis added).

102. See *supra* text at note 51.

103. See *supra* notes 52-55 and accompanying text.

104. 261 N.C. 285, 134 S.E.2d 654 (1964).

105. See *supra* notes 59-67 and accompanying text.

106. See *Smith*, 67 N.C. App. at 634, 313 S.E.2d at 861.

are covered by workers' compensation will be read as if it excluded only employees covered by workers' compensation. In light of the similarity between the employee exclusion clause in *Smith* and a "cross-" or "fellow-employee" exclusion clause,¹⁰⁷ it is likely that the court would reach a similar conclusion in construing a clause that purports to exclude liability for injuries to an employee resulting from the actions of a fellow employee.

Although *Smith* provided a clear answer to one insurance problem, the decision raises doubts about the interpretation of other common policy exclusions. For example, separate panels of the Michigan Court of Appeals have disagreed over whether that state's financial responsibility law requires invalidation of a policy clause excluding coverage for injuries to members of the insured's household.¹⁰⁸ Future litigation in North Carolina could raise difficult questions about whether a clause excluding coverage of injuries to the insured himself or to members of his family is somehow less repugnant to the letter or spirit of North Carolina's financial responsibility law than a clause excluding coverage for employees or members of the general public.

In conclusion, the North Carolina Court of Appeals in *Smith* demonstrated its commitment to expansive interpretation of the state's compulsory insurance law. The decision that an automobile liability policy cannot exclude an employee who is not covered by workers' compensation ultimately means that the cost of compensating employees such as Smith will be borne by all the state's residents who own motor vehicles and must purchase insurance. The court in *Smith* reaffirmed the policy expressed with the enactment of the state's first financial responsibility act in 1931 that such cost-spreading is a more equitable result than leaving the victims of highway negligence without compensation.

BRENDA JEAN BOYKIN

107. Some of the cases cited by the court in *Smith* as authority for its position concerned fellow employee exclusion clauses rather than the type of employee exclusion clause in Gore's policy. See, e.g., *Atkins v. Pacific Indem. Ins. Group*, 125 Ariz. 46, 607 P.2d 29 (Ct. App. 1979); *Dahm v. Employer's Mut. Liab. Ins. Co.*, 246 N.W.2d 131 (Wis. 1976). For a discussion of fellow employee exclusion clauses, see *supra* note 69.

108. The debate centers around whether the statute requires coverage for injuries of the insured and his household, or only for third parties who may be injured through the use of his vehicle. Compare *State Farm v. Peckham*, 74 Mich. App. 551, 254 N.W.2d 575 (1977) (holding household exclusion clause valid) with *Gurwin v. Alcodray*, 77 Mich. App. 97, 257 N.W.2d 665 (1977) (holding household exclusion clause invalid). See also *Schwab v. State Farm Fire & Casualty Co.*, 27 Ariz. App. 747, 558 P.2d 942 (1976) (holding that a policy clause excluding bodily injury to the insured is not in conflict with the state's financial responsibility law).

Fortress Re, Inc. v. Central National Insurance Co.: Application of the Tate Test to Notice Requirements in Reinsurance Contracts

Provisions requiring the insured to give the insurer prompt notice of the occurrence of an insured event are common in insurance contracts.¹ Because most insurance contracts also contain clauses requiring the insurer to defend claims brought against the insured,² the purpose of notice provisions is to give the insurer an opportunity to conduct a timely investigation so it may adequately defend these claims.³ Most jurisdictions traditionally have taken a strict construction approach in breach of notice provision cases, absolving the insurer of liability under the contract if the notice requirement was not met.⁴ In recent years, however, some courts have abandoned the strict construction approach in favor of the rule that for the insurer to escape its contractual obligations not only does the insured have to breach the notice provision, but this breach also must prejudice the insurer by actually frustrating its ability to adequately investigate and defend the claim.⁵ This Note analyzes the recent decision of *Fortress Re, Inc. v. Central National Insurance Co.*⁶ in which the United States District Court for the Eastern District of North Carolina applied this new "prejudice test" to a reinsurance contract. Also, this Note discusses the unsuitability of the prejudice test in the reinsurance context and proposes a new standard to be used in evaluating notice requirements in reinsurance contracts.

Until 1981 North Carolina courts followed the strict construction approach in their treatment of notice requirements in insurance policies.⁷ This approach stemmed from the belief that because the terms of the insurance contract, including the notice requirements, were agreed upon by the parties, courts should not interfere with these terms.⁸ Thus the courts had only one duty in interpreting insurance contracts: to ascertain and uphold the intent of the parties, always

1. See 8 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4731, at 2 (1981); 13A G. COUCH, *COUCH CYCLOPEDIA OF INSURANCE LAW* § 49:2, at 227 (2d ed. 1982); Note, *Great American Insurance Co. v. C.G. Tate Construction Co.: Interpretation of Notice Provisions in Insurance Contracts*, 61 N.C.L. REV. 167, 167 (1982).

2. 7C J. APPLEMAN, *supra* note 1, § 4682, at 16; 14 G. COUCH, *supra* note 1, § 51:35, at 438.

3. 7C J. APPLEMAN, *supra* note 1, § 4681, at 2; 13A G. COUCH, *supra* note 1, § 49:2, at 227.

4. 8 J. APPLEMAN, *supra* note 1, § 4732, at 10-13; 13A G. COUCH, *supra* note 1, § 49:50, at 278. The notice provision often is phrased in terms of a condition precedent: if notice is late, the insurer is relieved of liability under the policy. Professors Appleman and Couch also note that even if policies do not specify that notice is a condition precedent, courts often interpret policies as if they did.

5. Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice*, 74 DICK. L. REV. 260, 266-72 (1970); see, e.g., *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 237 A.2d 870 (1968); *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977); *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 282 A.2d 584 (1971).

6. 595 F. Supp. 334 (E.D.N.C. 1983).

7. See, e.g., *Fleming v. Nationwide Mut. Ins. Co.*, 261 N.C. 303, 134 S.E.2d 614 (1964); *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960); *Peeler v. United States Casualty Co.*, 197 N.C. 286, 148 S.E. 261 (1929).

8. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

giving effect to the clear and unambiguous meaning of the terms of the contract.⁹ Therefore, if the contract called for notice to be given "immediately"¹⁰ or "as soon as practicable,"¹¹ any unreasonable delay¹² abrogated the insurer's liability under the policy, regardless of whether the insurer's ability to defend the claim would have been aided by timely notice.

In 1981, however, the North Carolina Supreme Court in *Great American Insurance Co. v. C. G. Tate Construction Co.*¹³ overruled previous cases espousing the strict construction approach.¹⁴ The court adopted a three-part test for determining whether the insurer should be relieved of its contractual obligations because of the insured's failure to comply with notice requirements.¹⁵ First, a court must determine whether notice was in fact given as soon as practicable.¹⁶ Second, if notice was not given in a timely manner, the insured must show that there was a good faith reason for the delay. Last, if the good faith standard is met, the burden shifts to the insurer to show that its ability to investigate and defend the claim was prejudiced by the delay. The court emphasized the prejudice component of the test, stating that the failure of an insured to give prompt notice pursuant to an insurance contract provision does not relieve the insurer's liability under the contract "unless the delay operates materially to prejudice the ability of the insurer to investigate and defend."¹⁷

The prejudice test adopted in *Tate* is consistent with the modern trend away from strict construction of notice provisions in insurance contracts.¹⁸ The basis for the test lies in the courts' perception of the relationship between the parties to an insurance contract. Courts adopting this test have noted that an insurance contract is not usually the result of an arm's length bargaining process, but is an adhesion contract¹⁹ issued by an insurer on a take-it-or-leave-it

9. *Id.*; see also *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974) ("The intention of the parties is the controlling guide to [the] interpretation [of the insurance contract].").

10. See, e.g., *Mewborn v. Employers' Liab. Assur. Co.*, 198 N.C. 156, 150 S.E. 887 (1929).

11. See, e.g., *Fleming v. Nationwide Mut. Ins. Co.*, 261 N.C. 303, 134 S.E.2d 614 (1964); *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960); *Peeler v. United States Casualty Co.*, 197 N.C. 286, 148 S.E. 261 (1929).

12. North Carolina courts have never required that immediate notice be given; rather they have construed notice provisions to require that notice be given in a reasonable time considering the facts and circumstances of the particular situation. See *Harris v. Nationwide Mut. Ins. Co.*, 261 N.C. 499, 135 S.E.2d 209 (1964); *Mewborn v. Employers' Liab. Assur. Co.*, 198 N.C. 156, 150 S.E. 887 (1929); see also *Ball v. Employers' Liab. Assur. Corp.*, 206 N.C. 90, 172 S.E. 878 (1934) (delay in giving notice due to inability to discern injury held excusable and not violative of notice requirement); *Rhyne v. Jefferson Standard Life Ins. Co.*, 196 N.C. 717, 147 S.E. 6 (1929) (delay in giving notice due to insured's incapacitation held excusable).

13. 303 N.C. 387, 279 S.E.2d 769 (1981).

14. *Tate*, 303 N.C. at 396, 279 S.E.2d at 774 ("[W]e hereby overrule the *Peeler-Muncie-Fleming* line of cases . . ."). See *supra* note 7 and accompanying text.

15. *Id.* at 399, 279 S.E.2d at 776. For a thorough discussion of the *Tate* decision, see Note, *supra* note 1, at 168-73.

16. This initial prong of the *Tate* test ends the inquiry for courts adhering to the strict construction approach. See Comment, *supra* note 5, at 264.

17. *Tate*, 303 N.C. at 396, 279 S.E.2d at 774.

18. See *supra* note 5 and accompanying text.

19. An adhesion contract is a contract in which the terms are dictated largely by one party, rather than resulting from negotiation. See *infra* note 43 and accompanying text.

basis.²⁰ Thus, the danger exists that insurers may take advantage of their superior bargaining position to include provisions that heavily favor themselves. Notice requirements are such provisions, inasmuch as failure to comply relieves the insurer of liability and compliance with the provision affords no additional protection to the insured, but simply maintains the existing policy coverage.

In jurisdictions that have abandoned the strict construction approach, prejudice against the insurer determines whether insurers remain liable when notice does not comply with the policy provisions.²¹ Since the main purpose of a notice requirement is to afford the insurer the opportunity to adequately investigate and defend the claim, the test is whether the late notice in any way prejudices the insurer's ability to do so. If not, there is no reason for the insurer to escape liability. In most jurisdictions that have abandoned the strict construction approach, including North Carolina under the test set forth in *Tate*, the burden of proof is on the insurer to show that it was prejudiced by the delay.²²

Tate and all previous North Carolina cases involving insurance contract notice provisions dealt with notice requirements in original insurance contracts. Recently, however, the United States District Court for the Eastern District of North Carolina applied the test adopted in *Tate* to a reinsurance contract.²³ In *Fortress Re, Inc. v. Central National Insurance Co.*,²⁴ the court held that the insurer's excessive delay in notifying the reinsurer of the claim had prejudiced the reinsurer. Therefore the reinsurer was relieved of its obligation to pay under the contract.²⁵ *Fortress Re*, the first case to apply the *Tate* test, extended the scope of *Tate* from original insurance contracts to reinsurance contracts. In so ruling, the court departed from previous federal court decisions, applying pre-*Tate* North Carolina law, that had applied the strict construction approach to reinsurance contracts.²⁶

Reinsurance, as distinguished from original insurance, is a means of risk distribution whereby one insurer (the reinsured) contracts with another insurer (the reinsurer) for indemnity from all or a portion of the risk underwritten by the reinsured.²⁷ Even though reinsurance has been characterized as a separate

20. See *State Farm Mut. Auto. Ins. Co. v. Milam*, 438 F. Supp. 227 (S.D.W.Va. 1977); *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 237 A.2d 870 (1968); *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977); see also Note, *supra* note 1, at 171 ("[A]lmost all of the decisions [adopting a prejudice test] have been based on the adhesion contract rationale."). For a general discussion of the rationale behind courts' adoption of the prejudice test, see Comment, *supra* note 5, at 266-72.

21. See 8 J. APPLEMAN, *supra* note 1, § 4732, at 26-31; 13A G. COUCH, *supra* note 1, § 49:10, at 234.

22. See Note, *supra* note 1, at 172-73.

23. For a discussion of the distinction between original insurance contracts and reinsurance contracts, see *infra* notes § 27-30 and accompanying text.

24. 595 F. Supp. 334 (E.D.N.C. 1983).

25. *Id.* at 340.

26. See *Fortress Re, Inc. v. Jefferson Ins. Co. of New York*, 465 F. Supp. 333 (E.D.N.C. 1978), *aff'd*, 628 F.2d 860 (4th Cir. 1980). "Generally the rules which govern the construction of contracts and original policies of insurance are applicable to reinsurance contracts." *Id.* at 338 (quoting 13A J. APPLEMAN, *supra* note 1, § 7686, at 500).

27. Shulman, *Reinsurance: A Primer for the Practitioner*, L.A. LAW, Oct. 1980 at 34; see also 13A J. APPLEMAN, *supra* note 1, § 7681, at 480; 19 G. COUCH, *supra* note 1, § 80:1, at 624.

class of insurance,²⁸ contracts of reinsurance are governed by the same rules applicable to other insurance contracts.²⁹ Thus, even though most cases concerning notice requirements have involved original insurance policies, the same rules and terms are used in cases concerning reinsurance contracts.³⁰

The controversy in *Fortress Re* arose out of a reinsurance contract executed by the parties in 1975.³¹ In September 1978 the insurer was notified of a claim filed against its insured, a swimming pool manufacturer, for injuries sustained by an individual while diving into one of the insured's pools.³² Because of the reinsurer's obligation under the contract to reimburse the insurer in the event of liability under the insurer's policy, it appeared likely that the claim would involve the reinsurer. Shortly after receiving notification of the claim, the insurer assigned the case to counsel. Upon investigation, counsel determined that "the claim was a serious one and excess carriers should certainly be notified."³³ In April 1980 counsel again advised the insurer of the seriousness of the claim.³⁴ On at least two occasions the insurer's internal memoranda indicated that it was aware of the need to notify the reinsurers.³⁵ Throughout this period, the insurer sought to reach a settlement agreement with the accident victim.³⁶

The insurer finally notified the reinsurer, Fortress Re, of the suit on January 6, 1982, over three years after the claim arose.³⁷ Trial was set for January 12, which was only three working days following the initial notice. The insurer invited Fortress Re to attend a conference with the trial defense counsel on the eve of the trial.³⁸ Fortress Re did not attend this meeting, at which the claim was settled for \$923,605.³⁹ Fortress Re then instituted a declaratory judgment action to obtain a declaration of its rights and obligations under the contract, alleging that the insurer had breached the notice requirement,⁴⁰ thereby absolv-

28. 19 G. COUCH, *supra* note 1, § 80:2, at 624.

29. 13A J. APPLEMAN, *supra* note 1, § 7686, at 500; 19 G. COUCH, *supra* note 1, § 80:1, at 623.

30. *E.g.*, *Fortress Re, Inc. v. Jefferson Ins. Co. of New York*, 465 F. Supp. 333 (E.D.N.C. 1978), *aff'd*, 628 F.2d 860 (4th Cir. 1980); *Security Mut. Casualty Co. v. Century Casualty Co.*, 531 F.2d 974 (10th Cir.), *cert. denied*, 429 U.S. 860 (1976); *Highlands Ins. Co. v. Employers Surplus Lines Ins. Co.*, 497 F. Supp. 169 (E.D. La. 1980); *Stuyvesant Ins. Co. v. United Public Ins. Co.*, 139 Ind. App. 533, 221 N.E.2d 358 (1966).

31. Under the contract, the reinsurer was to reinsure one-half of the insurer's liability over \$250,000 under a products liability insurance policy issued to a swimming pool manufacturer. The upper limit of the liability policy was \$1,000,000. *Fortress Re*, 595 F. Supp. at 336 & n.1.

32. *Id.* at 336.

33. *Id.*

34. *Id.*

35. Internal memoranda indicating an awareness of this need were dated November 1980 and July 1981. The 1981 memorandum read, in part: "They [the reinsurers] must be put on notice . . . and get notice out to the facultative reinsurers." *Id.*

36. *Id.* at 337.

37. *Id.*

38. The correspondence extending the invitation read: "'Consider this your invitation to attend [the trial]. We will be meeting with defense counsel . . . in New Jersey on Sunday evening [January 11].'" *Id.* at 337 (quoting Letter from Central National Insurance Co. to Fortress Re, Inc. (Jan. 6, 1982)).

39. *Id.* at 337.

40. The notice provision in the reinsurance contract read:

Prompt notice shall be given to the Reinsurer by the Company of any occurrence or accident which appears likely to involve this reinsurance and while the Reinsurer does not

ing the reinsurer of liability under the reinsurance contract.

After noting that North Carolina law applied to the case,⁴¹ the United States District Court for the Eastern District of North Carolina turned to the substantive issue raised—whether the reinsurer was relieved of liability because of the insured's violation of the notice requirement. The court assumed without discussion that *Tate* controlled the outcome of the case.⁴² *Fortress Re*, however, is distinguishable from *Tate*, which dealt with a notice requirement in an original insurance contract. The considerations that led the court in *Tate* to adopt the prejudice test do not apply with equal force to a reinsurance contract. Prior federal cases interpreting North Carolina law that dealt with notice requirements in reinsurance contracts had applied a rule of strict construction. Even though courts in reinsurance cases generally apply rules applicable to insurance policies and other contracts, it is arguable that the *Tate* test should not be applied in the reinsurance context. One of the principal bases for the court's decision in *Tate* was the belief that the "terms of an insurance contract are not bargained for in the traditional sense"; rather, they are "offered on a take-it-or-leave-it basis" with the insured having little, if any, input.⁴³ This same belief pervades decisions in other jurisdictions adopting a prejudice test.⁴⁴ In cases arising out of original insurance contracts, some courts see a necessity to protect insureds from potentially unfair insurance contracts since insureds have no control over the terms of their contracts. Reinsurance contracts, however, typically are negotiated by the parties.⁴⁵ Thus, the need for protection of the insured does not exist in a reinsurance context. The parties to the contract presumably are aware of the law relating to insurance and reinsurance contracts, including the importance of prompt notice.⁴⁶ Accordingly, it would be reasonable to apply a stricter standard of compliance with the notice requirement to a reinsured than to an insured under an original insurance contract.⁴⁷

undertake to investigate or defend claims or suits it shall nevertheless have the right and be given the opportunity to associate with the Company and its representatives at the Reinsurer's expense in the defense and control of any claim, suit or proceeding involving this reinsurance, with the full cooperation of the Company.

Id. at 337 n.4.

41. *Id.* at 337.

42. *Id.* at 337-38.

43. *Tate*, 303 N.C. at 395, 279 S.E.2d at 774.

44. See, e.g., *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 93, 237 A.2d 870, 873 (1968) ("[T]he terms of an insurance policy are not talked out or bargained for as in the case of contracts generally."); *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 72, 371 A.2d 193, 196 (1977) ("An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured."); *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 159, 282 A.2d 584, 593 (1971) ("An insurance contract is not the end result of the give-and-take that goes on at a bargaining table."). The *Tate* court relied on all three of these cases. *Tate*, 303 N.C. at 394-95, 279 S.E.2d at 773-74.

45. See *Shulman*, *supra* note 27, at 35. For example, the contract in *Fortress Re* was negotiated between the parties. *Fortress Re*, 595 F. Supp. at 336.

46. Because both parties are insurance companies, it is reasonable to expect them to have knowledge of the law surrounding the interpretation of insurance contracts, including reinsurance contracts.

47. This idea has been applied in cases and endorsed by commentators. See, e.g., *Stuyvesant Ins. Co. v. United Public Ins. Co.*, 139 Ind. App. 533, 543, 221 N.E.2d 358, 360 (1966) (compared to individual insureds, insurance company held to a stricter standard of reasonable time to notify rein-

The court correctly decided under the first part of the test that the reinsured in fact had failed to give prompt notice of the claim to the reinsurer.⁴⁸ Under the second prong of the *Tate* test, the court held that the reinsured failed to meet its burden of proof that it had acted in good faith in giving notice at such a late date. The reinsured contended that good faith may be shown by an "absence of motive or specific intent not to notify the insurer."⁴⁹ The court rejected this contention, concluding that "[a] bad motive or specific intent is not required" for a showing of bad faith.⁵⁰ The court noted that even though the reinsured was aware of the necessity for notifying the reinsurers, it failed to do so until just before trial. The court also held that the delinquency of notice had prejudiced the reinsurer in its "ability to participate in the defense and control of the claim and its evaluation for settlement purposes."⁵¹ The reinsured's conduct was "so lacking in reasonableness and fair dealing that it amount[ed] to a lack of good faith as a matter of law."⁵² The court therefore granted the reinsurer's motion for summary judgment.⁵³

The court was justified in reaching this conclusion. Under North Carolina law each party to a contract is "required to act in good faith and to make reasonable efforts to perform his obligations under the agreement."⁵⁴ This principle has been applied to contracts between business entities as well as to contracts between individuals.⁵⁵ It also has been held that good faith means more than an honest intention to act fairly; it includes an absence of knowledge of any information that would cause the action to be unfair.⁵⁶ Thus, as the court in *Fortress Re* concluded, "where two business entities deal at arms length, unreasonable or unfair dealings can amount to a lack of good faith."⁵⁷

surer of claim of loss due to its superior knowledge); 19 G. COUCH, *supra* note 1, § 80:71, at 681 ("Being an insurance company, the reinsured is held to a high degree of compliance with policy provisions which require prompt notice to the reinsurer when a loss occurs which may potentially be within policy coverage").

48. The reinsured "waited for over three years before notifying the [reinsurer] and then [gave notice] only on the eve of trial," even though it was aware shortly after it received notice of the claim that the reinsurance was likely to be involved. The reinsured also was advised by counsel to notify the reinsurers well in advance of the time it actually gave notification. *Fortress Re*, 595 F. Supp. at 338. Internal memoranda reflected the reinsured's acknowledgement of its duty to give notification. *Id.*; see also *supra* notes 33-37 and accompanying text.

49. *Fortress Re*, 595 F. Supp. at 338.

50. *Id.* The court noted that the court in *Tate* had cited lack of knowledge that a claim had been filed as an example of good faith. *Tate*, 303 N.C. at 339, 279 S.E.2d at 776. Since in *Fortress Re* the reinsurer was aware of the claim for over three years before it gave notice, the court in *Fortress Re* must have concluded from the *Tate* example that actual notice of a claim followed by a delay in notifying the insurer/reinsurer amounted to a lack of good faith.

51. *Fortress Re*, 595 F. Supp. at 339.

52. *Id.*

53. *Id.* at 336.

54. *Weyerhaeuser Co. v. Godwin Bldg. Supply Co., Inc.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979); see also *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 990 (4th Cir. 1981) ("North Carolina law does require that parties perform their contractual obligations in good faith.").

55. See, e.g., *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985, 989-90 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981); *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627-28 (1979).

56. See *Jaudon v. Swink*, 51 N.C. App. 433, 435, 276 S.E.2d 511, 513 (1981).

57. *Fortress Re*, 595 F. Supp. at 339.

The principal issue raised by *Fortress Re* is the application of the prejudice component of the *Tate* test to a delayed notice situation involving a reinsurance contract. Using the *Tate* test, the court in *Fortress Re* found that the reinsured acted in bad faith; and as a result, the reinsurer was relieved of its obligations under the contract. There was, therefore, no need to discuss prejudice since under the *Tate* test it is only when the good faith test is met that the issue of prejudice even arises.⁵⁸ Nevertheless, the court in *Fortress Re* addressed the prejudice issue. Noting the distinction between insurance and reinsurance, the court looked to the purpose of the notice requirement in a reinsurance contract to determine whether the reinsurer had been prejudiced by delayed notice. The court decided that the underlying purpose of notice requirements in both insurance and reinsurance contracts is to protect the bargain of the parties.⁵⁹ It then defined prejudice as "the irretrievable loss of the bargain."⁶⁰ Prejudice occurred in *Fortress Re* when the reinsured lost what it had bargained for—"the ability to participate in the defense and control of the claim and its evaluation for settlement purposes."⁶¹ Because the reinsurer was given notice only three working days before trial, the purpose of the notice requirement was frustrated. Thus, the court held as a matter of law that the reinsurer had been prejudiced by the reinsured's tardy notice.⁶²

The *Tate* test places the burden to prove prejudice on the insurer.⁶³ The *Tate* court apparently intended the prejudice issue to be a question of fact, decided on a case-by-case basis.⁶⁴ Thus, it is curious that the court in *Fortress Re* held that the reinsurer was prejudiced as a matter of law. The court candidly recognized the lack of case law in North Carolina interpreting the prejudice requirement.⁶⁵ Without case law to develop a standard of prejudice, it seems anomalous that a court would find prejudice as a matter of law in any situation.

The facts in *Fortress Re* justify the court's holding; the reinsured substantially delayed giving notice to the reinsurer. If, however, a case with a less compelling fact situation arises, the application of the *Tate* test could thwart the intention of the parties, who are aware of their duties and who often have negotiated their contract. Therefore, a modified version of the *Tate* test should be applied in reinsurance cases. Courts should hold the reinsured to a high standard of good faith and require only a low degree of prejudice to the reinsurer.

58. *Tate*, 303 N.C. at 399, 279 S.E.2d at 776.

59. Although it noted that the *Tate* court discussed prejudice in terms of the insurer's ability to defend the lawsuit, the *Fortress Re* court nevertheless declared that prejudice as defined in *Tate* did not apply in the reinsurance context. The *Tate* approach was intended "to protect the bargain of the parties." *Fortress Re*, 595 F. Supp. at 339. The court reasoned that the reinsurer had bargained for the opportunity to participate in the case and the notice requirement was designed to protect that bargain. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 340.

63. *Tate*, 303 N.C. at 397-99, 279 S.E.2d at 775-76.

64. "Circumstances which may cause prejudice to an insurer are as varied and as numerous as the circumstances surrounding automobile accidents. A more complete discussion of prejudicial factors will have to await a case-by-case development." *Id.* at 399, 279 S.E.2d 776.

65. *Fortress Re*, 595 F. Supp. at 339.

Such a test would emphasize the obligation of the reinsured to perform its duty of prompt notice under a bargained-for reinsurance contract, while retaining the notion of prejudice in the event that the reinsured shows a legitimate justification for the delayed notice. Good faith under this test should be limited to situations in which the reinsured lacks actual knowledge of a claim and lacks any information that should give rise to knowledge of the claim and to situations in which delay is caused by factors beyond the reinsured's control. Even if the good faith test is met, however, the burden on the reinsurer of showing prejudice should be light. A reasonable showing that timely notice might have made a difference in the ultimate liability of the reinsurer should be enough to show prejudice.

The court in *Fortress Re* followed a recent innovation in North Carolina original insurance law and applied it in a different context—reinsurance law. The reinsurer in *Fortress Re* was relieved of liability because of a bad faith delay in notice to the reinsurer and the prejudice that resulted. The application of the *Tate* test to the facts of *Fortress Re* resulted in a correct decision that upheld the intention of the parties. It remains to be seen whether this same test can continue to uphold the intention of parties in future reinsurance actions. Since no North Carolina cases have addressed the issue of notice requirements in reinsurance contracts, it is not possible to determine whether North Carolina courts will follow the rationale of the federal district court in *Fortress Re*. North Carolina courts should not strictly apply the *Tate* test to notice provisions of reinsurance contracts. Instead, they should adopt a modified version of the *Tate* test, as described in this Note. Such a test would protect the reasonable expectations of both parties to a reinsurance contract.

CARLTON A. SHANNON, JR.

The Souring of Sweet *Acidophilus* Milk: *Speck v. North Carolina Dairy Foundation* and the Rights of University Faculty to Their Inventive Ideas

Although universities and university faculty have litigated many cases concerning patent rights,¹ cases deciding the respective rights of the faculty inventor and the university are few.² The North Carolina Supreme Court addressed this issue in *Speck v. North Carolina Dairy Foundation*.³ The court held that university faculty employed as "teachers and researchers"⁴ fall within the category of persons "hired to invent" and thus have no right to or interest in inventions arising from university research.⁵

This Note analyzes the development of the common-law rights of employees to their inventive ideas and the *Speck* court's failure to delineate the rights of university employees within this established framework. The Note concludes that the court's classification of university faculty as persons hired to invent is contrary to the premises upon which higher education is based.

Traditionally, in the absence of an express contract, the rights of employees to their inventions have depended upon the nature of the employment. If the employee was hired to invent, the employer was entitled to full property rights

1. See *Mead Corp. v. United States*, 652 F.2d 1050 (D.C. Cir. 1981) (per curiam) (Dr. Richard Sweet, a research scientist at Stanford University, developed an ink-jet device pursuant to a contract between the university and the Department of Defense. Sweet then conveyed all his rights to A.B. Dick Co. as allowed by his contract with Stanford. Mead Corp. was unsuccessful in its attempts to force the government to recognize that the Department of Defense had acquired all interests in the patent.); *Burns v. Massachusetts Inst. of Technology*, 394 F.2d 416 (1st Cir. 1968) (Burns informed the university of certain secret ideas so that the university could access those ideas and furnish an opinion as to their usefulness to an agency of the United States. Burns alleged that the university presented an unfavorable report but proceeded to develop those ideas. The court held the statute of limitations for torts governed and dismissed the action.); *Vitamin Technologists, Inc. v. Wisconsin Alumni Research Found.*, 146 F.2d 941 (9th Cir.) (Dr. Steenbock of the University of Wisconsin had developed a process for the production of Vitamin D from lipoid contained in milk and other food products. The court held that plaintiff's failure to authorize the use of this process by the margarine industry was against the public interest. An infringement action against defendant therefore was dismissed. Dr. Steenbock had received \$760,000 in royalties at the time of the action.), *cert. denied*, 325 U.S. 876 (1945); *Dinwiddie v. St. Louis & O'Fallon Coal Co.*, 64 F.2d 303 (4th Cir. 1933) (Dr. Harrison Bashium, head of the Chemical Engineering Department of the University of Pittsburgh, and others were denied all rights to patents pertaining to coal products that had been developed under the employment of defendant.); *Powell Mfg. Co. v. Long Mfg. Co.*, 319 F. Supp. 24 (E.D.N.C. 1970) (Dr. Francis Hassler, a professor at North Carolina State College, obtained patents relating to the bulk-curing of tobacco. These patents were assigned to Powell Manufacturing. In an infringement suit, the court held that Hassler's connection to the college did not create a dedication to the public.); *Simmons v. California Inst. of Technology*, 34 Cal. 2d 264, 209 P.2d 581 (1949) (en banc) (Edward Simmons, a student at the California Institute of Technology, developed a strain sensitive element that was used in research conducted by a faculty member. The court allowed Simmons to rescind a contract to convey an interest in the device because of fraud.); Blackwell, *Avoiding Litigation over Faculty Patents*, 1950-51 CURRENT LEGAL PROBLEMS OF COLLEGES AND UNIVERSITIES 21 (Dr. Albert Schatz, assistant professor at Brooklyn College, claimed he was codiscoverer of streptomycin along with Dr. Selman Waksman of Rutgers University. The Superior Court of New Jersey accepted a settlement between the two.)

2. T. BLACKWELL, *COLLEGE LAW: A GUIDE FOR ADMINISTRATORS* 175 (1961).

3. 311 N.C. 679, 319 S.E.2d 139 (1984).

4. *Id.* at 686, 319 S.E.2d at 143.

5. *Id.*

in the invention. If the invention was created during hours of employment with the employer's materials, the employee retained the right to the inventive idea, subject to the employer's shop right—a nonexclusive right to use the invention in the employer's business. If the employee was not hired to invent and the invention was developed without the aid of the employer's resources, the employee retained full title to the invention.⁶

In 1970 Dr. Marvin Speck, a professor at North Carolina State University (NCSU), began working on the development of a pleasant-tasting milk containing *Lactobacillus acidophilus*.⁷ *Lactobacillus acidophilus* is a bacteria that facilitates proper digestion by neutralizing various undesirable microorganisms in the human intestines.⁸ While an employee of NCSU, Speck, with the assistance of Dr. Stanley Gilliland, developed an improved medium for growing *Lactobacillus acidophilus*.⁹

Speck informed his department chairman, Dr. William Roberts, of this discovery and noted that it would make possible the mass marketing of milk containing such bacteria.¹⁰ In September 1972 Speck sent a memo to the department head stating that "there would appear to be nothing sufficiently novel to warrant the filing of a patent application on this product . . ." ¹¹ Instead, Speck suggested that NCSU pursue registration of a trademark and proceed to market milk containing *Lactobacillus acidophilus*. Speck then submitted a proposal to the University's Patent Committee¹² that the North Carolina Dairy Foundation,¹³ a nonprofit organization closely tied to NCSU, pursue licensing of a trademark.¹⁴

6. See *infra* notes 31-44 and accompanying text.

7. *Speck*, 311 N.C. at 680, 319 S.E.2d at 140.

8. Plaintiff-Appellees' New Brief at 1, *Speck v. North Carolina Dairy Found.*, 311 N.C. 679, 319 S.E.2d 139 (1984).

9. Defendant-Appellants' New Brief (Board of Governors, et al.) at 2, *Speck v. North Carolina Dairy Found.*, 311 N.C. 679, 319 S.E.2d 139 (1984).

10. *Speck*, 311 N.C. at 681-82, 319 S.E.2d at 141.

11. Defendant-Appellants' New Brief (Board of Governors, et al.) at 2, *Speck v. North Carolina Dairy Found.*, 311 N.C. 679, 319 S.E.2d 139 (1984).

12. North Carolina State University (NCSU) is one of 16 constituent universities that comprise the University of North Carolina (UNC) system; this system is administered by the Board of Governors. N.C. GEN. STAT §§ 116-4, -11 (1983 & Supp. 1984). The UNC Board of Governors adopted a patent policy that provides for the establishment of a patent committee at each constituent university. Such committees are responsible for reviewing "all patent disclosures made by the faculty and staff . . . [and resolving] questions of invention ownership that may arise between the institution and its faculty . . ." University of North Carolina Patent Policy 10 (Nov. 16, 1973) (available from the University of North Carolina General Administration Office).

13. The Dairy Foundation is a nonprofit organization that promotes University research on dairy products. It has its office on the University campus and one of its officers is a dean at the University. Dr. Speck and University officials helped the Dairy Foundation negotiate a contract for commercial production of *acidophilus*. The Dairy Foundation's *Acidophilus* Committee minutes of 9 January 1973 stated that University officials "would be kept informed of all pending actions and would be given the opportunity to review all agreements and contracts prior to execution." The Patent Committee and ranking University officials consistently maintained their desire to "work through" the Dairy Foundation to make Sweet *Acidophilus* milk a commercially viable product.

Speck v. North Carolina Dairy Found., 64 N.C. App. 419, 421, 307 S.E.2d 785, 787 (1983), *rev'd*, 311 N.C. 679, 319 S.E.2d 139 (1984).

14. University of North Carolina Patent Policy, *supra* note 12, provides that the inventor shall

In 1975 Speck wrote to Roberts to inform him that the royalty rights of Speck and Gilliland had been overlooked in the Dairy Foundation's marketing of Sweet Acidophilus milk.¹⁵ A legal advisor to NCSU responded, asserting that Speck had no claim to any such royalties.¹⁶ Although the Chairman of the University's Patent Committee previously had recommended that the University make a one-time payment of fifteen percent of the royalties to plaintiffs to avoid "hard feelings" within the Department,¹⁷ Speck and Gilliland had received no compensation, other than salaries, for this development. In 1981 Speck and Gilliland sued NCSU and the North Carolina Dairy Foundation.¹⁸

The trial court granted summary judgment for defendants on the ground that the three-year statute of limitations for implied contracts barred any action for recovery of royalties.¹⁹ The North Carolina Court of Appeals reversed, holding that if a special confidence existed between plaintiffs and NCSU, a breach of this fiduciary relationship would result in a constructive trust that triggered the ten-year statute of limitations. The court also rejected the North Carolina Dairy Foundation's contention that the action should be barred on a waiver and abandonment theory.²⁰ Whether a fiduciary relationship existed and whether plaintiffs' actions should be barred by waiver and abandonment were deemed issues for the jury.²¹

The North Carolina Supreme Court held that to prove a constructive trust plaintiffs would have to prove a property interest in the secret process: "If the plaintiffs never had any interest in the process which they developed while employed by the University, the defendants did not stand in a fiduciary relationship

receive not less than 15% of the gross royalties from licensing a patent. As noted by the North Carolina Supreme Court: "The written Patent Policy adopted on November 16, 1973 by the defendant, The Board of Governors of the University of North Carolina, simply was silent as to trademarks and trade secrets." *Speck*, 311 N.C. at 687, 319 S.E.2d at 144. The North Carolina Court of Appeals had stated, "the Patent Committee revised the policy in 1976 to expressly cover trademarks and trade secret agreements." *Speck*, 64 N.C. App. at 421, 307 S.E.2d at 787, *rev'd*, 311 N.C. 679, 319 S.E.2d 139 (1984). The supreme court rebutted this statement: "There is no indication in the record on appeal that the defendant Board of Governors has ever authorized or approved an amendment to its written Patent Policy in any way to cover trademarks and trade secrets." *Speck*, 311 N.C. at 687, 319 S.E.2d at 144. The UNC Patent and Copyright policies as adopted by the Board of Governors in June 1983 specifically state that the issuance of a trademark in the name of the University shall not result in royalties to the individual developing the trademark. University of North Carolina Patent and Copyright Policies 14-15 (June 1983) (available from the University of North Carolina General Administration Office). The policy denounces trade secret agreements as being inconsistent with the goals of the University. *Id.* at 15.

15. *Speck*, 311 N.C. at 684, 319 S.E.2d at 142.

16. *Id.*

17. *Id.* at 684-85, 319 S.E.2d at 142-43.

18. *Id.* at 685, 319 S.E.2d at 143.

19. *Speck v. North Carolina Dairy Found.*, 64 N.C. App. 419, 422, 307 S.E.2d 785, 788 (1983), *rev'd*, 311 N.C. 679, 319 S.E.2d 139 (1984).

20. The North Carolina Dairy Foundation argued: "[A]n employee is not entitled to compensation . . . for the use of his invention, where in express terms the employee *has given* his employer the free use of his invention or by his conduct or actions has manifested his acquiescence in its use without payment therefor." Defendant-Appellee's Brief (N.C. Dairy Foundation, Inc.) at 15, *Speck v. North Carolina Dairy Found.*, 64 N.C. App. 419, 307 S.E.2d 785 (1983), *rev'd*, 311 N.C. 679, 319 S.E.2d 139 (1984).

21. *Speck*, 64 N.C. App. at 431, 307 S.E.2d at 793.

to the plaintiffs with regard to the process."²² The court, after analyzing the rights of employees to their inventions, categorized Speck and Gilliland as "persons hired to invent" who therefore had no right to inventions arising from their research.

The North Carolina Supreme Court embarked upon this path on its own initiative. Of the ten cases cited in the majority opinion, only three were cited in the parties' briefs. None of the numerous cases cited by the court of appeals was even mentioned by the supreme court. Because of the nature of the summary judgment motion, only limited facts had been presented at trial concerning Speck's status as a person hired to invent. It was therefore unusual for the supreme court to allow the case to turn on the rights of the employed inventor. If the issue had been presented properly at the trial level and before the court of appeals, not only would additional facts concerning the context and nature of Speck and Gilliland's employment have come to light, but in all likelihood the court would have been presented with a more developed discussion of the issue whether faculty members should be classified as persons hired to invent.

An employee's claim for compensation for an inventive idea usually is based upon the unjust enrichment of the employer and therefore is a question of state contract law. Although patent infringement is governed by federal statute,²³ state law governs whether the employee has impliedly or explicitly assigned an inventive idea to the employer.²⁴ Trade secret protection, however, is entirely a product of state common law.²⁵ In *Speck* the court failed to distin-

22. *Speck*, 311 N.C. at 685, 319 S.E.2d at 143.

23. The Patent Act provides for the inventor's exclusive right to market and use any product or process that is appropriately filed with the patent office. This right is limited to a maximum of 17 years. 35 U.S.C. § 154 (1982). "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." *Id.* § 101. The Patent Act also establishes a civil action for damages as the inventor's remedy against infringement. *Id.* §§ 271, 281.

Trademark and copyright infringement also are governed by federal statute. A trademark is a mark of authenticity used to distinguish a manufacturer's products from those of another. *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 673 (1901) ("The term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers . . . may be distinguished from those of others."); *BLACK'S LAW DICTIONARY* 1338 (5th ed. 1979). Federal statutes provide for injunctions, recovery of damages, and destruction of infringing goods when the original trademark is properly registered with the United States Patent and Trademark Office. 15 U.S.C. §§ 1051, 1116-18 (1982).

Copyright protection is extended to literary material and the like, with civil and criminal actions available for infringement. 17 U.S.C. §§ 102, 501-509 (1982).

24. *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388, 390-91 (1929); *Standard Brands, Inc. v. United States Partition & Packaging Corp.*, 199 F. Supp. 161, 176 (E.D. Wis. 1961).

25. *Engelhard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352-53 (9th Cir.), *cert. denied*, 377 U.S. 923 (1964); *Smith v. Dravo Corp.*, 203 F.2d 369, 373 (7th Cir. 1953).

A trade secret is based upon a confidential relationship. *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917). As defined by the American Law Institute, a trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and

guish plaintiffs' claim for compensation for use of a trademark from a claim for use of a patent. Although the opinion refers to the improved medium for growing *Lactobacillus acidophilus* as a "secret process" (implying similarity to both trade secrets and patents), the court applied both patent and trade secret law by analogy. The hired-to-invent doctrine is common to patent,²⁶ trade secret,²⁷ copyright,²⁸ and other similar claims.²⁹ The North Carolina Supreme Court in *Speck* properly recognized, however, as does the greater weight of authority, that an employee's right to compensation for use of an invention should be determined without regard to the patentability of the invention.³⁰

The United States Supreme Court in *Solomons v. United States*³¹ recognized that an employee hired to invent has no property rights in his own inventive ideas: "If one is employed to devise or perfect an instrument . . . , he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes . . . the property of the employer."³² In *Standard Parts Co. v. Peck*,³³ the Court held that an employee under a general employment contract who is later assigned to pursue a project of developing a particular process or machinery has no property rights to inventions related to that project or process.³⁴ This point was further clarified by the United States

his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 comment b (1939). Due to the development of the fields of unfair competition and trade regulation during the 40 years after the formulation of the first Restatement of Torts, the provisions pertaining to trade secrets were eliminated from the second Restatement. RESTATEMENT (SECOND) OF TORTS §§ 708-761 introductory note (1977). For examples of modern courts citing the first Restatement, see *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621, 623-24 (7th Cir. 1971); *Demit v. Venezuela, C.A. v. Electronic Water Sys., Inc.*, 547 F. Supp. 850, 852 (S.D. Fla. 1982), *aff'd mem.*, 740 F.2d 977 (11th Cir. 1984) (quoting *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 340 F. Supp. 55, 74 (S.D. Fla. 1972), *aff'd*, 506 F.2d 960 (5th Cir. 1975) (citing Restatement)); *International Election Sys. Corp. v. Shoup*, 452 F. Supp. 684, 705-06 (E.D. Pa. 1978), *aff'd mem.*, 595 F.2d 1212 (3d Cir. 1979).

26. See *Gill v. United States*, 160 U.S. 426, 435 (1896); *McAlee v. United States*, 150 U.S. 424, 430-31 (1893); *Solomons v. United States*, 137 U.S. 342, 346 (1890).

27. *Vigtron, Inc. v. Ferguson*, 120 N.H. 626, 629-30, 419 A.2d 1115, 1117 (1980).

28. 17 U.S.C. § 201(b) (1982).

29. *Stevens v. National Broadcasting Co.*, 270 Cal. App. 2d 886, 890, 76 Cal. Rptr. 106, 108 (1969) (alluding to doctrine in discussion of "cutting" and "editing" rights in motion pictures).

30. "Nearly all of the cases agree that relief in respect of a defendant's use or disclosure of a secret invention, discovery, etc., is to be granted, or withheld, without regard to questions of patentability." Annot., 170 A.L.R. 481 (1947) (citing cases); see also *Wilson v. Barton & Ludwig, Inc.*, 163 Ga. App. 721, 296 S.E.2d 74 (1982) (The court recognized that an employee could recover compensation for an employer's use of an unpatentable idea or product based on implied contract. The court, however, concluded the employee's idea was not sufficiently novel so as to constitute a protectable interest.); *Dewey v. American Stair Glide Corp.*, 557 S.W.2d 643 (Mo. Ct. App. 1977) (claim for compensation analyzed under shop-right doctrine despite failure to file for patent; invention referred to as "novel idea"); *Vigtron, Inc. v. Ferguson*, 120 N.H. 626, 419 A.2d 1115 (1980) (In employer's suit seeking to enjoin employee from working for competitor, court applied shop-right and hired-to-invent doctrine to unpatented device created by employee that was similar to trade secret.).

31. 137 U.S. 342 (1890).

32. *Id.* at 346.

33. 264 U.S. 52 (1924).

34. *Id.* at 58-60.

Court of Appeals for the Fourth Circuit in *Houghton v. United States*.³⁵ "The right of the employer to the invention or discovery of the employee depends, not upon the terms of the original contract of hiring, but upon the nature of the service in which the employee is engaged at the time he makes the discovery or invention"³⁶ The hired-to-invent doctrine is firmly established,³⁷ but courts have differed in the application of the doctrine. Generally, an employee is classified as one hired to invent only when there exists clear evidence of such a situation. "Courts . . . are reluctant to find a specifically-inventive employment agreement. They distinguish between employees hired to invent and those hired merely to improve the embodiment of an idea."³⁸

An employer acquires an implied license to use the employee's inventive ideas—a shop right—when the employee uses his work time or the employer's materials to reduce his idea to practice.³⁹ The rationale for granting a shop right was articulated in *United States v. Dubilier Condenser Corp.*⁴⁰

Since the servant uses his master's time, facilities and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business. But the employer in such a case has no equity to demand a conveyance of the invention, which is the original conception of the employee alone⁴¹

An employer's shop right is personal to the employer and cannot be assigned to

35. 23 F.2d 386 (4th Cir.), *cert. denied*, 277 U.S. 592 (1928).

36. *Id.* at 390.

37. See *Gill v. United States*, 160 U.S. 426, 435 (1896); *McAleer v. United States*, 150 U.S. 424, 430-31 (1893); *Solomons v. United States*, 137 U.S. 342, 346 (1890); *Houghton v. United States*, 23 F.2d 386, 388 (4th Cir.), *cert. denied*, 277 U.S. 592 (1928); *Bandag, Inc. v. Morenings*, 259 Iowa 998, 1005, 146 N.W.2d 916, 921 (1966); *National Dev. Co. v. Gray*, 316 Mass. 240, 247, 55 N.E.2d 783, 787 (1944); *Wireless Specialty Apparatus Co. v. Mica Condenser Co.*, 239 Mass. 158, 162-63, 131 N.E. 307, 308 (1921); *Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253, 269-70, 362 N.E.2d 222, 233-34 (1977); *International Pulverizing Corp. v. Kidwell*, 7 N.J. Super. 345, 347, 71 A.2d 151, 151 (Ch. Div. 1950).

38. Note, *Patent Ownership: An Employer's Rights To His Employee's Invention*, 58 NOTRE DAME L. REV. 863, 867 (1983). For an example of a court's reluctance to classify an employee as a person hired to invent, see *Logus Mfg. Corp. v. Nelson*, 195 U.S.P.Q. (BNA) 566, 568 (E.D.N.Y. 1977) (court held that vice-president hired to direct development of microwave products not hired to invent).

39. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188 (1933); *Kinkade v. New York Shipbuilding Corp.*, 21 N.J. 362, 371, 122 A.2d 360, 365 (1956); *Cahill v. Regan*, 5 N.Y.2d 292, 298, 157 N.E.2d 505, 509, 184 N.Y.S.2d 348, 353-55 (1959); see also *Aero Bolt & Screw Co. v. Iaia*, 180 Cal. App. 2d 728, 736-39, 5 Cal. Rptr. 53, 58-60 (1960) (shop right not granted for invention that was created on employee's own time at his own expense); *Brown v. Ocean Drilling & Exploration Co.*, 374 A.2d 842, 847 (Del. Ch. 1977) (court recognized shop-right doctrine, but concluded doctrine was not applicable because of existence of express contract), *rev'd on other grounds*, 403 A.2d 1114 (Del. 1979); *Dewey v. American Stair Glide Corp.*, 557 S.W.2d 643, 648 (Mo. Ct. App. 1977) (shop right not granted because use of employer's materials was de minimis); Annot., 61 A.L.R.2d 374-76 (1958) (collecting cases).

40. 289 U.S. 178 (1933). *Dubilier* is the seminal case delineating the rights of employees to inventions created during employment. The United States Supreme Court held that two employees of the United States Bureau of Standards who had conducted research in the use of radio remote control would be required to grant a shop right in a radio receiving set they had invented. *Id.* at 185-86, 193.

41. *Id.* at 188-89.

a third person,⁴² except to a successor corporation.⁴³

When the employee is under a general contract of employment—a person not hired to invent—and the invention is not developed with the use of the employer's resources, the employee retains full rights to the invention.⁴⁴ The employee retains these rights even if the invention is related to the employer's product line.⁴⁵

These classifications of employees were summarized by the United States Supreme Court in *Dubilier*.

One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was hired to invent On the other hand, if the employment be general, albeit it cover a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent.

. . . .
[W]here a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a nonexclusive right to practice the invention.⁴⁶

The Florida Supreme Court has examined two cases involving the rights of employees to inventive ideas associated with institutional research. In *State Board of Education v. Bourne*⁴⁷ the court upheld an employee's right to his inventions. Bourne was employed as a member of the research staff of the Everglades Experiment Station on a project attempting to develop new strains of sugar cane.⁴⁸ At trial the chancellor determined that Bourne was hired as a plant pathologist and physiologist, but not as a geneticist.⁴⁹ The chancellor held that the nature of Bourne's employment did not contemplate invention of these strains; thus, Bourne was not hired to invent. The Supreme Court of Florida upheld the chancellor's determination because the employment contract "by express terms or unequivocal inference" did not show that Bourne was hired to invent.⁵⁰ Lacking such evidence, the employment was deemed to be of a general nature.⁵¹ Although Bourne was part of a project researching new plant varieties, unless his individual inventive capacities were employed specifically for the

42. *Standard Parts Co. v. Peck*, 264 U.S. 52, 54 (1924); *Hapgood v. Hewitt*, 119 U.S. 226, 233 (1886); *Francklyn v. Guilford Packing Co.*, 695 F.2d 1158, 1160-62 (9th Cir. 1983); *PPG Indus. v. Guardian Indus.*, 597 F.2d 1090, 1093-94 (6th Cir.), *cert. denied*, 444 U.S. 930 (1979).

43. *Neon Signal Devices, Inc. v. Alpha-Claude Neon Corp.*, 54 F.2d 793, 796 (W.D. Pa. 1931).

44. *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U.S. 315, 320 (1893).

45. *Mainland Indus. v. Timberland Machines & Eng'g Corp.*, 58 Or. App. 585, 589, 649 P.2d 613, 616, *appeal denied*, 293 Or. 801, 653 P.2d 999 (1982), *cert. denied*, 460 U.S. 1051 (1983).

46. *Dubilier*, 289 U.S. at 187-88.

47. 150 Fla. 323, 7 So. 2d 838 (1942).

48. *Id.* at 324, 7 So. 2d at 839.

49. *Id.* at 325, 7 So. 2d at 839.

50. *Id.* at 328, 7 So. 2d at 840.

51. *Id.*

purpose of deriving such strains he would not be considered a person hired to invent. The court recognized that an individual employed for the purpose of conducting research does not lose the rights to his inventive ideas unless he is assigned to a specific project from which the employer expects to derive a patent or trade secret.⁵²

In *State v. Neal*⁵³ the Supreme Court of Florida heard the appeal of another employee of the Experiment Station who claimed rights to his research. In *Neal* the court found additional facts supporting a finding that the employee was hired to invent. The rationale of *Bourne*, however, was left intact with only slight modification. Dr. Wayne Neal, an assistant in animal nutrition at the Experiment Station, was assigned to a project that was to examine the digestibility of dried citrus waste among livestock.⁵⁴ The project later was modified to include the development of dried citrus waste as a dairy feed.⁵⁵ Neal, as director of the project, applied for a patent for such a dairy feed in the name of the Experiment Station.⁵⁶ Upon being informed that a patent could be issued only in the name of an individual, Neal applied for the patent in his own name.⁵⁷ Neal later assigned the patent, which resulted in litigation between the State and the assignee.⁵⁸ In determining that there was an "unequivocal inference" that Neal was hired to invent, the court pointed to his responsibility for directing the project, the payment of patent expenses by the Station, and Neal's intention of obtaining the patent in the name of his employer.⁵⁹ The only modification of the *Bourne* ruling appears to be that an "unequivocal inference" that an employee was hired to invent need not arise from the express wording of the employment contract, but may arise from subsequent conditions. That *Neal* cites *Bourne* with approval supports this conclusion.⁶⁰

In *Kaplan v. Johnson*⁶¹ the United States District Court for the Northern District of Illinois was faced with the question whether the government had acquired all interests in a whole-body imaging system developed by the Chief of the Nuclear Medicine Services at a Veterans Administration hospital. Plaintiff acknowledged that during the development of this invention he had made use of his employer's facilities and equipment and the services of other employees.⁶² The court addressed the ownership of inventions created in connection with an employer's research:

52. *Id.* at 329, 7 So. 2d at 840.

53. 152 Fla. 582, 12 So. 2d 590, *cert. denied*, 320 U.S. 783 (1943).

54. *Id.* at 583-84, 12 So. 2d at 590.

55. *Id.* at 584, 12 So. 2d at 590.

56. *Id.* at 584, 12 So. 2d at 590-91.

57. *Id.* at 584, 12 So. 2d at 590.

58. *Id.* at 584, 12 So. 2d at 590-91.

59. *Id.* at 585-86, 12 So. 2d at 591.

60. *Id.* at 587, 12 So. 2d at 592 ("[T]he invention in question was the product of Dr. Neal's contract of employment and . . . under the rule announced in *State Board of Education v. Bourne*, . . . it enured to his employer.").

61. 409 F. Supp. 190 (N.D. Ill.), *rev'd sub nom.* *Kaplan v. Corcoran*, 545 F.2d 1073 (7th Cir. 1976).

62. *Id.* at 193.

The government . . . argues that the invention related to [Kaplan's] official duties. This argument is based upon [a] letter . . . indicating that plaintiff was expected to engage in research. . . . In *Dubilier*, the Court did not consider either the performance or the supervision of research to be an absolutely critical factor It is readily apparent that the Court desired to draw a distinction between employment calling for general research work and employment with the specific objective of invention. The Court held that even if an employee receives a general research assignment and ultimately invents a patented process or machine, he will not be required to assign his rights to the patent absent an express agreement or assignment to invent. The Court held this to be true even if the contract of employment covers a field of endeavor to which the invention relates.⁶³

The district court also considered the constitutionality of Executive Order No. 10096, which directs that any government employee who creates an invention during work hours or with government contribution of facilities, material, or funds must assign all rights to the government.⁶⁴ After finding the order unconstitutional, the court found in favor of plaintiff, granting only a shop right to the government.⁶⁵ The United States Court of Appeals for the Seventh Circuit reversed, holding the executive order constitutional, and granted the government full rights to the patent.⁶⁶

The ownership of literary property developed by a university professor has been considered by the California Court of Appeals. In *Williams v. Weisser*⁶⁷ a college professor was awarded damages based on property rights in lectures delivered at the University of California at Los Angeles (UCLA). Defendant Weisser had paid graduate students to audit Williams' class and prepare summaries of his lectures. These notes then were sold to students. Defendant asserted that any rights to the lectures were held by the university, which was not a party to the suit. The court noted that UCLA was incapable of prescribing Williams' "way of expressing the ideas he puts before his students."⁶⁸ This lack of control refuted defendant's contention that Williams was hired to produce these specific lectures. The court also noted that if Williams did not hold property rights to his lectures, the university could enjoin him from teaching similar courses at other schools in the future. The university, however, had not purchased Williams' every thought by virtue of the employment contract.

Despite the holdings in other jurisdictions that an employee assigned to perform general institutional research is not a person hired to invent, the North Carolina Supreme Court in *Speck* categorized faculty researchers as persons hired to invent. The strongest reasoning supporting this classification was expressed in *Houghton v. United States*.⁶⁹

63. *Id.* at 200.

64. *Id.* at 203-06.

65. *Id.* at 206.

66. *Kaplan v. Corcoran*, 545 F.2d 1073, 1077-78 (7th Cir. 1976).

67. 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969).

68. *Id.* at 734, 78 Cal. Rptr. at 546.

69. 23 F.2d 386 (4th Cir), *cert. denied*, 277 U.S. 592 (1928).

Let a case be supposed of a charitable foundation, which employs chemists and physicians to study diseases, with a view of discovering a cure for them, one of whose employees, in the course of experiments conducted for it, discovers a remedy which it is seeking, and for the discovery of which the experiments are conducted, and procures a patent on it. Should such employee be allowed to withhold the patent from the foundation for his own profit, merely because the foundation does not desire to monopolize the remedy but to give the benefit of the discovery to mankind?⁷⁰

Preserving the interests of an employer that has expended resources in developing a particular inventive idea is the foundation of the hired-to-invent doctrine. "[W]hen an employee merely does what he is hired to do, his successes, as well as failures, belong to his employer."⁷¹ When an employee pursues a particular discovery on behalf of the employer, there is no reason to distinguish the products of an employee's inventive skills and the products of his mechanical skills; both are property of the employer.⁷² The *Restatement (Second) of Agency*⁷³ finds this rationale particularly appropriate when applied to persons assigned to experimental work. The *Restatement* would create an inference of ownership in the employer when a person is hired to conduct "experimental work for inventive purposes."⁷⁴ Finally, a court cannot but notice the vast amounts spent by universities on research. A court determining ownership rights to university research naturally would be inclined to find that the university has acquired all rights to the knowledge it has paid to attain.

Although the common law has recognized a shop right when the inventive idea is reduced to practice with the employer's resources or during hours of employment, the North Carolina Supreme Court in *Speck* did not use these factors to determine the existence of a shop right. Instead, these factors were cited as support for the determination whether the employee was hired to invent. After noting that the secret process was developed during hours of employment and with university resources, the court stated: "Under these facts, the secret process developed through research of the plaintiffs belonged to the University absent a written contract by the University to assign."⁷⁵ Although other courts have shown reluctance in classifying persons as hired to invent because of the risk of implying too much within the employment contract,⁷⁶ the North Carolina Supreme Court has categorically found that university faculty conducting research are persons hired to invent.

In *Speck*, the court also noted the nature of NCSU as an institution pro-

70. *Id.* at 390.

71. *Id.*

72. *Gill v. United States*, 160 U.S. 426, 436 (1896).

73. *RESTATEMENT (SECOND) OF AGENCY* § 397 (1957).

74. *Id.* comment a.

75. *Speck*, 311 N.C. at 686, 319 S.E.2d at 143.

76. See *supra* note 38 and accompanying text. This is particularly true in the area of trade secrets. Legal scholars have emphasized that courts should deny protection of a trade secret if the job skills of the employee are such that "he will have difficulty in obtaining a new position if he cannot take [the trade secret] with him." Note, *Competitive Torts*, 77 HARV. L. REV. 888, 949 (1964).

moting research for the common good.⁷⁷ The court's holding in favor of NCSU, however, does not necessarily promote the public good. The United States Constitution created the patent system upon the theory that placing limited exclusive rights in the inventor would create incentives to pursue inventive ideas and enhance the development of technology.⁷⁸ Courts have refrained from frustrating this policy. As the Supreme Court noted in *Dubilier*, "[T]he courts are incompetent to answer the difficult question whether the patentee is to be . . . compelled to dedicate his invention to the public. . . . [A]ny such declaration of policy must come from Congress"⁷⁹

Academic research is fundamentally different from research conducted by private industry. Although private industry pursues research and development to attain practical applications capable of generating revenue, universities pursue research to attain intellectual enlightenment. For this reason, university research is more adequately characterized as "general research" than as "employment with the specific objective of invention." Teaching is the primary responsibility of professors; their research is conducted to enhance the university's position as an institution designed to convey knowledge. Professors, therefore, are allowed to research whatever problems their minds move them to pursue. One avenue of research may be abandoned at will and another begun, without reflection upon economic consequences and without any consultation with university officials. The United States Supreme Court consistently has recognized the necessity of pursuing scholarship in a free and open environment.

The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁸⁰

In contrast to the free pursuit of knowledge stands the *Speck* court's assumption that university professors are hired to pursue specific research from which they are expected to produce patentable inventions. Although university faculty may be encouraged to research or publish, the goal of the university is not to achieve marketable inventions. "[U]niversity personnel, as compared with those in a commercial organization, are employed and promoted on a basis which gives no recognition to the [economic] value of the inventions they make."⁸¹ One court has held that when an employer is disinterested in whether an employee produces an invention, that employee is not a person hired to invent.⁸²

77. *Speck*, 311 N.C. at 688, 319 S.E.2d at 145.

78. U.S. CONST. art. I, § 8, cl. 8.

79. *Dubilier*, 289 U.S. at 208-09.

80. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

81. Caruso, UNIVERSITY PATENT POLICIES, 3 C. Couns. 64, 65-66 (1968).

82. *Bowers v. Woodman*, 59 F.2d 797 (D. Mass. 1932). In *Bowers*, the court held that an

The common-law rights of ownership with regard to employed inventors have developed from common expectations concerning employment. The common expectations concerning university employment are not the same as the expectations concerning employees within private industry. University faculty are not hired to produce commercially successful inventions; they are hired as teachers and educators. Unlike the typical hired-to-invent situation in which the acorn of an inventive idea is planted by the employer, patentable inventions arising from university research are results of the individual work of faculty who chose to pursue such research. That professors are encouraged to pursue knowledge by means of research should not be a basis for claiming that a professor who engages in such research is hired to invent.

It is regrettable that the North Carolina Supreme Court classified university employees as persons hired to invent without the issue being properly before the court. Because plaintiffs used university resources, NCSU should have been afforded a shop right. Speck and Gilliland, however, should not have been deprived of all interests in the process they developed. If NCSU had considered Speck's work to be of such importance in improving public health as to require full ownership by the university, it should have taken measures to establish that interest. The university should have the responsibility and obligation to delineate, by means of the employment contract, the rights of employees to patents derived from educational research.

CHRISTOPHER GRAFFLIN BROWNING, JR.

employee's assignment to study operations at various plants and to suggest improvements did not anticipate that the employee would be required to invent. "If he had never invented anything, he could not have been charged with a failure in the performance of his duties . . . [T]here is, in this case, no contract to invent." *Id.* at 802. This same disinterest characterizes universities' attitudes toward faculty inventions. "[T]he research of university faculty members is not directed by others into channels where its purpose is a solution of specific technological problems. Rather, it is pure or basic research which is undirected in the sense that areas of natural phenomena are explored primarily for the purpose of adding to the store of knowledge." Caruso, *supra* note 81, at 64.

Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule

Annexation, the process by which a municipality extends its boundaries to include outlying areas,¹ is usually an attractive prospect to both the annexing municipality and the territory being annexed. The main benefit to citizens in the annexed area is that after annexation they receive city services and access to city facilities.² Through annexation, the city forces persons in fringe areas who often use municipal services to share the tax burden of those services.³ Furthermore, annexation ensures that the development of fringe areas is not inconsistent with city planning objectives.⁴

Annexation has been a major factor in the growth of North Carolina cities.⁵ From 1917 to 1947, there were 225 special legislative acts extending municipal corporate boundaries in North Carolina.⁶ In the seven year period from 1970 to 1977, annexations by cities with populations over 2500 accounted for 1480 corporate boundary extensions.⁷ Annually, about one-half of North Carolina's cit-

1. Note, *Annexation—North Carolina's Referendum Procedure*—Texfi Industries, Inc. v. City of Fayetteville, 17 WAKE FOREST L. REV. 765, 767-68 (1981).

2. NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS & NORTH CAROLINA LEAGUE OF MUNICIPALITIES, REPORT OF THE JOINT ANNEXATION STUDY COMMISSION OF THE NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS AND THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES 21 (1980) [hereinafter cited as NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS]; NORTH CAROLINA BAR ASSOCIATION, LOCAL GOVERNMENT LAW VI-11 to -12 (1959) (quoting MUNICIPAL GOVERNMENT STUDY COMMISSION, SUPPLEMENTARY REPORT OF MUNICIPAL GOVERNMENT STUDY COMMISSION 5 (1959)).

3. DEPARTMENT OF URBAN STUDIES NATIONAL LEAGUE OF CITIES, ADJUSTING MUNICIPAL BOUNDARIES 1-2 (1966), *reprinted in* SELECTED MATERIALS ON MUNICIPAL ANNEXATION 78-79 (W. Wicker ed. 1980). N.C. GEN. STAT. § 160A-58.10 (1982) provides that an annexed area is subject to immediate taxation by the annexing authority.

4. According to a 1958 study, problems may arise in uncontrolled fringe areas:

We have viewed with alarm the experience in other states where failure of cities to expand their boundaries periodically has resulted in what is called the "metropolitan problem." We have analyzed what can happen if a city is surrounded by heavily populated fringe areas that cannot for a variety of reasons be annexed by the city. We have noted fringe areas that are, in every sense of the word, slums. We have noted fringe areas whose problems of sanitation and traffic and law enforcement are so great that cities are discouraged from attempting annexation. We have noted fringe areas so poorly developed that the city finds it impossible to extend water and sewer facilities through these areas to serve presently undeveloped land that could accommodate sound development.

MUNICIPAL GOVERNMENT STUDY COMMISSION, REPORT OF MUNICIPAL GOVERNMENT STUDY COMMISSION 19 (1958), *reprinted in* SELECTED MATERIALS ON MUNICIPAL ANNEXATION 41 (W. Wicker ed. 1980). See also A. COATES, INTRODUCTION TO GOVERNMENT IN NORTH CAROLINA, 21-22 (tracing the history of municipal growth in North Carolina and observing that when fringe areas came to be "sufficiently near to affect the health of the inhabitants of the town," the town's limits were inevitably extended); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, ALTERNATIVE APPROACHES TO GOVERNMENTAL REORGANIZATION IN METROPOLITAN AREAS 63 (1962), *reprinted in* SELECTED MATERIALS ON MUNICIPAL ANNEXATION 72 (W. Wicker ed. 1980) ("[i]f uncontrolled, [fringe] areas can be a source of trouble and cost for the entire area—the residents of the fringe area as well as the annexing city").

5. NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS, *supra* note 2, at 11.

6. *Id.* at 12. Until 1947 the only way to annex territory to a municipality was by special act of the general assembly. *Abbott v. Town of Highlands*, 52 N.C. App. 69, 73, 277 S.E.2d 820, 823, *cert. denied*, 303 N.C. 710, 283 S.E.2d 136 (1981).

7. NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS, *supra* note 2, at 17.

ies make three annexations each.⁸ In this flurry of annexation activity the boundaries of North Carolina's cities move closer to one another, increasing the likelihood that two or more municipalities will want to annex the same fringe area. Under North Carolina statutes more than one municipality may have authority to annex the same territory;⁹ thus, a conflict might ensue if two or more municipalities take action at once.

The North Carolina Supreme Court has resolved two such conflicts. In *Town of Hudson v. City of Lenoir*¹⁰ and in *City of Burlington v. Town of Elon College*,¹¹ the court had to determine which of two competing annexation attempts would prevail. The *Hudson* court considered the nature of the competing proceedings and chose a "voluntary" proceeding over an "involuntary" one.¹² In 1984 the court in *Burlington* explicitly overruled the *Hudson* decision, holding that the "winner" of the race for annexation is the first municipality officially to begin its proceedings, regardless of the type of proceedings involved.¹³ The *Burlington* court thus adopted the prior jurisdiction rule, which had been long recognized elsewhere as dispositive of disputes between municipalities over annexation of the same territory.¹⁴

In the *Hudson* case the town of Hudson sought to extend its boundaries under statutes permitting unilateral, involuntary annexation,¹⁵ a type of annexation that does not require the consent of residents in the area to be annexed. The city of Lenoir, responding to a petition from residents of the area to be annexed, sought to annex the same territory pursuant to the voluntary procedure prescribed by section 160A-31 of the North Carolina General Statutes.¹⁶ The court temporarily restrained both municipalities from pursuing their proceedings. After the restraining order was lifted, both municipalities simultaneously began

8. *Id.* at 16.

9. For a discussion of statutory annexation methods in North Carolina and jurisdictional requisites for annexation, which may be satisfied by more than one municipality, see *infra* notes 25-42 and accompanying text.

10. 279 N.C. 156, 181 S.E.2d 443 (1971).

11. 310 N.C. 723, 314 S.E.2d 534 (1984).

12. "Voluntary" proceedings are those initiated by the residents of an area proposed for annexation. "Involuntary" annexations proceed regardless of the desire or consent of those residents. See *infra* notes 28-42 and accompanying text.

13. *Burlington*, 310 N.C. at 730, 314 S.E.2d at 538.

14. See, e.g., *Borghi v. Board of Supervisors*, 133 Cal. App. 2d 463, 284 P.2d 537 (1955); *City of Daytona Beach v. City of Port Orange*, 165 So. 2d 768 (Fla. Dist. Ct. App. 1964); *City of Muscatine v. Waters*, 251 N.W.2d 544 (Iowa 1977); *Pfeiffer v. City of Louisville*, 240 S.W.2d 560 (Ky. 1951); *State ex rel. Orono v. Village of Long Lake*, 274 Minn. 264, 77 N.W.2d 46 (1956); *Sugar Creek v. City of Independence*, 466 S.W.2d 100 (Mo. Ct. App. 1971); *City of West Fargo v. City of Fargo*, 251 N.W.2d 918 (N.D. 1977); *State ex rel. Winn v. City of San Antonio*, 259 S.W.2d 248 (Tex. Civ. App. 1953); *Town of Greenfield v. City of Milwaukee*, 259 Wis. 77, 47 N.W.2d 292 (1951). But see VA. CODE ANN. § 15.1-1037(a) (1981) (Virginia statutes do not follow the prior jurisdiction rule and instead provide that if there is an annexation dispute, "the court in which the original proceedings are pending . . . shall consolidate the cases and hear them together, and shall make such decision as is just taking into consideration the interest of all parties to each case.").

15. N.C. GEN. STAT. §§ 160A-33 to -56 (1982 & Supp. 1983) provide for involuntary annexation; §§ 160A-33 to -44 govern involuntary annexations by cities of fewer than 5000 persons; and §§ 160A-45 to -56 govern involuntary annexations by cities of 5000 or more. Because it was populated by fewer than 5000 persons, the Town of Hudson used §§ 160A-33 to -44 in its attempted involuntary annexation.

16. *Id.* § 160A-31 (1982).

new annexations; thus, neither proceeding was commenced before the other. Searching for a basis on which to declare that one of the proceedings would prevail, the court examined the nature of the two proceedings and noted that statutes for voluntary annexation allow for quicker completion of proceedings than do statutes for involuntary annexation.¹⁷ The court concluded that the general assembly preferred an annexation that had the blessing of the landowners and ruled that the voluntary annexation prevailed over the simultaneously begun involuntary one.¹⁸ Because the two annexation attempts had been initiated simultaneously, the *Hudson* court could not give priority based on a first-to-start rule. The court, however, did not limit its holding to simultaneously begun annexations; instead, the court suggested that voluntary proceedings would always be given priority.¹⁹

In *Burlington*²⁰ the North Carolina Supreme Court faced another contest between an involuntary and a voluntary proceeding. Unlike *Hudson*, in which neither of two competing proceedings clearly had been begun first, the town of Burlington had initiated its involuntary proceedings for annexing a territory before the town of Elon College ever received a petition from the territory's residents to begin voluntary proceedings. Nonetheless, Elon College completed its proceedings first. Burlington brought suit alleging that it had prior jurisdiction over the territory and, therefore, that Elon College's activities were null and void. The North Carolina Supreme Court accepted Burlington's reasoning, rejected the *Hudson* court's holding that voluntary annexation proceedings are "more equal" than involuntary ones, and adopted instead the rule of prior jurisdiction.²¹

Under the prior jurisdiction rule, when "separate equivalent proceedings relat[e] to the same subject matter, that one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted."²² A proceeding is "prior in time" if it is initiated before another; the proceeding is initiated when

17. *Hudson*, 279 N.C. at 161, 181 S.E.2d at 447.

18. *See id.* at 161-62, 181 S.E.2d at 447.

19. *See id.* The *Hudson* court cited no cases for support and one case to the contrary. The contrary case, which the court cited with the signal "*but see*," was *Town of Clive v. Colby*, 255 Iowa 483, 123 N.W.2d 331 (1963) (supplemental opinion).

20. *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E.2d 534 (1984).

21. *Id.* at 728-30, 314 S.E.2d at 537-39. Had the *Hudson* court restricted its holding to cases in which an involuntary and voluntary proceeding began simultaneously, the *Burlington* court could have limited *Hudson* to the facts of the case. Because the *Hudson* holding went beyond the facts of the case, however, the *Burlington* court had to overrule *Hudson* to adopt the prior jurisdiction doctrine. To the extent that *Hudson* is still good law, it applies only when multiple annexation attempts are simultaneously begun.

22. 2 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 7.22(a), at 377 (3d rev. ed. 1979). The prior jurisdiction rule

applies, generally speaking, to and among proceedings for the municipal incorporation, annexation, or consolidation of a particular territory, i.e., in proceedings of this character, while the [proceeding] first commenced is pending, jurisdiction to consider and determine others concerning the same territory is excluded. Thus, where two or more bodies or tribunals have concurrent jurisdiction over a subject matter, the one first acquiring jurisdiction may proceed, and subsequent purported assumptions of jurisdiction in the premises are a nullity.

Id. at 377-78.

the "first mandatory public procedural step" is taken.²³ Applying the prior jurisdiction rule to the *Burlington* facts, the supreme court found that Burlington took the first mandatory public procedural step by following the first directive of the statute pursuant to which it annexed—adopting a resolution of intent to annex.²⁴ Because adoption of this resolution occurred before Elon College made any annexation efforts, Elon College had no jurisdiction to annex, even though it completed its proceedings first.

Before examining potential implications of the prior jurisdiction rule, it is useful to consider the various methods by which annexation may be accomplished in North Carolina.²⁵ Although the general assembly has the authority to extend municipal boundaries by special act,²⁶ it has also enacted statutes allowing municipalities to extend their boundaries independent of the general assembly. In recent years these more local forms of annexation have become increasingly common.²⁷

One method by which municipalities may annex without reference to the general assembly or to the desires of citizens living in an area to be annexed is the involuntary method prescribed by sections 160A-33 to -56 of the North Carolina General Statutes.²⁸ If the annexing body has at least 5000 citizens, it proceeds under sections 160A-33 to -44,²⁹ the statutes under which Burlington proceeded, and if it has fewer than 5000, it proceeds under sections 160A-45 to -

23. See *infra* notes 53-61 and accompanying text.

24. See N.C. GEN. STAT. § 160A-49(a) (1982) (current version at *Id.* § 160A-49(a) (Supp. 1983)). For a discussion of how the amended version of § 160A-49 might change the *Burlington* court's determination that the resolution of intent is the first step, see *infra* text accompanying note 59.

25. N.C. CONST. art. VII, § 1 gives the general assembly the power to create and control the boundaries of cities and towns. The general assembly has delegated much of this power to the municipalities, providing statutory means by which municipalities may effect annexation without legislative action. When the general assembly has so delegated its authority, annexation is invalid unless the municipalities comply with the statutory directives. *E.g., In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978) (quoting *Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961)). "Substantial compliance" with the statutes, however, is probably sufficient. For a discussion of substantial compliance, see *infra* notes 67-83 and accompanying text.

Despite the delegation of its annexation powers, the general assembly has retained the right to annex by special legislative act, N.C. GEN. STAT. § 160A-21 (1982), formerly the only means by which annexation could be accomplished, *Abbott v. Town of Highlands*, 52 N.C. App. 69, 73, 277 S.E.2d 820, 823, *disc. rev. denied*, 303 N.C. 710, 283 S.E.2d 136 (1981). Consideration of this method of annexation is beyond the scope of this Note.

26. N.C. GEN. STAT. § 160A-21 (1982).

27. See *supra* notes 6-8 and accompanying text.

28. N.C. GEN. STAT. §§ 160A-33 to -56 (1982 & Supp. 1983). The U.S. Advisory Commission on Intergovernmental Relations has cited these statutes as model statutes. See NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS, *supra* note 2, at 2.

29. N.C. GEN. STAT. § 160A-34 (1982) specifically limits the application of §§ 160A-33 to -44 to annexing cities of fewer than 5000 persons. N.C. GEN. STAT. § 160A-33(4) (1982) notes that because

urban development in and around municipalities having a population of less than 5000 persons tends to be concentrated close to the municipal boundary rather than being scattered and dispersed as in the vicinity of larger municipalities . . . the legislative standards governing annexation by smaller municipalities can be simpler than those for larger municipalities and still attain the objectives set forth in this section.

56, the statutes under which Hudson proceeded.³⁰ To undertake this involuntary annexation, a municipality must be contiguous to at least one-eighth of the proposed annexed area's boundaries,³¹ the area proposed for annexation must not already be part of another municipality,³² and the annexed area must be developed for urban purposes.³³ Furthermore, a municipal governing board must pass a resolution identifying an area under consideration for annexation³⁴

30. N.C. GEN. STAT. § 160A-46 (1982) specifically limits the application of §§ 160A-45 to -56 to annexing cities of 5000 or more persons. Section 160A-45(4) notes that

new urban development in and around municipalities having a population of 5000 or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the objectives set forth in this section are to be attained.

31. *Id.* §§ 160A-36(b)(2), -48(b)(2). The definition of "contiguous" for involuntary annexation, set forth in §§ 160A-41(1) and 160A-53(1) is, with a few semantic changes, the same as the definition of "contiguous" for voluntary annexation under § 160A-31(f), *infra* note 39.

32. *Id.* §§ 160A-36(b)(3), -48(b)(3).

33. Section 160A-36(c) sets forth the "urban purposes" requirement for annexation by cities of fewer than 5000 persons:

An area developed for urban purposes is defined as any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional, or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental, or institutional purposes, consists of lots and tracts five acres or less in size.

Id. § 160A-36(c). Section 160A-48(c) defines an area developed for "urban purposes" when annexation is sought by a city of 5000 or more persons. *Id.* § 160A-48(c) (Supp. 1983). Such an area:

(1) Has a total resident population equal to at least two persons for each acre of land included in its boundaries; or

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional, or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

Id. Cities of 5000 or more persons may also annex an area that does not meet the requirements of § 160A-48(c) but:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

Id. § 160A-48(d) (1982).

Huntley v. Potter, 255 N.C. 619, 629, 122 S.E.2d 681, 688 (1961) remanded for specification an ordinance which stated in conclusory terms that the area being annexed was developed for urban purposes.

34. N.C. GEN. STAT. §§ 160A-37(i)-(j), -49(i)-(j) (Supp. 1983). The requirement for adoption of an identifying resolution appears in an amended version of the statute not in effect when Burlington annexed under the involuntary procedures. For a discussion of the effect the amendment might have on the operation of the prior jurisdiction doctrine, see *infra* text accompanying note 59.

and a resolution of intent to annex.³⁵ The local board must prepare a report setting forth proposed boundary changes and proposed plans for extending municipal services to the area to be annexed.³⁶ Finally, a notice of public hearing and a public hearing are required before the local board may enact an annexation ordinance.³⁷

"Voluntary" proceedings are another means by which North Carolina municipalities may annex without legislative action.³⁸ Unlike involuntary proceedings, residents of the area to be annexed must initiate and consent to voluntary proceedings. Voluntary proceedings may accomplish the annexation of both contiguous³⁹ and satellite⁴⁰ areas. If the area to be annexed meets either the definition of "contiguous" or the definition of "satellite," annexation may be initiated by a petition signed by all residents of the proposed annexation area.⁴¹ The voluntary procedures further require public notice and a hearing prior to enactment of an annexation ordinance by the local board.⁴²

Because two or more North Carolina municipalities could satisfy the statutory prerequisites for annexation and could attempt annexation at the same time, a rule to govern which proceeding would prevail in those circumstances is necessary. Such a rule should ensure that annexation proceedings are predictable and orderly and that the better conceived plan, which furthers the interests of the greatest number of persons in an urban area, prevails. The recently adopted prior jurisdiction rule seems suited to address most of these concerns because it embodies certain of the policy objectives of annexation. Alternatives to the prior jurisdiction rule, however, also could address these concerns.

Perhaps the most significant attribute of the prior jurisdiction rule is that it enhances the predictability and order of annexation proceedings. A rule declaring as the winner the first municipality to *complete* its proceedings would only encourage North Carolina municipalities to rush annexation proceedings in order to thwart the success of other proceedings begun earlier. In North Carolina each annexation method takes a different amount of time to complete, and thus it is possible, as in *Burlington*, that the second annexation to begin will be the first completed. Because the prior jurisdiction rule looks to the time of com-

35. N.C. GEN. STAT. §§ 160A-37(a), -49(a) (Supp. 1983).

36. *Id.* §§ 160A-35, -47 (1982 & Supp. 1983).

37. *Id.* §§ 160A-37(b) to (e), -49(b) to (e).

38. *Id.* § 160A-31 (1982).

39. Section 160A-31 defines an area as "contiguous" if

such area either abuts directly on the municipal boundary or is separated from the municipality by a street or a street right-of-way, a creek or a river, or the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the state of North Carolina.

Id. § 160A-31(f).

40. *Id.* § 160A-58 to -58.6. This statute defines "satellite corporate limits" as "the corporate limits of a noncontiguous area annexed pursuant to this Part or a local act authorizing or effecting noncontiguous annexations." *Id.* § 160A-58(3). For further discussion of limitations on annexation of a satellite, see *infra* note 81.

41. N.C. GEN. STAT. §§ 160A-31(a), -58.1(a) (1982).

42. *Id.* §§ 160A-31(c)-(d), -58.2.

mencement rather than to the time of completion of proceedings,⁴³ it guarantees that the first annexation proceedings begun will not be undermined by subsequently initiated plans. Thus, the rule ensures predictability and eliminates the incentive for a rush to the finish line.

Because both the *Hudson* rule and the first-completed rule favor voluntary procedures,⁴⁴ which are undertaken with the blessing of residents in an area to be annexed, either rule arguably is preferable to the prior jurisdiction rule, which is blind to the nature of the competing proceedings and thus ignores the desires of residents. Furthermore, the voluntary procedures may have been preferred by the general assembly, for, as noted by the *Hudson* court,⁴⁵ they are quicker than the involuntary procedures. Considerable commentary, however, suggests that individual desires should not be paramount in annexation. Elaborating on the necessity of subordinating individual desires to effectuate sound urban development, a government study commission in 1958 declared:

[W]e believe in the essential rights of every person, but we believe that the rights and privileges of residents of urban fringe areas must be interpreted in the context of the rights and privileges of every person in the urban area. We do not believe that an individual who chooses to buy a lot and build a home in the vicinity of a city thereby *acquires* the right to stand in the way of action which is deemed necessary for the good of the entire urban area. By his very choice to build and live in the vicinity of a city, he has chosen to identify himself with an urban population, to assume the responsibilities of urban living, and to reap the benefits of such location. Therefore, sooner or later his property must become subject to the regulations and services that have been found necessary and indispensable to the health, welfare, safety, convenience, and general prosperity of the entire urban area.⁴⁶

Although this policy appears to deprive property owners of their liberty, it is consistent with the maxim that an individual's property rights are only those that the law chooses to acknowledge. The policy also recognizes that an organized society is more far-sighted than are self-interested individuals. Individuals are more likely to resist annexation because of personal grievances or fears about a neighboring municipality and to seek annexation by one municipality solely to prevent annexation by another, precisely the scenario that led to the *Hudson* and *Burlington* cases.⁴⁷ In doing so individuals probably will not consider either the likely impact of annexation on an entire urban area or whether one municipality

43. 2 E. McQUILLAN, *supra* note 22, § 7.22(a), at 378.

44. A rule that would declare as the winner the first to the finish line almost always would favor the voluntarily annexing municipality because the voluntary procedures require less time to complete than do the involuntary procedures. The disparity in the time required to complete the various proceedings was noted in *Hudson*, 279 N.C. at 161, 181 S.E.2d at 447. The voluntary proceeding would win consistently if the *Hudson* rule governed annexation disputes because that rule favors voluntary proceedings.

45. *Id.*

46. MUNICIPAL GOVERNMENT STUDY COMMISSION, *supra* note 4, at 19-21 (quoted in *Burlington*, 310 N.C. at 729-30, 314 S.E.2d at 538).

47. See *Burlington*, 310 N.C. at 724-25, 314 S.E.2d at 535; *Hudson*, 279 N.C. at 157-58, 181 S.E.2d at 444.

is better equipped than another to extend municipal service to an annexed area. Moreover, residents of a territory under consideration for annexation might seek incorporation as a means of thwarting a neighboring municipality's annexation efforts. Such rushed incorporation might lead to unnecessary fragmentation of municipal services and leave North Carolina a conglomerate of tiny municipal corporations, none of which would be large enough to provide its inhabitants the diversity and quality of services more easily afforded by a larger entity.⁴⁸ That courts have so readily adopted the prior jurisdiction rule rather than one favoring the preferences of local residents demonstrates that the policy underlying annexation subordinates individual desires to the orderly growth of cities and the convenience, health, and safety of entire urban areas.⁴⁹

Certainly not all initial, involuntary annexation attempts are entirely noble⁵⁰ for municipalities might be as greedy and short-sighted as individuals. The first municipality to begin proceedings may well seek to annex merely as a political expediency.⁵¹ The first municipality to initiate proceedings might also see "an area, which will certainly be vital to [its] development in the foreseeable future, threatened by the possibility of a rival annexation or incorporation, [and] force . . . a premature annexation of the territory in order to protect its interests."⁵² Thus, a subsequently begun annexation attempt, whether voluntary or involuntary, does not always present the worse alternative; the second municipality is not necessarily less deserving of or less able to serve a new area than is the first municipality to begin its proceedings.

Although none of the alternatives—the first-completed rule, the *Hudson* rule, or the prior jurisdiction rule—is without drawbacks, the policy statements and the universal acceptance of the prior jurisdiction rule suggest widespread agreement that proceedings first begun are more likely to be well conceived than those subsequently begun. Both *Hudson* and *Burlington* support this conclusion; in each the subsequently begun proceeding was voluntary and little more than a response to an earlier-begun proceeding. Moreover, although none of the rules can guarantee that the best annexation plan will win, the prior jurisdiction rule does ensure greater predictability than the alternatives. Measuring priority from the date of commencement determines the outcome from the beginning,

48. The 1958 Study Commission observed

urban areas where the fringe is not unincorporated but a tangled thicket of small, financially weak and competing towns and special districts. In these areas it is impossible to find any one governmental unit which has the jurisdiction or financial ability to provide those services and facilities which are essential to the development of the entire urban area.

MUNICIPAL GOVERNMENT STUDY COMMISSION, *supra* note 4, at 19-21.

49. See N.C. GEN. STAT. §§ 160A-33(1), -45(1) (1982 & Supp. 1983) (setting forth as the policy behind involuntary annexation "[t]hat sound urban development is essential to the continued economic development of North Carolina").

50. "Some annexations have been attempted for less noble reasons. So-called land grabs for additional tax revenues, for increasing the area or population of the city as an end in itself, and competitive annexation to thwart anticipated annexation by another jurisdiction, have usually proved to be unwise actions." DEPARTMENT OF URBAN STUDIES NATIONAL LEAGUE OF CITIES, *supra* note 3, at 2.

51. Yeager, *City and Town Boundaries—Incorporation, Consolidation, Annexation, and Severance Under the Iowa Statutes*, 19 DRAKE L. REV. 1, 29 (1969).

52. *Id.* at 29-30.

whereas a rule looking to the date of completion would lead to uncertainty throughout the annexation process. A rule favoring voluntary proceedings would make an involuntary proceeding even more uncertain since the involuntary proceeding could be thwarted at any time by a voluntary one. Therefore, given the alternatives, the prior jurisdiction rule seems a practical choice.

North Carolina, having only recently adopted the prior jurisdiction rule, has yet to refine the doctrine to specify the limits of its application. One necessary refinement is the determination of what marks commencement of proceedings for purposes of acquiring prior jurisdiction. Another is a determination of how defective a proceeding must be before it will lose the benefits of prior jurisdiction. North Carolina courts also have yet to determine how quickly an annexing municipality must complete proceedings in order to retain prior jurisdiction.

Typically, proceedings are commenced for prior jurisdiction purposes when the "first mandatory public procedural step" in the statutory process is taken.⁵³ In North Carolina there is more than one statutory means of annexation,⁵⁴ so the first step will not be the same for all proceedings. The city of Burlington pursued annexation under the involuntary procedures permitting a city of 5000 or more persons to annex unilaterally;⁵⁵ the involuntary procedures for smaller cities are functionally identical.⁵⁶ Under these statutes at the time Burlington annexed, the first directive was that an annexing municipality adopt a resolution of intent,⁵⁷ and it was the adoption of such a resolution that marked the "first mandatory public procedural step" in that case.⁵⁸

A 1983 amendment to section 160A-49 of the North Carolina General Statutes, however, might have created a new first step in this particular statutory process.⁵⁹ The amendment, effective for resolutions of intent adopted on or after July 1, 1984, requires that at least one year prior to adopting the resolution of intent, a municipal governing board adopt a resolution identifying an area under consideration for annexation. A municipality may annex without the identifying

53. 2 E. McQUILLAN, *supra* note 22, § 7.22(a), at 378.

54. The statutory methods of annexation discussed in this Note are those that the municipalities may pursue without a specific act of the general assembly because these are the methods in which municipalities will more likely conflict with one another. Another means of annexation, annexation by special act of the general assembly, N.C. GEN. STAT. § 160A-21 (1982), will not be discussed in this Note in view of the intricacies of relations between the State and local bodies.

55. *Id.* §§ 160A-45 to -56 (1982 & Supp. 1983).

56. *Id.* §§ 160A-33 to -44. Given the statutory similarity, the "first mandatory public procedural step" in the involuntary process should be the same for both small and large municipalities.

57. *Id.* § 160A-49(a). An amendment to this statute, effective in 1984, prescribes another step before the adoption of the resolution of intent, namely adoption of a resolution identifying an area under consideration for annexation. *Id.* § 160A-49(i)-(j) (Supp. 1983). The statutes governing involuntary annexation by a smaller municipality were similarly amended. *Id.* § 160A-37(i)-(j). For a discussion of this amendment, see *infra* text accompanying note 59.

58. *Burlington*, 310 N.C. at 728, 314 S.E.2d at 537. A North Carolina decision prior to *Burlington* had determined that adoption of the resolution of intent "mark[s] the formal beginning of the municipality's actions." *Kritzer v. Town of Southern Pines*, 33 N.C. App. 152, 155, 234 S.E.2d 648, 651 (1977). Interestingly, in *City of Muscatine v. Waters*, 251 N.E.2d 544 (Iowa 1977), similar annexation proceedings were not officially begun for prior jurisdiction purposes until there was publication of notice of a public hearing on the proposed annexation.

59. N.C. GEN. STAT. § 160A-48(i)-(j) (Supp. 1983).

resolution, but in that event the ordinance annexing the particular area will not be effective until one year after the date of its adoption. Because there is an alternative to adoption of the identifying resolution, that resolution might not be deemed the "first mandatory public procedural step" for prior jurisdiction purposes. Since the identifying resolution is directed by the statute, however, it should be considered official and public enough to be the "first mandatory public procedural step." In fact, if the identifying resolution is not deemed to mark the first step, no municipality concerned about protection from competing annexation will adopt it; there will be a one-year wait whether a municipality adopts an identifying resolution or a resolution of intent, and it would be safer for a municipality to adopt a resolution of intent so that it could be assured the protection of the prior jurisdiction rule. If the new amendment is to have vitality, courts need to interpret it as giving jurisdictional priority to municipalities that choose the identifying resolution alternative.

The voluntary procedures for annexation of both a contiguous area⁶⁰ under section 160A-31 and a satellite area⁶¹ under section 160A-58 require a petition signed by all owners of real property in the area to be annexed.⁶² The receipt of this petition probably marks the "first mandatory public procedural step" of these processes. The *Hudson* case, which involved an involuntary and a voluntary proceeding, is unclear on whether the receipt of the petition by the local governing board or the investigation and certification of the petition's accuracy marks the beginning of voluntary proceedings. In reciting the facts, the court indicated that the voluntary procedure was initiated when investigation and certification of the petition were complete.⁶³ In the text of the opinion, however, the court detailed the steps taken to commence the proceedings and included the presentation of the petition to the governing board.⁶⁴ Under the precedent of other jurisdictions, presentation and receipt of the petition is sufficiently "public" to mark the beginning of proceedings.⁶⁵

Other jurisdictions have determined that the advantages of prior jurisdiction do not accrue to a municipality not complying with applicable statutes, even though that municipality commenced its proceedings first.⁶⁶ North Carolina has yet to decide how rigidly a municipality must comply with the letter of the statutes in order to obtain and retain prior jurisdiction. Because "substantial

60. For a definition of contiguous, see *supra* note 39.

61. For a general definition of satellite, see *supra* note 40.

62. N.C. GEN. STAT. §§ 160A-31(a), -58.1(a) (1982).

63. *Hudson*, 279 N.C. at 158, 181 S.E.2d at 445.

64. *Id.* at 162, 181 S.E.2d at 447.

65. See Comment, *Municipal Corporations: Prior Jurisdiction Rule*, 7 WAKE FOREST L. REV. 77-83 (1970-71). In jurisdictions in which the statutory procedure for annexation requires publication of notice prior to circulation of a petition, courts have held that the first public step for purposes of prior jurisdiction is the posting of this notice. *Village of Brown Deer v. City of Milwaukee*, 274 Wis. 50, 58, 79 N.W.2d 340, 345 (1956); *Town of Greenfield v. City of Milwaukee*, 259 Wis. 77, 83, 47 N.W.2d 292, 296 (1951). In other jurisdictions which, like North Carolina, require a petition but no posting of notice that a petition will be circulated, however, the first public step is the filing of the petition with the local governing board. *Greenfield*, 259 Wis. at 83, 47 N.W.2d at 296.

66. 2 E. McQUILLAN, *supra* note 22, § 7.22(a), at 378. See also *Town of Clive v. Colby*, 455 Iowa 483, 496-97, 123 N.W.2d 331, 333 (1963) (supplemental opinion); *State ex rel. Village of Orono v. Village of Long Lake*, 274 Minn. 264, 273-74, 77 N.W.2d 46, 52 (1956).

compliance with the statutes,"⁶⁷ as opposed to absolute compliance, has been sufficient when a single North Carolina municipality has attempted to annex,⁶⁸ less than meticulous compliance with the details of the statutes probably should not cause one municipality competing with another to lose its jurisdictional priority. Even when there have been "procedural irregularities [in an annexation proceeding which were] found to have materially prejudiced the substantive rights of . . . petitioners"⁶⁹ and the annexation ordinance has been remanded to the local governing board for amendment as directed by the statute, the amendments have not always been serious enough to require a second public hearing.⁷⁰ The cases in which deficiencies requiring remand have not been serious enough to require a second public hearing might be good precedent for what deficiencies will allow a municipality to retain prior jurisdiction. On the other hand, when there is a capable, competing municipality waiting in the wings, a judge may not be predisposed to wink at statutory deficiencies. A stricter application of the statutes for purposes of prior jurisdiction could well ensure greater obedience to the statutes by municipalities concerned about a potential competing annexation. In turn, the quality of annexation proceedings generally would improve.

Although complete, literal compliance with every requirement of the involuntary annexation statute should not be necessary for a municipality to claim exclusive jurisdiction over an area, the physical conditions required—that at least one-eighth of the proposed annexed area's boundaries coincide with the annexing municipality's primary limits,⁷¹ that the proposed annexation area not be a part of another municipality,⁷² and that the proposed annexation area be developed for urban purposes⁷³—should be followed strictly.⁷⁴ These conditions are jurisdictional requirements, and "if they do not exist, any attempts to

67. *E.g.*, *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 23, 293 S.E.2d 240, 246 (1982).

68. *E.g.*, *City of Conover v. City of Newton*, 297 N.C. 506, 521-22, 256 S.E.2d 216, 226 (1979) (failure of a resolution of intent to detail correctly the metes and bounds description of an area to be annexed was not fatal to validity of involuntary proceeding because maps available for public inspection correctly depicted the area); *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E.2d 873 (1974) (failure to include in annexation report a proposed timetable for extension of municipal services to annexed area, though required by statute, did not preclude substantial compliance and did not affect the complainant's substantive rights); *In re Annexation Ordinance Adopted by New Bern*, 278 N.C. 641, 180 S.E.2d 851 (1971) (failure to have city official explain at public hearing plans for extension of city services to an area proposed for annexation, though required by statute, did not materially affect the substantial rights of complaining parties because the report itself was clear and understandable); *Adams-Millis Corp. v. Town of Kernersville*, 6 N.C. App. 78, 169 S.E.2d 496 (1969) (failure to extend the period for public inspection of annexation plans after amending the plans did not harm petitioner).

69. N.C. GEN. STAT. §§ 160A-38(g), -50(g) (1982).

70. *See Gregory v. Town of Plymouth*, 60 N.C. App. 431, 299 S.E.2d 232 (1983) (no required rehearing regarding amended report for extension of municipal services when report merely clarified the specifics of what services would be extended and how those services would be financed).

71. N.C. GEN. STAT. §§ 160A-36(b)(2), -48(b)(2) (1982); *Hawks v. Town of Valdese*, 299 N.C. 1, 261 S.E.2d 90 (1980) (requirement of contiguousness not satisfied when boundaries of the annexed area coincide with an annexing city's satellite limits but not with its "primary" limits).

72. N.C. GEN. STAT. §§ 160A-36(b)(3), -48(b)(3) (1982).

73. *Id.* §§ 160A-48(c)-(d), -36(c) (1982 & Supp. 1983). For discussion of the meaning of "urban purposes," see *supra* note 33.

74. *See Town of Clive v. Colby*, 255 Iowa 483, 123 N.W.2d 331 (1963) (supplemental opinion); *State ex rel. Village of Orono*, 247 Minn. 264, 77 N.W.2d 46 (1956).

annex are of no legal consequence.”⁷⁵ Moreover, the annexing city must conform to the requirement that it have the ability to extend municipal services to the area it seeks to annex.⁷⁶ Because these requirements directly affect the need for a particular “urban” area to be annexed and the ability of an annexing city to accommodate additional territory, the policy behind annexation dictates that they be followed strictly. Otherwise, the purpose behind allowing involuntary annexation—that sound urban development be effected by extension of municipal services into areas where population, industry, and other activity are concentrated⁷⁷—is not operative.

Having satisfied the prerequisites for involuntary annexation, an annexing municipality probably will have to take the major procedural steps to be able to take advantage of the prior jurisdiction rule. In addition to adopting resolutions of identification and intent,⁷⁸ these steps include issuing a report setting forth proposed boundary changes and plans for extending municipal services to the area to be annexed,⁷⁹ publishing notice of a public hearing and conducting a public hearing prior to officially enacting an annexation ordinance.⁸⁰ Citizens are given early notice that annexation is being considered through the public adoption of resolutions, are informed of the nature and potential effects of this boundary extension by the report, and are given a voice in the proposed change by the notice and public hearing. Because these steps inform citizens about the annexation and give them a chance to express their opinions, they should not be omitted. If these general steps are taken, however, specific irregularities within the hearing or the report should not be deemed to preclude “substantial compliance” so long as the citizens’ rights to be informed and heard are not undermined.

The same conclusions that apply to involuntary proceedings should apply to voluntary ones. First, the annexing municipality must make sure that all physical conditions for jurisdiction to annex are strictly met.⁸¹ Second, a peti-

75. Yeager, *supra* note 51, at 17. As a practical matter, these jurisdictional prerequisites will be met completely or not at all because they are primarily all-or-nothing type requirements; thus, there will not be “substantial compliance” with them.

76. N.C. GEN. STAT. §§ 160A-35, -47 (1982 & Supp. 1983). See *Town of Clive v. Colby*, 255 Iowa 483, 123 N.W.2d 331 (1963) (supplemental opinion) (no jurisdiction to annex because of failure to show capability to extend municipal services to proposed annexation area); *In re Annexation Ordinance Adopted by Jacksonville*, 255 N.C. 633, 646-47, 122 S.E.2d 690, 700 (1961) (plans for extension of services condition precedent to annexation); *Gregory v. Town of Plymouth*, 60 N.C. App. 431, 433, 299 S.E.2d 232, 234 (original ordinance remanded to local board to add details of extension of municipal services to annexed area), *cert. denied*, 308 N.C. 544, 304 S.E.2d 237 (1983).

77. N.C. GEN. STAT. §§ 160A-33, -45 (1982).

78. For discussion of the resolutions of identification and of intent, see *supra* notes 57-59 and accompanying text.

79. N.C. GEN. STAT. §§ 160A-35, -47 (1982 & Supp. 1983).

80. *Id.* §§ 160A-37, -49.

81. Section 160A-31 requires that a contiguous area, to be annexed as such, meet the statutory definition of “contiguous.” *Id.* § 160A-31 (1982). For that statutory definition, see *supra* note 39.

Conditions for annexation of satellites are more rigorous. See N.C. GEN. STAT. § 160A-58.1(b)(1982). A city may not annex a satellite area that is not within three miles of the annexing city’s primary limits, *id.* § 160A-58.1(b)(1), or that is closer to the primary limits of another city than to the annexing city. *Id.* § 160A-58.1(b)(2). Any subdivision in the satellite area must be wholly included in the annexation. *Id.* § 160A-58.1(b)(4). The annexing city also must be capable of

tion requesting annexation signed by all residents of the area to be annexed must be received and certified by the local governing board.⁸² Last, there must be notice and a public hearing about the proposed annexation.⁸³ As with the involuntary proceedings, something short of strict compliance with the details of these steps should suffice to maintain prior jurisdiction, but the steps themselves should be substantially taken.

Finally, North Carolina must determine how long an acquired jurisdictional priority lasts. The general law is that "the right of priority in order of time may be lost if proceedings, once instituted, are not completed within a reasonable time."⁸⁴ As with all invocations of the word "reasonable," what is a reasonable amount of time depends on the circumstances of each case.⁸⁵ Key factors will be whether annexation is pursued actively and whether there is a projected date for completion of the proceedings.⁸⁶ Beyond these general considerations, North Carolina courts will have to define more specifically what amount of time is reasonable.

That the only two North Carolina cases involving competition for annexation are *Hudson* and *Burlington* suggests that adoption of a rule to govern such competition is a relatively insignificant event. The increasing population of North Carolina's cities, however, and their need to expand and accommodate that population probably mean that disputes of the *Burlington* variety will multiply in the future.⁸⁷ The mere existence of the prior jurisdiction rule might have the beneficial effect of discouraging residents of an area targeted for involuntary annexation by a neighboring municipality from seeking voluntary annexation by a different municipality. Because the prior jurisdiction rule does not countenance such efforts, annexation will be well considered rather than purely reactive. Even though the rule will prevent some annexation conflicts from arising, other fights over priority to annex are inevitable. These fights will result from the increased need for annexation and from the variety of annexation procedures available in North Carolina, procedures that do not require that annexation of a particular area be by a particular municipality. The rule of prior jurisdiction

providing municipal services to the satellite area equivalent to the services already provided citizens of the annexing city. *Id.* § 160A-58.1(b)(3). Finally, the annexation of the new satellite area, when added to all other satellites of the annexing city, must not result in the city having more than 10% of its area within satellite boundaries. *Id.* § 160A-58.1(b)(5).

82. *Id.* §§ 160A-31(a), -58.1(a). The court in *City of Conover v. City of Newton*, 297 N.C. 506, 256 S.E.2d 216 (1979), stated that withdrawal of six required signatures from the petition prior to completion of proceedings invalidates a voluntary annexation attempt.

83. N.C. GEN. STAT. §§ 160A-31(c) to -31(d), -58.2 (1982).

84. 2 E. McQUILLIN, *supra* note 22, § 7.22(a), at 378-79. See also *Town of Clive v. Colby*, 255 Iowa 483, 492, 121 N.W.2d 115, 120 (1963) ("proceedings should be conducted with reasonable dispatch and completed within a reasonable time"); Yeager, *supra* note 51, at 16-17 (reciting the facts of *Clive*); Comment, *supra* note 65, at 84 (annexation and incorporation proceedings must be completed within a reasonable time or else exclusive jurisdiction is lost).

85. See *City of Muscatine v. Waters*, 251 N.W.2d 544 (Iowa 1977) (more than one year to complete annexation is not unreasonable given the circumstances); *In re Incorporation of Brown Deer*, 267 Wis. 481, 484-85, 66 N.W.2d 333, 335-36 (1954) (although annexing city acted in good faith, it lost its prior jurisdiction because annexation efforts were moving slowly and completion of proceedings was not expected for two years); Yeager, *supra* note 51, at 16-17.

86. Comment, *supra* note 65, at 84.

87. See *id.* at 79-80.

should provide a fair and practical method for settling these disputes and should be even more useful when the problems discussed by this Note—when the prior jurisdiction rule is invoked, when annexation is too defective to merit the rewards of the prior jurisdiction rule, and when an annexation proceeding must be completed in order to retain the benefits of the rule—are resolved.

JONI WALSER CRICHLOW

The Prodigal Father: Intestate Succession of Illegitimate Children in North Carolina Under Section 29-19

Section 29-19 of the North Carolina General Statutes establishes procedures for a father's legal recognition of his illegitimate child for the purpose of intestate succession.¹ In *In re Estate of Stern v. Stern*,² a case of first impression,³ the North Carolina Court of Appeals held that section 29-19 can prevent the lineal and collateral kindred of an illegitimate child's father from inheriting from the child's intestate estate if the father failed to acknowledge his paternity by the statutorily prescribed method.⁴ In its holding, the court relied on precedent from the United States Supreme Court and on North Carolina courts' interpretation of the statute's language and purpose. A dissent, however, contended that, based on the facts presented, the court's failure to recognize the father's constructive compliance with section 29-19 rendered the statute violative of the equal protection clause.⁵ Whichever view is technically correct, the outcome of *Stern* raises doubts about the fairness of the legislative scheme and its interpretation by the courts. This Note examines the *Stern* decision and its implications, proposes changes in section 29-19, and suggests a change in the judiciary's construction of the statute to ensure that the legislation will better serve its stated purpose of equalizing the inheritance rights of legitimate and illegitimate children.

1. The statute provides:

(a) For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him.

(b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:

(1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;

(2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

(c) Any person described under subdivision (b)(1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.

(d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said will or, in the absence of any express provision, the same as a legitimate child.

N.C. GEN. STAT. § 29-19 (1984).

2. 66 N.C. App. 507, 311 S.E.2d 909, *aff'd per curiam*, 312 N.C. 486, 322 S.E.2d 771 (1984).

3. *Id.* at 515, 311 S.E.2d at 914 (Johnson, J., dissenting).

4. *Id.* at 512, 311 S.E.2d at 912.

5. *Id.* at 521-22, 311 S.E.2d at 917 (Johnson, J., dissenting). The equal protection clause states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Prior to the passage of section 29-19, illegitimate children had few inheritance rights. Originally, illegitimate children were seen as *filius nullius*—unable to inherit either intestate or through a will.⁶ The North Carolina courts later recognized an illegitimate child as an heir of the mother, entitled to the same inheritance rights as her legitimate children.⁷ The 1935 Intestate Succession Act went further and provided that collateral heirs of a mother could inherit from her illegitimate child.⁸ When the Act was modified in 1959, however, the North Carolina General Assembly rejected a proposal that would have permitted intestate inheritance by an illegitimate child from the father if paternity was established in a court action for nonsupport.⁹

The current version of section 29-19 is a remedial statute intended to “mitigate the hardships” of the common law on inheritance by illegitimates¹⁰ and achieve “insofar as practical” equal inheritance between legitimate and illegitimate children.¹¹ Statutory provisions requiring that the father legally recognize his illegitimate child before the child can inherit are intended to strike a balance between this remedial goal and the state’s dual interests in orderly disposition of estates and prevention of fraudulent claims against the estates of putative fathers.¹² While a mother’s illegitimate children are treated as legitimate for intestate succession purposes,¹³ section 29-19(b) provides that they can “take by, through and from”¹⁴ their father only if paternity is established in a criminal

6. See Note, *Judicial Impairment of the Illegitimate's Paternal Inheritance Rights in North Carolina*—Mitchell v. Freuler, 16 WAKE FOREST L. REV. 205, 205 (1980). See, e.g., Trimble v. Gordon, 430 U.S. 762, 768 (1977).

7. Paul v. Willoughby, 204 N.C. 796, 798, 169 S.E. 226, 228 (1933). The limited nature of this modification of the common law is illustrated in Brown v. Holland, 221 N.C. 135, 136, 19 S.E.2d 255, 256 (1942), where the North Carolina Supreme Court held that the term “issue” in a mother’s will only included her legitimate children. The modification also did not allow collateral heirs of the mother to inherit from the mother’s illegitimate child. Carter v. Smith, 209 N.C. 788, 185 S.E. 15 (1936); Board of Educ. v. Johnston, 224 N.C. 86, 29 S.E.2d 126 (1944). In addition, an illegitimate child could not inherit any property from her mother which the mother had received from the father of the legitimate children. McCall, *North Carolina's New Intestate Succession Act*, 39 N.C.L. REV. 1, 13 (1960). See also Battle v. Shore, 197 N.C. 449, 449, 149 S.E. 590, 590 (1929) (mother’s illegitimate children inherit as her heirs but father’s do not).

8. Board of Educ. v. Johnston, 224 N.C. 86, 88, 29 S.E.2d 126, 127 (1944).

9. McCall, *supra* note 7, at 14. The general assembly provided full inheritance rights for legitimated and adopted children in 1955. Greenlee v. Quinn, 255 N.C. 601, 606, 122 S.E.2d 409, 413 (1961). See also Comment, *Illegitimacy in North Carolina*, 46 N.C.L. REV. 813, 825 (1968) (adoption laws intended to alleviate stigma of illegitimacy, but only through nonreference to child’s parental status).

10. Mitchell v. Freuler, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979); *Stern*, 66 N.C. App. at 511, 311 S.E.2d at 912 (quoting *Mitchell*).

11. Mitchell v. Freuler, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979); *Stern*, 66 N.C. App. at 511, 311 S.E.2d at 912 (quoting *Mitchell*).

12. Mitchell v. Freuler, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979); *Stern*, 66 N.C. App. at 511-12, 311 S.E.2d at 912. See also Note, *supra* note 6, at 205 (In dealing with unequal treatment of illegitimate persons, state legislatures must consider countervailing factors such as efficiency in administering estates and the policy of discouraging “spurious assertions of paternity.”); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. REV. 479, 511 (1974) (“The state is properly concerned with minimizing administrative expense and inconvenience, as well as with preventing the successful assertion of fraudulent claims.”).

13. N.C. GEN. STAT. § 29-19(a) (1984). For text of statute, see *supra* note 1.

14. N.C. GEN. STAT. § 29-19(b) (1984). For text of statute, see *supra* note 1. See also McCall, *supra* note 7, at 13-14 (discussion of “by, through and from” language).

action for nonsupport,¹⁵ in a civil proceeding for support,¹⁶ or by the father's acknowledgement of paternity "before a certifying officer . . . during his own lifetime and the child's lifetime."¹⁷ The statute also provides that a duly adjudged or acknowledged father and his heirs may inherit from the illegitimate child's estate¹⁸ and that a father's acknowledgement of his illegitimate child in a will may be treated as intent to have the illegitimate child inherit as though she were legitimate.¹⁹

The *Stern* case arose in this statutory context. Decedent Gordon Stern was born to Hilda Weiss and Edward D. Stern in Saskatchewan, Canada, where laws forbidding intermarriage between Jews and Catholics prevented the couple from marrying. Decedent lived with his parents from birth and continued to live with his father after his mother's death. He adopted his father's surname to facilitate inheritance under his father's will and subsequently inherited \$500,000 at his father's death. Although decedent's father had never sought judicial or other official recognition of his paternity, he had recognized decedent as a son in his will. Upon decedent's death intestate one year after his father's death, the heirs of decedent's father sued to share in the decedent's estate. The trial court ruled that only the mother's heirs were entitled to inherit and plaintiffs appealed.²⁰

Stern presented the court of appeals with the novel issue of when the heirs of an illegitimate child's father are entitled to inherit from the illegitimate child by intestate succession. Plaintiffs first contended that Edward Stern had com-

15. N.C. GEN. STAT. § 29-19 (b)(1) (1984). For text of statute, see *supra* note 1. The criminal nonsupport provisions are found in N.C. GEN. STAT. §§ 49-1 to -9 (1984). Nonsupport of a child is a misdemeanor. *Id.* § 49-2. The trial court has the power to compel both defendant and child to submit to blood tests. *Id.* § 49-7. If defendant is convicted, the judge must fix a child support arrangement. *Id.*

16. N.C. GEN. STAT. § 29-19(b)(1) (1984). For text of statute, see *supra* note 1. The civil proceeding is a paternity action for support under N.C. GEN. STAT. §§ 49-14 to -16 (1984). See *Mitchell v. Freuler*, 297 N.C. 206, 221 n.2, 254 S.E.2d 762, 763 n.2. The action must be completed before the putative father's death. N.C. GEN. STAT. § 49-14(b) (1984).

In addition to blood tests, a broad range of evidence is allowed to prove or disprove paternity in a civil proceeding. See *Wright v. Gann*, 27 N.C. App. 45, 217 S.E.2d 761 (1975); Note, *The Use of Blood Tests in Actions to Determine Paternity*, 16 WAKE FOREST L. REV. 591 (1980). A mother's testimony about the period between sexual intercourse with defendant and the child's birth is admissible. *County of Lenoir ex rel. Dudley v. Dawson*, 60 N.C. App. 122, 298 S.E.2d 418 (1982); *State v. Snyder*, 3 N.C. App. 114, 164 S.E.2d 42 (1968). The child can be exhibited to show resemblance to the defendant. *State v. Green*, 55 N.C. App. 255, 284 S.E.2d 688 (1981). Defendant's out of court admission of paternity is relevant. *State v. Bowman*, 231 N.C. 51, 55 S.E.2d 789 (1949). Defendant's payments to child's mother are admissible evidence. *State v. Garner*, 34 N.C. App. 498, 238 S.E.2d 653 (1977). Evidence of a mother's sexual relations with other men near the time of conception can be offered. *State v. Farmer*, 63 N.C. App. 384, 304 S.E.2d 765 (1983). For a discussion of evidence used to prove paternity in intestate proceedings in other states, see *infra* notes 58-59, 61-63 and 68-70 and accompanying text.

17. N.C. GEN. STAT. § 29-19(b)(2) (1984). For text of statute, see *supra* note 1. The father may voluntarily acknowledge paternity before a certifying officer listed in N.C. GEN. STAT. § 52-10(b) (1984). The certifying officer "shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made." *Id.*

18. N.C. GEN. STAT. § 29-19(c) (1984). For text of statute, see *supra* note 1.

19. N.C. GEN. STAT. § 29-19(d) (1984). For text of statute, see *supra* note 1.

20. *Stern*, 66 N.C. App. at 507-10, 311 S.E.2d at 909-11. At his death, decedent was a resident of North Carolina. His parents, however, had never resided in the state. *Id.* at 508, 311 S.E.2d at 910.

plied with the paternal acknowledgment requirements of section 29-19 when he recognized Gordon Stern as his son in his will, thus allowing the son, under section 29-19(d), to be treated as a legitimate child under the will.²¹ Section 29-19(c) explicitly provides that the heirs of an illegitimate child's father are entitled to intestate inheritance from the child under the same circumstances that the child can inherit from the father—specifically, when the father has recognized the child under section 29-19(b).²² Plaintiffs in *Stern* did not argue that Edward Stern had complied directly with section 29-19(b) in acknowledging Gordon Stern as his illegitimate son.²³ Instead, they contended that Edward Stern's statement of paternity in his will in compliance with section 29-19(d) constructively satisfied the requirements of section 29-19(b).²⁴ Under plaintiffs' interpretation, Edward Stern's indirect compliance with subsection (b) enabled them to recover under subsection (c). The *Stern* court rejected this construction, holding that section 29-19(d) only enables the illegitimate child to take under the will from the putative father; it does not allow the father's heirs to inherit from the child under intestacy.²⁵ The court found that Edward Stern had failed to comply with section 29-19(b) and that his heirs were not entitled to inherit from Gordon Stern under section 29-19(c).²⁶

Plaintiffs also contended that failure to grant them inheritance rights would deny equal protection of the law to fathers of illegitimate children and heirs of such fathers.²⁷ The court in *Stern* relied on the denial of equal protection claims in prior cases to dispose of this argument even though the equal protection problem in *Stern* is distinguishable from earlier suits. In one case relied on by the court, *Mitchell v. Freuler*,²⁸ the class distinction complained of was between legitimate and illegitimate children. In contrast, plaintiffs in *Stern* alleged discrimination against the father's heirs in favor of the mother's.²⁹ The court of appeals, however, employed the same equal protection analysis in *Stern* as had

21. *Id.* at 510, 311 S.E.2d at 911. See N.C. GEN. STAT. § 29-19(d). For text of statute, see *supra* note 1.

22. N.C. GEN. STAT. § 29-19(c) (1984). For text of statute, see *supra* note 1.

23. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911.

24. *Id.* In his dissent Judge Johnson contended that the presence of a provision for inheritance under a will in the intestate succession statute rendered its meaning ambiguous in relation to the other provisions of § 29-19. Therefore, to further the remedial purposes of the statute, Judge Johnson stated that compliance with § 29-19(d) should be interpreted to fulfill the paternal acknowledgment provisions of § 29-19(b). *Id.* at 519, 311 S.E.2d at 916 (Johnson, J., dissenting). See *infra* note 46 and accompanying text.

25. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. According to the majority, "G.S. 29-19(c) clearly and unambiguously provides that a putative father and his kindred are only entitled to inherit from an illegitimate child if paternity has been established by one of the methods prescribed in G.S. 29-19(b)." *Id.*

26. *Id.*

27. *Stern*, 66 N.C. App. at 511, 311 S.E.2d at 911.

28. 297 N.C. 206, 254 S.E.2d 762 (1979). In *Mitchell* an illegitimate child argued that § 29-19(b) violates the equal protection clause of the 14th amendment by placing the burden of showing paternal recognition on illegitimate children but not on legitimate children. *Id.* at 207, 254 S.E.2d at 763. See also *Trimble v. Gordon*, 430 U.S. 762, 763 (1977) (illegitimate children as plaintiffs); *Lalli v. Lalli*, 439 U.S. 259, 262 (1978) (illegitimate children as plaintiffs).

29. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. In *Stern*, plaintiffs contended that section 29-19(b) violates the equal protection rights of the illegitimate child's father and paternal heirs by requiring that paternity be acknowledged in the manner required by the statute before they can

been used in *Mitchell* because it found that the statute's purpose—to balance inheritance rights against the state's interests in preventing fraudulent claims upon estates—protected it against equal protection challenges whether the challenges were brought by a father's heirs or by an illegitimate child.³⁰

Once the court of appeals determined that *Stern* presented the same equal protection problem as prior cases, United States Supreme Court and North Carolina Supreme Court precedent foreclosed plaintiff's contention that section 29-19(b) on its face violated equal protection. In *Trimble v. Gordon*³¹ and *Lalli v. Lalli*³² the United States Supreme Court established a framework for review of statutes affecting intestate succession by illegitimate children. The Court applied the intermediate scrutiny equal protection test and suggested that statutes which classify illegitimate children's inheritance rights differently from those of legitimate children may be unconstitutional even if they "bear some rational relationship to a legitimate state purpose."³³ Thus, a statute that imposes a substantially greater burden on illegitimate children cannot be written broadly to deprive illegitimate children of inheritance rights in situations that do not promote permissible state interests.³⁴ In *Trimble* the Court held that the state of Illinois' interest in preventing fraudulent claims against estates did not justify depriving all illegitimate children of the right to intestate succession.³⁵ In *Lalli*,

inherit from the child without placing the same burden on the illegitimate child's mother and maternal heirs. *Id.*

30. *Stern*, 66 N.C. App. at 511-12, 311 S.E.2d at 911-12. In fact the court questioned whether a statute classifying the parents of an illegitimate should not be subject to a less stringent equal protection review. *Id.* at 511, 311 S.E.2d at 911.

31. 430 U.S. 762 (1977).

32. 439 U.S. 259 (1978).

33. *Trimble*, 430 U.S. at 766-67 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972)). Statutes affecting illegitimate children are given an intermediate equal protection review. See *Stern*, 66 N.C. App. at 511, 311 S.E. 2d at 911; Note, *supra* note 6, at 207; Note, *Trimble v. Gordon: Expanding the Illegitimate's Right to Inherit*, 32 ARK. L. REV. 120, 121-22 (1979). A court may require a more careful balancing between the rights of a class entitled to intermediate review, such as illegitimate children, and permissible state interests than is required under the normal rational basis standard. *Id.* at 125-26; see *infra* note 34 and accompanying text. The Court in *Trimble* rejected the argument that illegitimate children are a suspect class entitled to the highest level of equal protection review. 430 U.S. at 767. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101-03, 1121-22 (1969).

The equal protection review for illegitimate children is not limited to intestate succession rights. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (discussing eligibility of illegitimate children to receive deceased parent's workers' compensation benefits).

34. *Trimble*, 430 U.S. at 772. The Court stated:

We think . . . that the Illinois Supreme Court gave inadequate consideration to the relation between [the statute] and the state's proper objective of assuring accuracy and efficiency in the disposition of property at death. The Court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity.

Id. at 770-71. Both *Trimble* and *Lalli* quoted with approval the Court's statement in *Matthew v. Lucas*, 427 U.S. 495, 513 (1976), that the statute must not "broadly discriminate between legitimates and illegitimates without more, [and must be] carefully tuned to alternative considerations." *Trimble*, 430 U.S. at 772; *Lalli*, 439 U.S. at 266. Professor Loewy suggests that in order to sustain a statute affecting illegitimates, a state must show a "legitimate nondiscriminatory purpose sufficient to render it probable that the discrimination was merely an incidental adjunct to a legitimate purpose." Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. REV. 1, 22 (1978).

35. *Trimble*, 430 U.S. at 771-72. An illegitimate child in Illinois could only inherit if she was subsequently legitimated by the marriage of her parents. *Id.* The Court noted that the state interest

however, a New York statute allowing inheritance by illegitimate children from their fathers only after a judicial declaration of paternity was obtained was held to be sufficiently related to the state's proper interest in avoiding spurious claims against estates.³⁶

In *Mitchell v. Frueier*³⁷ the North Carolina Supreme Court, relying on *Trimble* and *Lalli*, held that section 29-19 passed equal protection scrutiny.³⁸ Specifically, the court found section 29-19 constitutional because it had a legitimate purpose and provided more ways for an illegitimate child to establish paternity than the New York statute upheld in *Lalli*.³⁹

The dissent did not quarrel with the majority's characterization of section 29-19 as constitutional on its face.⁴⁰ Instead, Judge Johnson noted the United States Supreme Court's partial reliance on the New York courts' liberal judicial construction of the New York statute in holding the statute constitutional.⁴¹ He contrasted this treatment with the North Carolina Supreme Court's strict construction of section 29-19 in *Stern*⁴² and suggested that section 29-19(b) be interpreted broadly to allow substantial compliance with its provisions. He concluded that the court's failure to do so violated the equal protection rights of Edward Stern's heirs.⁴³

Judge Johnson argued further that even if the statute did not violate the equal protection clause, plaintiffs should have been allowed recovery based on decedent's father's constructive compliance with section 29-19.⁴⁴ He pointed to

in legitimate family relations is not served by totally depriving illegitimate children of their inheritance rights because their parents failed to marry. *Id.* at 770. See also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1975).

36. *Lalli*, 439 U.S. at 275. According to one commentator, *Trimble*

reflects the philosophy that a limited amount of discrimination against illegitimates is allowable in the formulation of state laws regarding the orderly disposition of property upon death, but laws which make it virtually impossible for an illegitimate child to be made legitimate, and thereby eligible to inherit from his biological father, are an unconstitutional denial of equal protection of the laws under the fourteenth amendment.

Note, *Davis v. Jones: A Case for Equitable Legitimation*, 23 S. TEX. L.J. 250, 252-53 (1982).

37. 297 N.C. 206, 254 S.E.2d 762 (1979).

38. *Mitchell*, 297 N.C. at 216, 254 S.E.2d at 762. See 3 R. LEE, NORTH CAROLINA FAMILY LAW § 252, at 361 (4th ed. 1981).

39. *Mitchell*, 297 N.C. at 216, 254 S.E.2d at 762.

40. *Stern*, 66 N.C. App. at 512, 311 S.E.2d at 911-12 (Johnson, J., dissenting).

41. *Id.* at 520-21, 311 S.E.2d at 916-17 (Johnson, J., dissenting). The New York court's liberal construction of the statute advanced the statute's remedial goal of equalizing inheritance rights for illegitimate children. *Id.*

42. *Id.* (Johnson, J., dissenting).

43. *Id.* at 521-22, 311 S.E.2d at 917 (Johnson, J., dissenting).

44. The doctrine of constructive compliance allows a party who acts consistently with the purposes of a statute, but fails to comply with a technical requirement, to benefit from the protection of the statute. See Note, *supra* note 6, at 216. The North Carolina courts have accepted the rule that statutes serving a remedial purpose are to be construed liberally to achieve their objectives. See *Joyner v. Lucas*, 42 N.C. App. 541, 546, 257 S.E.2d 105, 108 (1979) (civil paternity action under N.C. GEN. STAT. § 49-14). In contrast to other states, see, e.g., *Weber v. Anderson*, 269 N.W.2d 892, 894-95 (Minn. 1978), North Carolina courts have not applied this principle to § 29-19. See *Stern*, 66 N.C. App. at 510-11, 311 S.E.2d at 911 (§ 29-19 language is unambiguous).

In the absence of legislative history, one can only wonder whether the general assembly expected the requirements of § 29-19 to be strictly construed. The statute's provision for voluntary acknowledgement of paternity, however, see *supra* note 17 and accompanying text, suggests that the

the trial court's findings of fact to show that there was little chance that the *Stern* plaintiffs' claim was spurious. First, Edward Stern was clearly the biological father. Second, the decedent and his father lived together for the first eighteen years of decedent's life and always treated each other as father and son. Third, decedent adopted his father's surname and was closer to his father's relatives than to his mother's. Last, most of the disputed estate was inherited by the decedent from his father's estate one year before the lawsuit was commenced.⁴⁵ Judge Johnson stated that the majority should have addressed

the issue of statutory construction . . . whether a father's acknowledgement of paternity in his duly probated last will is the substantial equivalent of an *inter vivos* acknowledgement of paternity in a written instrument executed or acknowledged [in compliance with section 29-19(b)(2)].⁴⁶

Although the outcome advocated by Judge Johnson is appealing, his equal protection reasoning is not entirely sound. Consideration of New York's "liberal" statutory construction in *Lalli*⁴⁷ does not necessarily lead to the conclusion that section 29-19(b) as applied in *Stern* is insufficiently related to the state interest of preventing fraud upon estates so as to deny equal protection to the paternal heirs of an illegitimate child.⁴⁸ The father's recognition of his child in his duly probated last will is more remote from statutory requirements than the exceptions made by the New York courts for technical noncompliance with New York's statutory provisions.⁴⁹ For example, a New York trial court recognized as proof of paternity a judicial support order that did not specifically mention paternity⁵⁰ and allowed a paternity proceeding that was commenced, but not terminated, before the father's death to constitute compliance with the statute's requirement that paternity be established during the father's lifetime.⁵¹ Further, the Court in *Lalli* was aware that statutory procedures intended to promote the state's interest in disposition of estates would cause some inequitable results:

We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased father without serious disruption of the administration of estates and that, as applied to such individuals [the statute] appears to operate unfairly. . . . Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interest it is intended to promote is so tenu-

general assembly expected the standard to cover even the estates of putative fathers who appeared to have lived with or supported their children. *Stern*, 66 N.C. App. at 513, 311 S.E.2d at 912 (Johnson, J., dissenting).

45. *Stern*, 66 N.C. App. at 513-14, 311 S.E.2d at 912-13 (Johnson, J., dissenting).

46. *Id.* at 515, 311 S.E.2d at 913-14 (Johnson, J., dissenting). Although a will does not technically meet the requirements of subsection (b) as a written, signed, and acknowledged recognition of paternity, it certainly falls within the spirit of subsection (b). See *supra* note 1.

47. See *supra* note 41 and accompanying text.

48. See *supra* note 33.

49. *Lalli*, 439 U.S. at 273-74.

50. *Id.* at 274. See *In re Kennedy*, 89 Misc. 2d 551, 392 N.Y.S.2d 365 (1977).

51. *Lalli*, 439 U.S. at 274. See *In re Niles*, 53 A.D.2d 983, 385 N.Y.S.2d 876 (1976), appeal denied *sub nom.* *Niles v. Beninati*, 40 N.Y.2d 809, 360 N.E.2d 1109, 392 N.Y.S.2d 1027 (1977).

ous that it lacks the rationality contemplated by the fourteenth amendment.⁵²

Thus, it appears that even without the liberal construction of Judge Johnson section 29-19(b) as construed by the majority does not run afoul of the equal protection clause.

Judge Johnson's second contention, that constructive compliance with section 29-19(b) was present in *Stern*, is a more promising argument for plaintiffs. The court of appeals held in *Herndon v. Robinson*⁵³ that an illegitimate child's proof that his father had paid for his birth, had taken out insurance policies on him, and had listed him as a son on an employment application did not "rise to the dignity of constructive compliance" with section 29-19(b).⁵⁴ That constructive compliance was even recognized, however, suggests that the doctrine would be accepted under the right facts.⁵⁵ The *Herndon* court's conclusion that the father's acknowledgment of paternity did not show intent to allow the child to inherit was crucial to its analysis.

The formalities [of section 29-19(b)] . . . assure that the decedent intended the illegitimate child to share in the estate, much in the same way a father intentionally excludes legitimate children as beneficiaries under his will. But, just as the father must act to *exclude* a legitimate child from sharing in his estate, he must also act to *include* an illegitimate child.⁵⁶

In *Stern*, however, Edward Stern had acted to include his son in the will. Plaintiffs had both the father's acknowledgment of paternity in the will and a direct bequest of his entire estate to his son. Thus, a finding of constructive compliance on the facts in *Stern* would have been consistent with the purpose of section 29-19(b) as expressed in *Herndon*.

Judge Johnson suggested that the North Carolina courts recognize inheritance rights under section 29-19 whenever achievement of the remedial purposes of the statute could be enhanced without undermining the state's interest in preventing fraudulent claims.⁵⁷ While this solution would erode the predictability of the statute, it would lead to fairer results. The harsh result in *Stern* and, more disturbingly, in cases such as *Herndon* in which an illegitimate child is deprived of his share in his father's estate suggests that section 29-19 as currently interpreted fails to achieve its egalitarian goals. An approach to intestate succession that balances the interests of illegitimate children and the state would reduce the instances in which illegitimate children are unjustly deprived of their inheritance and would not unduly burden estates with fraudulent claims.

52. *Lalli*, 439 U.S. at 272-73.

53. 57 N.C. App. 318, 291 S.E.2d 305, *cert. denied*, 306 N.C. 557, 294 S.E.2d 223 (1982).

54. *Id.* at 321, 291 S.E.2d at 307.

55. *Stern*, 66 N.C. App. at 514, 311 S.E.2d at 914-15 (Johnson, J., dissenting).

56. *Herndon*, 57 N.C. App. at 320-21, 291 S.E.2d at 307. The weakness in this reasoning is obvious. A decedent cannot exclude any of his legal heirs when he dies intestate. Thus, the question is not whether decedent intended for his illegitimate child to inherit, but whether the child is recognized as a legal heir. See, Note, *Survey of Developments in North Carolina Law: Property*, 61 N.C.L. REV. 1171, 1212 (1983).

57. *Stern*, 66 N.C. App. at 516, 311 S.E.2d at 914 (Johnson, J., dissenting).

Many state legislatures have recognized that statutes, which are constitutional under *Trimble* and *Lalli* do not adequately protect the inheritance rights of illegitimate children and thus have enacted more flexible statutes. Some of the most protective statutes allow an illegitimate child to take by intestate succession if her father "openly and notoriously" recognized her⁵⁸ or if a "mutually acknowledged relationship of parent and child" was present.⁵⁹ Under these statutes, the state's interest in the orderly disposition of estates is subordinated to provide inheritance to "the informally acknowledged child."⁶⁰ In New Mexico⁶¹ and Massachusetts⁶² paternity may be established in an intestate succession proceeding by a preponderance of the evidence. Under this approach, a father's acknowledgement of his child is strong evidence of paternity, but is not required for inheritance.⁶³ This inheritance scheme reaches both informally acknowledged children and illegitimate children who would have been able to establish paternity only in an adversary proceeding during their father's lifetime. The Minnesota Supreme Court has interpreted its statute⁶⁴ to allow a paternity

58. See IOWA CODE ANN. § 633.222 (West 1963); KAN. STAT. ANN. § 59-501 (1976) (notorious recognition sufficient to establish paternity for intestate succession); see also *Hawk's Estate v. Lain*, 329 N.W.2d 660 (Iowa 1983) (in the absence of blood tests, testimony of mother and photographs of father and child together were sufficient to find paternity by a preponderance of the evidence); *In re Wolf's Estate*, 242 Iowa 1012, 48 N.W.2d 890 (1951) (testimony that it was common knowledge that decedent was the father and that decedent had admitted he was father supported a finding of paternity); *Kuhn v. Hicks*, 229 Kan. 536, 626 P.2d 794 (1981) (clearly identified voluntary child support constitutes recognition).

59. See MICH. COMP. LAWS ANN. § 700.111(4)(c) (West 1982). In *In re Vellenga*, 120 Mich. App. 699, 702, 327 N.W.2d 340, 342 (1982), the Michigan Court of Appeals held that because an unborn child could not acknowledge her father she was unable to take intestate from him when he died before her birth. For an annotation critical of this result, see *In re Vellenga: An Heir Apparently Not*, 1984 DET. L. REV. 829 (1984).

60. The failure of the revised Louisiana statute to provide for the "informally acknowledged child" is discussed at length in Note, *A Survey of Recent Changes in Intestate Succession Law Affecting Illegitimate Children—The Informally Acknowledged Child Is the Ultimate Loser*, 29 LOY. L. REV. 323 (1983).

As Justice Brennan pointed out in *Lalli*, the child who is recognized and supported by his father is unlikely to have filed a paternity suit and thus will be unable to inherit under any statute that, like North Carolina's, requires recognition in a criminal or civil proceeding or entry with a clerk of court. See *Lalli*, 439 U.S. at 278 (Brennan, J., dissenting). This creates the bizarre result that a father who recognizes and even lives with his illegitimate child will have none of his estate go to the child, while a father who is compelled by the courts to support his child will have his estate shared by the child. One commentator is particularly concerned about the offspring of the growing number of cohabitation relationships who become victims of society's preference for legitimate relationships, even though they were never denied the father's presence or support during his life. See Note, *supra* note 6, at 216-17. Thus, the state's permissible interest in preventing fraud upon estates causes the impermissible result of punishing children for their parents' choice not to marry. See *supra* note 35.

61. N.M. STAT. ANN. § 45-2-109(B)(3) (1978).

62. MASS. GEN. LAWS ANN. ch. 190, § 7 (West 1981).

63. Despite testimony of "lack of communication between decedent and [son] over a period of 36 years," the New Mexico trial court found paternity established. *In re Estate of Padilla*, 97 N.M. 508, 512, 641 P.2d 539, 543 (1982). Decedent's acknowledgement to mother, pediatrician, and friend; and grandmother's testimony that decedent visited child, met the "stricter" standard for illegitimate child's inheritance from father. *Higgins v. Ripley*, 16 Mass. App. 928, 928, 450 N.E.2d 186, 186 (1983).

64. MINN. STAT. ANN. § 525.172 (West 1975) provides:

An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who . . . shall have declared himself to be his father . . . or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction . . .

proceeding for intestate succession after a father's death. The court found these proceedings necessary for full protection of illegitimate children despite the state's interest in facilitating disposition of estates:

[W]e recognize the legitimate concern that has been expressed in some of the cases from other jurisdictions about the risk of fraudulent claims against the putative father's estate. However, this risk is not significantly greater in paternity actions brought after the putative father's death than in many other types of actions, including an action by a party seeking to prove that he is the *legitimate* child of a decedent. Most importantly, we believe that the risk is outweighed by the injustice which is done to the innocent child by denying it an adjudication of paternity simply because its putative father happened to die.⁶⁵

The Illinois legislature has made statutes allowing an adjudication of paternity after the father's death more acceptable to states concerned about fraud by giving plaintiffs a burden of proof by clear and convincing evidence.⁶⁶

Despite the advantages of such legislative reform in improving the fairness of inheritance laws, however, the North Carolina General Assembly is unlikely to adopt an approach that balances the equation strongly in favor of the inheritance rights of illegitimate children.⁶⁷ It is worthwhile, therefore, to propose those changes most vital to the needs of illegitimate children which might reasonably be expected to be added to the paternal acknowledgement provisions of section 29-19(b) in the near future.

The rights of illegitimate minors who are entitled to their fathers' support must be afforded greater protection. Children under eighteen should be granted a one year grace period from the date of their father's death to establish paternity.⁶⁸ This amendment would benefit both informally acknowledged children and those who had not been supported by their father. In addition, an illegiti-

The statute does not specify whether the proceeding must take place before the father's death. *Id.*; see *Weber v. Anderson*, 269 N.W.2d 892, 894-95 (Minn. 1978). The North Carolina statute is not open to judicial interpretation on this point because it refers specifically to paternity proceedings which must take place during the father's lifetime. N.C. GEN. STAT. § 29-19(b)(1) (1984). See *supra* notes 15-17 and accompanying text.

65. *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). The North Carolina General Assembly was apparently concerned about preventing claims that would slow the disposition of estates, a point not addressed by the Minnesota court, and about fraud.

66. Act of June 11, 1975, § 2-2(h), ILL. ANN. STAT. ch. 110½, § 2-2(h) (Smith-Hurd Supp. 1984). See also *Cody v. Johnson*, 92 Ill. App. 3d 208, 415 N.E.2d 1131 (1980) (rejecting argument that decedent's heirs were deprived of equal protection because they could not introduce blood test to disprove paternity after the putative father's death).

Justice Brennan's dissent in *Lalli* suggests that a state's interest in preventing fraud would be served by a statute requiring "formal public acknowledgements of paternity," or by statutes requiring proof of paternity by "clear and convincing evidence, or even beyond a reasonable doubt." *Lalli*, 439 U.S. at 278-9 (Brennan, J., dissenting).

North Carolina requires proof beyond a reasonable doubt for support actions during the father's lifetime. N.C. GEN. STAT. § 49-14(b) (1984). Furthermore, it makes no special provisions for informally acknowledged children, thus carefully safeguarding estates from fraudulent claims. See notes 15-17 and accompanying text.

67. The historical treatment by North Carolina of illegitimate children's inheritance rights suggests this conclusion. For a discussion of the developments of North Carolina law on inheritance for illegitimate children, see *supra* notes 6-19 and accompanying text and note 44.

68. See LA. CIV. CODE ANN. art. 209 (West Supp. 1984).

mate minor will benefit from a rebuttable presumption of paternity if he can show that the alleged father was known to have lived with the mother at the time of conception⁶⁹ or that the minor lived with the father immediately after birth.⁷⁰ Although these changes would reduce the certainty of the disposition of estates, they are warranted because of the compelling needs of dependent children. Further, the inheritance rights of the heirs of a father who acknowledges and provides for his illegitimate child in his duly probated will should be granted as they pose no danger of fraudulent claims on the illegitimate child's estate.

Several commentators in addition to Judge Johnson have proposed that the North Carolina Supreme Court protect further the inheritance rights of illegitimate children by expounding a doctrine of constructive compliance with section 29-19(b).⁷¹ A broad theory of constructive compliance would allow intestate inheritance whenever the child could establish proof of paternity by convincing evidence.⁷² The objective would be to protect illegitimate children whose fathers voluntarily acknowledged their paternity and provided support, but failed to certify their paternity in strict compliance with section 29-19(b). The effect of this practice would be to transform the formal requirements of section 29-19(b) into a looser standard equivalent to "open and notorious recognition."⁷³

An alternative standard for constructive compliance with section 29-19, more consistent with legislative intent⁷⁴ but less protective of illegitimate children, would be to grant inheritance rights if the illegitimate child's convincing proof of paternity includes at least one written document tending to establish acknowledgement of paternal obligation. Unfortunately, this standard would be more useful to the heirs of the child's father as in *Stern*, who could rely on a probated will, than it would be to illegitimate children. The doctrine could be extended, however, to a child who could show a consistent pattern of support documented by checks signed by the father to the child's mother or guardian or by checks for payment of expenses for the household in which the father and child were living as part of the proof of paternal acknowledgement.

69. Cf. *Id.*, comment (b) ("[p]roof of filiation may include, but is not limited to: 'Informal' acknowledgement; scientific test results; acknowledgement in a testament; and proof that the alleged parents lived in a state of concubinage at the time of conception").

70. Note that while this change would help plaintiffs in *Stern*, it would not affect the result in *Herndon* in which the child began living with his father at age nine, but the parents never lived together. See *supra* note 54 and accompanying text. These presumptions follow from the assumption of the public generally that the man living with the mother or supporting the infant is its father.

71. See Note, *supra* note 56, at 1211 (1983); Note, *supra* note 6, at 211-12.

72. Such an approach would have compelled the North Carolina Court of Appeals to rule differently in both *Stern* and *Herndon*. In both *Stern* and *Herndon* the father openly acknowledged his paternity and had the child live with him and take his name. See *supra* notes 20 & 54 and accompanying text. On these facts the court would have found constructive compliance. If the North Carolina Supreme Court had been presented with this argument in *Mitchell v. Freuler*, 297 N.C. 206, 207, 254 S.E.2d 762, 762 (1979), it would have been required to recognize constructive compliance because decedent lived with his son for the final seven years of the decedent's life, took out insurance policies in his son's name, and openly acknowledged his paternity. In each of these cases, the danger of fraud was not present.

73. See *supra* note 58 and accompanying text.

74. One student commentator has suggested that equitable legitimation, and not constructive compliance, should be recognized, allowing all possible avenues of proof, such as photographs, letters and testimony, to prove paternal acknowledgement. See Note, *supra* note 36, at 254-55.

Though the holding in the *Stern* case was rather narrow, its implications are significant. *Stern* establishes for North Carolina the modest proposition that the same equal protection and statutory analysis is applicable under section 29-19(b) whether the plaintiff is an illegitimate child or the heir of an illegitimate child's father. It also upholds a standard of strict statutory construction of section 29-19. The decision's harsh result, however, should alert the North Carolina General Assembly that its concern for prevention of fraudulent claims upon estates has severely restricted the statute's ability to equalize inheritance rights between legitimate and illegitimate children and that statutory reform, therefore, is needed. In particular, the statute should be amended to address the problems of illegitimate minors not formally recognized by their fathers. Finally, the North Carolina Supreme Court should recognize the doctrine of constructive compliance with section 29-19(b) and establish a more flexible and equitable standard for the lower courts to follow.

DAVID E. WEBB

***Medford v. Lynch*: North Carolina's Shift to the Minority Rule Regarding Inheritance Taxation and Will Compromise Agreements**

In *Medford v. Lynch*¹ the North Carolina Court of Appeals recognized the North Carolina General Assembly's decision to impose inheritance taxes in accordance with the transfers under a compromise agreement when such an agreement is incorporated into a consent judgment in a caveat proceeding.² The majority view—previously followed by North Carolina—imposes inheritance taxes in accordance with the will provisions.³ *Medford* was the first opportunity for a North Carolina appellate court to interpret North Carolina General Statutes section 105-2(1)⁴ since its amendment in 1974⁵ to provide that inheritance taxes shall be imposed upon a transfer “when the transfer is made pursuant to a final judgment entered in a proceeding to caveat a will.”⁶ The *Medford* court found that a consent judgment qualified as a final judgment⁷ and therefore held that inheritance taxes should be imposed in accordance with the transfers under a compromise agreement when the agreement is incorporated into a consent judgment.⁸ This Note will explain the majority and minority views on imposing inheritance taxes; analyze the *Medford* decision under section 105-2(1); review the history of inheritance taxes in North Carolina concerning will compromise agreements; discuss the policy arguments behind both the minority and majority

1. 67 N.C. App. 543, 313 S.E.2d 593 (1984).

2. *Id.* at 546, 313 S.E.2d at 595. This places North Carolina in the minority of states. See 42 AM. JUR. 2D *Inheritance, Estate, And Gift Taxes* § 76 (1969) (discussing the majority and minority views on effect of compromise of will contest). A “caveat proceeding” is a proceeding undertaken in the proper courts to prevent (temporarily or provisionally) the proving of a will” BLACK’S LAW DICTIONARY 202 (5th ed. 1979).

3. See *Pulliam v. Thrash*, 245 N.C. 636, 639-40, 97 S.E.2d 253, 256 (1957) (citing Annot., 36 A.L.R. 2D 917 (1954)). See generally 42 AM. JUR. 2D, *supra* note 2, §§ 71, 76 (1969) (discussing the majority and minority views on taxation effect of compromise of will contest). The majority view also holds that transfers should be taxed according to intestate succession, rather than according to a compromise agreement, when decedent died intestate. *Id.* § 71. All further references in this Note to the majority tax according to the will view also apply to taxation according to intestacy.

4. The section reads:

A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

(1) When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State, or when the transfer is made pursuant to a final judgment entered in a proceeding to caveat a will executed by any person dying seized of the property while a resident of this State.

N.C. GEN. STAT. § 105-2 (1979 & Supp. 1984).

5. Act of April 1, 1974, ch. 1287, 1973 N.C. Sess. Laws 557 (codified at N.C. GEN. STAT. § 105-2(1) (1979 & Supp. 1984)).

6. N.C. GEN. STAT. § 105-2(1) (1979 & Supp. 1984). The section quoted was added by a 1974 amendment cited at note 5.

7. *Medford*, 67 N.C. App. at 545-46, 313 S.E.2d at 594-95.

8. *Id.* at 546, 313 S.E.2d at 595. The language of § 105-2(1) implies that a compromise agreement which is not incorporated into a final consent judgment will not qualify for taxation according to the compromise, but must be taxed according to the transfers specified by the will or by intestacy.

views; and briefly explain why the minority view, adopted by North Carolina, is the better view.

Two views exist regarding the correct method of taxing transfers from an estate when the will or intestate distribution has been contested and a compromise agreement between the heirs or devisees and the contestants has been consummated.⁹ The majority view holds that the tax should be imposed on transfers as provided in the will even though the compromise agreement may provide for a different distribution.¹⁰ Under this view a devisee would pay inheritance taxes on his total bequest under the will, even though he may not receive the entire bequest because of the compromise agreement. A contestant not named in the will would not pay any tax on the property he receives.¹¹ The minority view holds that the inheritance tax should be imposed on transfers made in accordance with the compromise agreement, thereby taxing a devisee, heir, or contestant only on the property he actually receives.¹² Because of these two views, the difference in inheritance taxes paid by each party to a will contest can vary substantially.¹³

In *Medford* plaintiff Bobby Lee Medford was executor and sole beneficiary of the estate of Mary Clemens under a 1978 will.¹⁴ After Medford probated this will, Robert McLendon instituted a caveat proceeding to probate a 1977 will, supposedly executed by Clemens, that made McLendon a devisee.¹⁵ Patrick Span and Claudia Span Johns, representing all of Clemens' heirs at law, intervened in the caveat proceeding.¹⁶ During the trial all parties executed a compromise agreement which provided that the 1978 will would be probated, but that the estate would be distributed in accordance with the terms of the agreement.¹⁷ The jury determined that the 1978 will was Clemens' last will and testament, and the trial court entered a consent judgment to that effect. The court ordered that the estate be distributed in accordance with the terms of the compromise agreement.¹⁸

As executor of the Clemens estate, Medford filed a North Carolina Inheri-

9. See generally 42 AM. JUR. 2D, *supra* note 2, § 76 (discussing both the majority and minority views on effect of compromise of will contest).

10. *Id.*

11. See, e.g., *Cochran's Ex'r & Trustee v. Commonwealth*, 241 Ky. 656, 661, 44 S.W.2d 603, 605 (1931).

12. *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 80, 172 N.W. 902, 903-04 (1919); 42 AM. JUR. 2D, *supra* note 2, § 76.

13. An heir or devisee would have to pay inheritance tax on his total bequest under the majority view; he would only pay inheritance tax on the part of the bequest he actually received under the minority view. Also, tax rates and exemption amounts for beneficiaries vary according to the closeness in kinship of the beneficiary and the decedent. See N.C. GEN. STAT. §§ 105-4, -5 (1979 & Supp. 1984). The majority, taxation according to the will view, can deny the advantages of such provisions to a contestant-beneficiary under a compromise agreement if he is closer in kin to the decedent than was the devisee.

14. *Medford*, 67 N.C. App. at 543, 313 S.E.2d at 593.

15. *Id.*

16. *Id.*

17. *Id.* The compromise agreement provided for a distribution as follows: fifty percent to Medford, twenty-eight percent to McLendon, and eleven percent each to Span and Johns. *Id.*

18. *Id.* at 543-44, 313 S.E.2d at 593.

tance Tax Return, computing the tax due based on the transfers under the consent judgment.¹⁹ Defendant Department of Revenue ignored the consent order, computing the estate's inheritance tax liability in accordance with the terms of the will and assessing Medford \$4,845.92 in additional taxes, penalties, and interest.²⁰ Medford paid the assessment, was denied a refund, and sued to recover the amount paid.²¹ In the resulting nonjury trial, the presiding judge ruled in favor of the Department of Revenue and concluded, as a matter of law, that Medford was required by section 105-2(1) to determine the inheritance tax in accordance with the terms of the will.²²

A unanimous court of appeals reversed, ruling that section 105-2(1) required Medford to compute the inheritance tax in accordance with the compromise agreement distributions contained in the consent judgment.²³ The Department of Revenue had contended that the 1957 case of *Pulliam v. Thrash*²⁴ was controlling.²⁵ In *Pulliam* the North Carolina Supreme Court had held that "the succession tax is computable in accordance with the terms of the will, unaffected by the compromise agreement" which had been incorporated into a consent judgment.²⁶ The *Medford* court, however, noted that *Pulliam* was decided prior to the amendment of section 105-2(1),²⁷ which added that a transfer is to be taxed "when the transfer is made pursuant to a final judgment entered in a proceeding to caveat a will."²⁸ The court found that the legislature, through this amendment, intended to change the *Pulliam* result and held that section 105-2(1) as amended clearly required that the inheritance tax be computed on transfers in accordance with the final judgment in a caveat proceeding.²⁹

The Department of Revenue also argued that the consent judgment was only a contract between the parties and did not constitute a "final judgment" as intended by section 105-2(1).³⁰ The court disagreed,³¹ noting that the North Carolina Supreme Court had held that:

Once the court adopts the agreement of the parties and sets it forth as a judgment of the court . . . the contractual character of the agreement is subsumed into the court ordered judgment. At that point the court and the parties are no longer dealing with a mere contract

19. *Id.* at 544, 313 S.E.2d at 594.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. 245 N.C. 636, 97 S.E.2d 253 (1957).

25. *Medford*, 67 N.C. App. at 545, 313 S.E.2d at 594.

26. *Pulliam*, 245 N.C. at 639, 97 S.E.2d at 256 (quoting Annot., 36 A.L.R. 2d 918 (1954)). "Succession tax" is merely a synonym for inheritance tax.

27. *Medford*, 67 N.C. App. at 545, 313 S.E.2d at 594.

28. N.C. GEN. STAT. § 105-2(1) (1979 & Supp. 1984).

29. *Medford*, 67 N.C. App. at 545, 313 S.E.2d at 594.

30. *Id.*

31. *Id.*

between the parties.³²

Therefore, the court held "that a consent judgment entered in a caveat proceeding is, absent any evidence of collusion, a final judgment for purposes of section 105-2(1)."³³ Accordingly, the court correctly held that the inheritance tax should have been computed according to the compromise agreement transfers instead of according to the will provisions.³⁴

Until 1937 North Carolina followed the majority rule of computing inheritance taxes according to the distributions made under the will or by intestate succession.³⁵ The inheritance tax statute was then amended to provide expressly that when an estate was distributed in accordance with a compromise agreement, inheritance taxes should be computed according to that agreement.³⁶ This change, however, did not last long. In 1941 the legislature again amended the inheritance tax statute, deleting the provision dealing with compromise agreements and realigning North Carolina with the majority view of taxation according to the will.³⁷ When the statute was amended to its present form in 1974, North Carolina rejoined the minority view of taxation according to the compromise agreement.³⁸

Although the North Carolina statute governing inheritance taxes has shifted between the majority and minority views, all pre-*Medford* cases concerning inheritance taxation in North Carolina were decided under the statute when it reflected the majority view. These cases, therefore, supported taxation according to the will.³⁹

32. *Id.* at 545-46, 313 S.E.2d at 594-95 (quoting *Henderson v. Henderson*, 307 N.C. 401, 407-08, 298 S.E.2d 345, 350 (1983)).

33. *Id.* at 546, 313 S.E.2d at 595.

34. *Id.*

35. *See, e.g.*, Act of May 9, 1935, ch. 371, § 1, 1935 N.C. Sess. Laws 429, 429; Act of March 10, 1925, ch. 101, § 6, 1925 N.C. Sess. Laws 116, 119; Act of March 9, 1915, ch. 285, § 6, 1915 N.C. Sess. Laws 355, 357; Act of March 15, 1901, ch. 9, § 12, 1901 N.C. Sess. Laws 116, 123. Until 1939 North Carolina's revenue act had to be renewed every two years. The statutes cited are examples of the inheritance tax statute during this period.

36. Act of March 13, 1937, ch. 127, 1937 N.C. Sess. Laws 170. This change reflected the minority view. *See supra* notes 9-13 and accompanying text.

37. Act of Feb. 28, 1941, ch. 50, 1941 N.C. Sess. Laws 66.

38. Act of Apr. 11, 1974, ch. 1287, 1973 N.C. Sess. Laws 557 (codified at N.C. GEN. STAT. § 105-2(1) (1979 & Supp. 1984)).

39. *See, e.g.*, *Pulliam v. Thrash*, 245 N.C. 636, 97 S.E.2d 253 (1957); *Bailey v. McLain*, 215 N.C. 150, 1 S.E.2d 372 (1939); *Greene v. Lynch*, 51 N.C. App. 665, 277 S.E.2d 454 (1981); *In re McCoy*, 39 N.C. App. 52, 249 S.E.2d 473 (1978), *disc. rev. denied*, 296 N.C. 585, 254 S.E.2d 36 (1979). In *McCoy*, which was decided four years after § 105-2(1) was amended, the court had to apply the statute as it appeared in 1973, the year of the decedent's death. Its holding therefore follows the majority view.

Pulliam was the first case in which the North Carolina Supreme Court explicitly recognized the majority view. The *Pulliam* court held that an executor must compute inheritance taxes according to the distributions in the will, basing its decision on the 1957 version of § 105-2(1). *Pulliam*, 245 N.C. at 639, 97 S.E.2d at 255-56. Section 105-2 did not then include a provision regarding caveat proceedings or compromise agreements. The court stated that:

Our statutes impose inheritance taxes upon transfers of property by will, by intestate laws or in contemplation of death. . . . No provision [in section 105-2] is made for the assessment of inheritance taxes on a different basis, because, pursuant to a contract made by the devisees after testator's death, the ultimate disposition differs in whole or in part from that prescribed by the will.

North Carolina's recognition of the majority view, however, was expressly rejected in *Medford*.⁴⁰ The *Medford* court found that the North Carolina legislature, through its 1974 amendment of section 105-2(1), had adopted the minority view—taxation according to the compromise agreement.⁴¹ The court of appeals' interpretation of this statute is consistent with the statutory language and, therefore, is correct.

The power to levy an inheritance tax and to specify how the tax should be computed is entirely within the province of the general assembly.⁴² The North Carolina General Assembly, by amending section 105-2(1) in 1974, has provided that North Carolina should follow the minority rule and tax transfers according to their distribution in a compromise agreement if the agreement is incorporated into a final judgment in a caveat proceeding.⁴³ Although it is clear that the legislature has amended section 105-2(1) to adopt the minority rule, the reasons for the legislature's reversal are unclear. Because no legislative history exists in North Carolina to identify the supporting arguments behind the amendment, an examination of the public policies supporting both the majority and minority views clarifies the North Carolina General Assembly's change in position.⁴⁴

Four major rationales support the majority, taxation according to the will view. First, some jurisdictions reason that the transfer to be taxed occurs on the date of the decedent's death, and the tax is fixed as of that time.⁴⁵ Any subse-

Id.

40. *Medford*, 67 N.C. App. at 546, 313 S.E.2d at 595.

41. *Id.* at 545, 313 S.E.2d at 594.

42. See *In re Morris' Estate*, 138 N.C. 259, 262-63, 50 S.E. 682, 683 (1905). The *Morris* court stated that:

[T]he right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law The authority which confers such rights may impose conditions upon them, or take them away entirely. Accordingly, it is held that the states may tax the privilege, grant exemptions, discriminate between relatives and between these and strangers, and are not precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation. Neither is it necessary to the validity of the tax that the state Constitution should contain a specific delegation of power authorizing the Legislature to impose such taxation. The power of the Legislature over the subject of taxation is absolute unless restricted by the Constitution of the state or nation.

Id.

43. *Medford*, 67 N.C. App. at 545, 313 S.E.2d at 594.

44. Although each state's statute governing inheritance taxes is different, the public policy reasoning behind these statutes, examined in existing case law, should be applicable and persuasive irrespective of the differences in the statutes' wording. Also, whether the majority or minority view will benefit the state or the taxpayer depends upon the facts peculiar to each situation; neither view consistently benefits one party more than the other.

The federal government's taxation on transfers at death is an estate tax based on a decedent's total estate, not an inheritance tax upon particular inheritances. Therefore, the federal government's attitude towards the majority and minority view will not be examined in detail. The vast majority of cases dealing with the federal estate tax and compromise agreements deal with charity-legatees who agree to pay a portion of the bequest to decedent's heirs at law in return for the heir's withdrawal of a will contest suit. The general rule in these cases favors the minority view and taxes the amount received by the heirs, while the charity's share is nontaxable. Annot., 36 A.L.R. 2d 917, 920-21 (1954). Two earlier cases, however, did involve a federal inheritance tax and taxed the distributions made in accordance with the compromise agreements. See *Page v. Rives*, 18 F. Cas. 990 (C.C.W.D. Va. 1877) (No. 10,666); *McCoy v. Gill*, 156 F. 985 (C.C.D. Mass. 1907).

45. See *MacKenzie v. Wright*, 31 Ariz. 272, 252 P. 521 (1927); *People v. Upson*, 338 Ill. 145, 170 N.E. 276 (1930); *Indiana Dept. of State Revenue, Inheritance Tax Div. v. Kitchin*, 119 Ind.

quent compromise agreement is merely a contract by which an heir or devisee assigns a part of his interest in the decedent's estate to the contestant.⁴⁶ Second, since the will is an essential link in the chain of title⁴⁷ and transfers in the will take effect at the testator's death, seisin immediately vests in the devisee upon testator's death. If the taxable transfer was made pursuant to a later compromise agreement, the seisin would not be vested in anyone from the time of testator's death until the compromise agreement became effective, violating the doctrine that someone must always possess the seisin.⁴⁸

The third rationale supporting the taxation according to the will view is that it, unlike the minority view, offers no opportunity for tax avoidance.⁴⁹ The minority view would allow a contestant and an heir or devisee to arrange collusively the property distribution so as to take advantage of favorable tax rates and exemptions.⁵⁰ This manipulation of taxes would, according to the majority position, wrongfully deprive the state of inheritance taxes.⁵¹

A fourth rationale in favor of the majority view is that statutory provisions allowing taxation according to the compromise agreement are unnecessary because the same result can be reached between the compromising parties by apportioning the total inheritance tax to be paid in the compromise agreement.⁵² The parties can specify in a tax apportionment clause that each will pay a certain percentage of the tax due, or apportion the taxes consistently with the property each receives from the estate.⁵³ Thus, the majority view can provide an equitable allocation of taxes according to the property actually received by a beneficiary while still complying with the doctrinal requirement that inheritance taxes

App. 422, 86 N.E.2d 96 (1949) (en banc); *Cochran's Ex'r and Trustee v. Commonwealth*, 241 Ky. 656, 44 S.W.2d 603 (1931); *Baxter v. Stevens*, 209 Mass. 459, 95 N.E. 854 (1911); *In re Cook's Estate*, 187 N.Y. 253, 79 N.E. 991 (1907).

46. *Indiana Dept. of State Revenue, Inheritance Tax Div. v. Kitchin*, 119 Ind. App. 422, 424, 86 N.E.2d 96, 97 (1949) (en banc); *Cochran's Ex'r and Trustee v. Commonwealth*, 241 Ky. 656, 659, 44 S.W.2d 603, 604 (1931).

47. *Borish v. Zink*, 2 N.J. Super. 42, 44, 64 A.2d 461, 461 (1949).

48. This argument concerning seisin seems less significant today because of the reduced emphasis on seisin in modern property law.

49. See Note, *A Survey of Statutory Changes in North Carolina in 1941*, 19 N.C.L. REV. 435, 527 (1941).

50. See *People v. Union Trust Co.*, 255 Ill. 168, 99 N.E. 377 (1912); *Hart v. Mercantile Trust Co.*, 180 Md. 218, 23 A.2d 682 (1942); *In re Gartside's Estate*, 357 Mo. 181, 207 S.W.2d 273 (1947); *In re Kierstead's Estate*, 122 Neb. 694, 241 N.W. 274 (1932); *In re Pepper's Estate*, 159 Pa. 508, 28 A. 353 (1894). Many states following the minority view, however, require that the compromise agreement be entered into in good faith and for purposes other than tax avoidance. These states guard against tax avoidance compromises through the use of fraud statutes and by requiring that compromise agreements be incorporated into a court judgment or decree, thereby providing judicial review of the agreement. See *Hart v. Mercantile Trust Co.*, 180 Md. 218, 222, 23 A.2d 682, 684 (1942); *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 80-81, 172 N.W. 902, 904 (1919); *In re Estate of Kierstead*, 122 Neb. 694, 703, 241 N.W. 274, 278 (1932).

51. *Hart v. Mercantile Trust Co.*, 180 Md. 218, 222, 23 A.2d 682, 684 (1932).

52. See *Brown v. McLoughlin*, 287 Mass. 15, 190 N.E. 795 (1934); *Pulliam v. Thrash*, 245 N.C. 636, 97 S.E.2d 253 (1957).

53. *Cohn v. Cohn*, 20 Cal. 2d 65, 68, 123 P.2d 833, 835 (1942); *Pulliam v. Thrash*, 245 N.C. 636, 640, 97 S.E.2d 253, 256 (1957); *In re Estate of Rendsland*, 92 Wash. 2d 185, 190, 594 P.2d 1346, 1349 (1979). See generally Annot., 70 A.L.R. 3d 691, 717 (1954) (discussing tax apportionment provisions in will compromise agreements).

tax transfers at decedent's death.⁵⁴

The minority, taxation according to the compromise agreement view also possesses significant public policy support. Five rationales have been advanced in support of the minority view. First, taxation according to the compromise provides a more equitable tax allocation.⁵⁵ Under the minority view, only the property actually received by a beneficiary under the compromise agreement is taxed.⁵⁶ If a compromise agreement significantly alters the transfers mentioned in a will, basing the inheritance tax due on the will provisions would impose an inequitable tax burden on the devisees.⁵⁷

Second, taxation according to the compromise agreement more closely follows the legislative intent implicit in inheritance taxes—to tax the transfer of the decedent's property.⁵⁸ Inheritance taxes do not tax a decedent's estate, but rather tax the receipt of property from that estate.⁵⁹ A third rationale supporting the minority view is based on the relationship between a testator and the contestant of his will.⁶⁰ To have standing to contest, a party must have an interest that would be adversely affected by probate of the contested will.⁶¹ Thus, an interested party could include heirs at law and beneficiaries under a prior will.⁶² Because of this interest requirement many courts have held that any property transferred to a contestant as a result of a compromise agreement should be treated as having passed under the laws concerning descent and distribution to an heir of the same relationship as the contestant was to the testator and taxed accordingly.⁶³ This result seemingly would create a part-will part-intestacy dis-

54. Under the majority view, however, the tax would be assessed against the beneficiaries under the will. See *In re Cook's Estate*, 187 N.Y. 253, 259-60, 79 N.E. 991, 993 (1907). Therefore, the majority view would ignore any favorable tax rates or exemptions a contestant close in kin to the decedent might possess that the minority view would allow. See *infra* note 63 and accompanying text.

55. See *In re Estate of Thorson*, 150 Minn. 464, 185 N.W. 508 (1921); *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 172 N.W. 902 (1919); *In re Estate of Gartside*, 357 Mo. 181, 207 S.W.2d 273 (1947); *In re Estate of Kierstead*, 122 Neb. 694, 241 N.W. 274 (1932); *In re Pepper's Estate*, 159 Pa. 508, 28 A. 353 (1894).

56. See *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 80, 172 N.W. 902, 903 (1919).

57. See *In re Estate of Gartside*, 357 Mo. 181, 185, 207 S.W.2d 273, 275 (1947); *Pepper's Estate*, 159 Pa. 508, 510, 28 A. 353, 353 (1894).

58. See *Hart v. Mercantile Trust Co.*, 180 Md. 218, 23 A.2d 682 (1942); *In re Estate of Thorson*, 150 Minn. 464, 185 N.W. 508 (1921); *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 172 N.W. 902 (1919); *In re Estate of Gartside*, 357 Mo. 181, 207 S.W.2d 273 (1947).

59. *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 80, 172 N.W. 902, 903 (1919); *In re Morris' Estate*, 138 N.C. 259, 262, 50 S.E. 682, 683 (1905). Although transfers from an estate theoretically are taxed as of the time of decedent's death and compromise agreements are entered into after a decedent's death, the legislative intent of inheritance tax law overrides this discrepancy and demands that the tax be computed on the property as it actually is distributed to the beneficiaries. See *State ex rel. Hilton*, 143 Minn. at 80, 172 N.W. at 903.

60. See *People ex rel. Attorney Gen. v. Rice*, 40 Colo. 508, 91 P. 33 (1907); *Taylor v. State*, 40 Ga. App. 295, 149 S.E. 321 (1929); *Hart v. Mercantile Trust Co.*, 180 Md. 218, 23 A.2d 682 (1942); *In re Estate of Gartside*, 357 Mo. 181, 207 S.W.2d 273 (1947); *In re Estate of Kierstead*, 122 Neb. 694, 241 N.W. 274 (1932); *In re Hastings' Estate*, 183 Misc. 517, 49 N.Y.S.2d 524 (1944).

61. *In re Will of Calhoun*, 47 N.C. App. 472, 267 S.E.2d 385, *disc. rev. denied*, 301 N.C. 90, 273 S.E.2d 311 (1980).

62. *In re Estate of Gartside*, 357 Mo. 181, 184, 207 S.W.2d 273, 275 (1947); *In re Will of Belvin*, 261 N.C. 275, 276, 134 S.E.2d 225, 226 (1964).

63. *Taylor v. State*, 40 Ga. App. 295, 295, 149 S.E. 321, 321 (1929); *Hart v. Mercantile Trust Co.*, 180 Md. 218, 222, 23 A.2d 682, 684 (1942); *In re Estate of Gartside*, 357 Mo. 181, 184, 207

tribution and would allow the transfers to be taxed according to the compromise agreement while still meeting the doctrinal requirement that transfers be taxed at the testator's death.⁶⁴ The theory of partial renunciation also supports the minority view.⁶⁵ Under this theory, when a beneficiary renounces a bequest or legacy he is not taxed on the attempted transfer; the property passes through intestacy and is taxed to the receiving heirs.⁶⁶ Likewise, a devisee under a will should not be taxed on his whole bequest if, as a result of a compromise agreement, he does not receive the whole bequest; the amount passing under the compromise agreement should be treated as a partial renunciation by the devisee and should be taxed to the recipients as if it were passing through intestacy.⁶⁷

The fourth public policy rationale in favor of the minority view is that taxation according to the compromise agreement encourages the settlement of will-contest litigation.⁶⁸ Because under the minority view a devisee or legatee must pay inheritance taxes only on the amount received and not on the total bequest or intestate share, a devisee or legatee should be more willing to compromise and settle a will-contest suit.⁶⁹

The fifth rationale favoring the minority view deals with the requirement, imposed by several states, that the compromise agreement be incorporated into a court decree or judgment for the minority rule to apply.⁷⁰ The possibility of an invalid will may create uncertainty as to who is entitled to property passing through a testator's estate.⁷¹ Therefore, the logical result in will-contest suits would be to hold that no actual transfer of the estate assets occurs until a court

S.W.2d 273, 275 (1947). Treating the transfers under a compromise agreement as having passed under the laws of descent and distribution would also meet the majority view's requirement that the transfer to be taxed occur at the decedent's death.

64. See *supra* notes 45-46 and accompanying text.

65. See *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 81-82, 172 N.W. 902, 904 (1919); *In re Estate of Kierstead*, 122 Neb. 694, 704, 241 N.W. 274, 278 (1932).

66. *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 81-82, 172 N.W. 902, 904 (1919); *In re Estate of Kierstead*, 122 Neb. 694, 704, 241 N.W. 274, 278 (1932).

67. *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 81-82, 172 N.W. 902, 904 (1919); *In re Estate of Kierstead*, 122 Neb. 694, 704, 241 N.W. 274, 278 (1932). Of course, under partial renunciation the property renounced would pass through intestacy to the heirs at law as a class, not to a specific "heir" as it would under a compromise agreement.

68. See *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 81, 172 N.W. 902, 904 (1919); *In re Estate of Kierstead*, 122 Neb. 694, 704, 241 N.W. 274, 278 (1932); Note, *Taxation—Effect of North Carolina Inheritance Tax on a Will Compromise Agreement*, 36 N.C.L. REV. 236, 238 (1958). A danger exists, however, that by encouraging settlements the minority view may also encourage a devisee and contestant to avoid inheritance taxes by apportioning the property in such a manner as to maximize the effect of favorable tax rates and exemptions available to parties close in kin to decedent. See *supra* notes 49-51 and accompanying text. By encouraging settlements, the minority view also may tempt a devisee and contestant to withhold evidence concerning the invalidity of a will in order to facilitate an agreement between themselves, possibly excluding rightful heirs. See *Bailey v. McLain*, 215 N.C. 150, 158-59, 1 S.E.2d 372, 377 (1939) (Clarkson, J., dissenting). Both of these dangers, however, can be minimized by requiring that the compromise agreement be incorporated into a judgment, thus subjecting it to judicial review. See *infra* notes 70-75 and accompanying text.

69. *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 81, 172 N.W. 902, 904 (1919).

70. See *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 172 N.W. 902 (1919); *In re Estate of Kierstead*, 122 Neb. 694, 241 N.W. 274 (1932); *Medford v. Lynch*, 67 N.C. App. 543, 313 S.E.2d 593 (1984).

71. *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 80, 172 N.W. 902, 903-04 (1919).

enters a final decree or judgment providing for a valid distribution.⁷² Any such decree or judgment would be treated as having occurred at decedent's death and would be binding on all, unless a compromise agreement had been entered into collusively.⁷³ The requirement that a compromise agreement be incorporated into a final decree or judgment provides the court an opportunity to evaluate whether the agreement was made collusively or solely to avoid taxes, rather than to settle a bona fide controversy.⁷⁴ Therefore, to require incorporation of a compromise agreement into a judgment or decree refutes criticism that the minority view allows taxation of transfers made after the decedent's death and encourages tax avoidance.⁷⁵

The minority view is the better of the two approaches. By taxing a beneficiary only on property he actually receives, the minority view provides a more equitable result.⁷⁶ Under this view, a devisee would not suffer any disproportionate inheritance tax hardship when he surrenders a portion of his bequest to a will contestant in a compromise agreement. The majority view would force the devisee to pay the inheritance tax on his total bequest under the will.

The minority view fulfills the legislative intent underlying inheritance taxes—to tax the beneficiary of a transfer of estate property only on the amount he actually receives.⁷⁷ Since the North Carolina Supreme Court has held that “[a] law imposing an inheritance tax is to be liberally construed to effectuate the intention of the Legislature,”⁷⁸ this result should be of primary importance. Therefore, the *Medford* court was correct in its interpretation of section 105-2(1) and its recognition of the minority view in North Carolina. The minority view also best implements the testator's intent. A testator would not wish for an intended devisee to pay inheritance taxes on property the devisee did not receive while an intentionally omitted contestant to the will pays no taxes on property received pursuant to a compromise agreement.

The criticisms of the minority view are unfounded. The principle criticism is that the minority rule does not comply with the theoretical requirement that

72. *Id.* The court in *State ex rel. Hilton v. Probate Court*, 143 Minn. 77, 80, 172 N.W. 902, 903-04 (1919) stated:

Where a decedent has attempted to transfer his estate by a purported will, there is frequently an uncertainty as to the persons who eventually will participate in the estate, and the amount or value of the portion to be received; and there is also a possibility that the transfer may after all be in virtue of the intestate law, and not through the will. The will may turn out not properly executed, or invalid because of lack of testamentary capacity or the exertion of undue influence. Therefore, in case of a contest between the beneficiaries named in the will, or where the instrument is attacked by one claiming under the intestate law, the practical proposition is that there is no actual transfer of any portion of the estate until the final decree of distribution is made, or until a court of competent jurisdiction construes or determines the issue between the claimants. The decree so finally entered relates back, and, of course, makes the transfer effectual as of the date of death.

73. *Id.*

74. *Id.*; Appellant's Brief at 7, *Medford*.

75. For a discussion of the majority view's criticism of these points, see *supra* notes 45-46 and 49-51 and accompanying text.

76. See *supra* notes 55-57 and accompanying text.

77. See *supra* notes 58-59 and accompanying text.

78. *Watkins v. Shaw*, 234 N.C. 96, 98, 65 S.E.2d 881, 883 (1951).

inheritance taxes be levied on transfers at the time of testator's death.⁷⁹ The minority view, however, counters this criticism by implying that the property the contestant received passes under the statutes of descent and distribution and relates back to the date of the testator's death under the compromise agreement.⁸⁰ This construction is supported by the close relationship that usually exists between the contestant and the testator.⁸¹ Therefore, the minority view satisfies the requirement that transfers be taxed at the date of testator's death.

By interpreting section 105-2(1) to tax inheritances according to the distributions in a compromise agreement when that agreement is incorporated into a final judgment in a caveat proceeding, the *Medford* court has given judicial recognition to the minority view of taxation according to the compromise agreement in North Carolina. This decision provides North Carolina with an equitable inheritance tax law that best effectuates both the legislative intent of the inheritance tax statute and the decedent's intent.

BRUCE ARCHER DENNING

79. See *supra* notes 45-46 and accompanying text.

80. See *supra* notes 60-67 and accompanying text.

81. See cases cited *supra* note 60.

North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry

The past few decades have witnessed what appropriately may be termed a revolution in the telecommunications industry in the United States. The advent of new technologies and changes in the tastes of the consuming public have resulted in an unprecedented demand for the wares of the telecommunications industry. Epitomizing this phenomenon is the cable television industry,¹ which has blossomed from a status of virtual nonexistence in the early 1950s to a multibillion dollar contemporary enterprise whose services are used by a rapidly increasing portion of the United States citizenry.²

Cable television's commercial success story has been tainted, however, by an increase in the theft of cable services without payment of a fee to the cable companies.³ The incidence of cable service theft transcends the basic problem of individual homeowners surreptitiously attaching their television sets to the cables; rather, an entire industry has sprouted that produces and markets devices designed to enable a viewer to receive all of the premium programming of a cable company without paying for it.⁴ Cable companies, unlike traditional broadcasters,⁵ are supported primarily by the fees paid by subscribing customers in return for cable services.⁶ It has been estimated, however, that "pirates" are "stealing . . . 900 million dollars a year from cable and pay-TV providers."⁷

1. For a description of the cable television industry, see *infra* notes 15-20 and accompanying text.

2. See, e.g., Wheeler, *Cable Television: Where It's Been, Where It's Headed*, 56 FLA. B.J. 228, 228-29 (1982) ("Today, approximately 4,600 [cable] systems serve 23 million TV homes, and the number of cable subscribers is growing at a rate of more than 250,000 per month. It is expected that by 1985 the cable industry will have wired more than 40 percent of American homes."); Comment, *Pay Television Legal Protections Against Interception: Backyard Earth Stations Amplify Current Imperfections*, 87 DICK. L. REV. 95, 99 n.22 (1982) (citing figures indicating that in 1980 44% of all American television households had access to cable and of that 44%, 50% of the homes subscribed to cable).

3. See, e.g., 2 C. FERRIS, F. LLOYD & T. CASEY, *CABLE TELEVISION LAW* § 26.04 (1984); Comment, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 U. CIN. L. REV. 362, 362 (1981) [hereinafter cited as Comment, *Decoding Section 605*]; Comment, *Pay Television Piracy: Does Section 605 of the Federal Communications Act of 1934 Prohibit Signal Piracy—And Should It?*, 10 WM. MITCHELL L. REV. 531, 531 (1984) [hereinafter cited as Comment, *Pay Television Piracy*].

4. See, e.g., Comment, *Pay Television and Section 605 of the Communications Act of 1934: A Need for Congressional Action*, 38 WASH. & LEE L. REV. 1249, 1249-50 (1981) [hereinafter cited as Comment, *Pay Television and Section 605*]; Comment, *Pay Television Piracy*, *supra* note 3, at 531.

Without a decoder, only basic cable service can be received. See *infra* notes 18-20 and accompanying text.

5. See Comment, *Pay Television and Section 605*, *supra* note 4, at 1249-50.

6. See, e.g., Comment, *Decoding Section 605*, *supra* note 3, at 362; Comment, *Pay Television and Section 605*, *supra* note 4, at 1249-50.

7. 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 26.04.

Considering the long-term effects on the willingness of currently paying customers to continue paying, the problem of cable piracy is even greater than the magnitude of immediate revenue losses indicates. Knowledge that many of their friends and relatives are successfully receiving services and avoiding payment for them will engender apathy and an incentive not to pay in those who ordinarily would pay the cable fees.

Also, theft of cable service indirectly results in a loss of revenues to state and local governments

The North Carolina General Assembly responded to the behests of the cable industry and in 1978 enacted a statute devoted solely to combatting cable service theft.⁸ The 1978 statute was completely rewritten by the general assembly in 1984.⁹ The new statute strengthens the criminal penalties against those who obtain cable services illegally and those who sell or distribute devices designed to assist purchasers in such illegal activity.¹⁰ In addition, cable companies now are permitted to instigate civil actions for injunctive and monetary relief against persons who previously were subject only to criminal prosecution under the statute.¹¹

This Note analyzes North Carolina's new theft of cable service statute by comparing and contrasting it with its predecessor and with similar statutes in other states, by addressing its potential constitutional infirmities, by assessing some of its limitations and inadequacies, and by exploring the possibility of overlapping federal causes of action. The Note also discusses whether federal statutes concerning theft of cable television service preempt North Carolina's statute.

It is imperative for analytical purposes to understand the primary distinctions between the cable television industry and other similar industries that are plagued by many of the same problems. Currently, four basic methods exist for distributing pay television.¹² Three of the systems use the airwaves to deliver their signals to the home. With two of the over-the-air systems, multipoint distribution service (MDS) and direct broadcast satellites (DBS), the coded signal is received by an antenna and unscrambled by a decoding device located between the antenna and the television.¹³ The other over-the-air pay TV system, subscription television (STV), transmits its scrambled signals using the facilities of

because state and local taxes and fees levied against cable companies generally are based on the gross receipts of the cable companies. These revenues are reduced to the extent that thieves would become paying customers if they were prevented from stealing cable service. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 151 (E.D.N.Y. 1984).

8. See Act of June 16, 1978, ch. 1185, 1977 N.C. Sess. Laws 86 (codified at N.C. GEN. STAT. § 14-118.5 (1981)). The 1978 statute superseded, for purposes of cable television, a theft of service statute applicable to a variety of telecommunications services. See Act of May 22, 1973, ch. 648, 1973 N.C. Sess. Laws 962 (codified at N.C. GEN. STAT. § 14-155 (Supp. 1977)). Mr. John Jerose, a representative of the cable television industry, testified before a House committee regarding the impending threat to the industry posed by service thieves and the inadequacy of the 1983 Act in dealing with the problem. See *Minutes, North Carolina House Committee on Judiciary II*, at 1 (June 8, 1978).

A number of states have passed legislation during the past few years in an effort to deter the activity of cable service thieves. See, e.g., *Ciminelli v. Cablevision*, 583 F. Supp. 144, 158 (E.D.N.Y. 1984) (providing citations for state theft of cable service statutes); 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.03[1] (noting that approximately 25 states have cable theft statutes).

9. See Act of July 5, 1984, ch. 1088, 1984 N.C. Sess. Laws 264 (codified at N.C. GEN. STAT. § 14-118.5 (Supp. 1984)).

10. See N.C. GEN. STAT. § 14-118.5(a), (b) (Supp. 1984); *infra* notes 30-35 and accompanying text.

11. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984); *infra* notes 41-53 and accompanying text.

12. See Comment, *supra* note 2, at 98. The four pay television systems are multipoint distribution service (MDS), direct broadcast satellites (DBS), subscription television (STV), and cable television. *Id.*

13. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶¶ 19.02, 20.02; Comment, *supra* note 2, at 101; Comment, *Subscription Television Decoders: Can California Prohibit Their Manufac-*

commercial television stations, and thus only a special decoder is required for interception.¹⁴ The final pay television delivery system, cable television,¹⁵ is transmitted to the home through wires or coaxial cables.¹⁶ The primary subject

ture and Sale?, 22 SANTA CLARA L. REV. 839, 843 (1982) [hereinafter cited as Comment, *Subscription Television*].

MDS signals are sent from the MDS operator to a satellite which transmits the signals to a distributor. A microwave transmitter at the distributor's facilities sends the signals to the homes of individual subscribers. The MDS signal is generally only intelligible on a conventional television set if the viewer has a special "directive" antenna to intercept the signal and a decoder to decipher and transform it. See Comment, *supra* note 2, at 100; Comment, *Subscription Television*, *supra*, at 843 (special antenna required because MDS signals travel outside the spectrum of the standard television broadcast signal).

The FCC recently approved a multiple channel capacity for MDS systems, but MDS systems are still much more limited than cable television systems in channel capacity. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, §§ 19.01, 19.09. As a result of its multiple channel capacity, comparable reception costs, and lower capital investment requirements, MDS should compete well with the other pay television delivery systems. See *id.* § 19.09.

DBS is the newest and least developed pay television system. See Comment, *supra* note 2, at 101; Comment, *Subscription Television*, *supra*, at 843. The DBS system is predicated on a satellite network concept. "[T]he [DBS] system will transmit from four orbiting satellites, one serving each time zone The satellite signal will be picked up by a dish-shaped antenna . . . [that] must be properly aligned and focused in the direction of a particular satellite." *Id.* One of the small antennas must be located at each subscriber's home. See Comment, *supra* note 2, at 101. It has been estimated that the DBS antenna will be mass-produced and sold for approximately \$200, putting it within the financial reach of private homeowners. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 20.02 n.4.

The prospects for commercial success for DBS are good. DBS has multichannel capacity, see 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 20.02, and it is superior to the other pay television technologies because of its more concentrated signal, which results in clearer reception. See Comment, *supra* note 2, at 101.

14. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 18.02.

STV is the only pay TV service that operates in the "standard broadcast frequency spectrum." Comment, *Subscription Television*, *supra* note 13, at 839. "The [STV] signals are receivable on standard television sets equipped for ultra high frequencies (UHF), but are encoded so that only subscribers whose televisions are equipped with decoding devices receive a comprehensible message." Comment, *Decoding Section 605*, *supra* note 3, at 362. The STV companies rent the decoder devices to paying customers. See Comment, *supra* note 2, at 101. STV systems do not use satellites. *Id.*

STV is at a competitive disadvantage because it is limited to a single channel capacity of pay programming, and consequently STV's commercial success has begun to wane in recent years when contrasted with the other pay TV technologies. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 18.05 (decline of STV attributed primarily to multichannel capabilities of competitors).

15. See Comment, *Subscription Television*, *supra* note 13, at 841-44.

16. Every cable television system has one or more antennas located on high ground to pick up signals to be sent to the "head-end" for processing. See Wheeler, *supra* note 2, at 229. One antenna is used "to receive local over the air broadcast signals. Other antennas pick up distant television station or specialized cable network signals transmitted from microwave relay stations or communications satellites." 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 5.02. The "head-end" is a processing center that receives the signals from the antenna, amplifies them for "maximum strength and clarity," and then converts them into cable television frequencies for transmission over the cable system. See, e.g., *id.*; Donaldson, *Minnesota's Approach to the Regulation of Cable Television*, 10 WM. MITCHELL L. REV. 413, 414 n.4 (1984).

A network of cables connects each receiver to the "head-end" or source of the signal. A "trunk" line conducts the signals from the head-end through major streets or thoroughfares. Those signals then travel through smaller "feeder" lines into individual homes. Ultimately, each subscriber has a separate line to the cable.

Stern, *The Evolution of Cable Television Regulation: A Proposal for the Future*, 21 URB. L. ANN. 179, 181-83 (1981); see also 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, §§ 5.02-5.03 (providing an excellent description of the cable television system and a synopsis of the historical development of cable television); Donaldson, *supra*, at 414 n.4 (discussing the components of a cable television system).

of this Note is cable television.¹⁷

All cable television subscribers pay a minimum periodic fee which entitles them to receive basic service.¹⁸ In addition, most cable television operators offer optional channels and premium services for an additional fee; in return for payment of the fee, subscribers receive one or more mechanical devices that enable reception of the additional broadcasts.¹⁹ Theft of cable television service may be theft of basic service, theft of premium service, or both.²⁰

While the terminology and designations employed above are the ones most commonly used in discussing the pay television industry, some commentators use the phrase "cable television" generically to refer collectively to all the pay television technologies.²¹ For purposes of analyzing the North Carolina statute, it is important to ascertain the meaning attributed to "cable television system" by the general assembly. Although the 1984 theft of cable service statute does not expressly define "cable television system," a complete definition is found in North Carolina General Statutes section 160A-319.

"[C]able television system" means any system or facility that, by means of a master antenna and wires or cables, or by wires or cables alone, receives, amplifies, modifies, transmits, or distributes any television, radio, or electronic signal, audio or video or both, to subscribing

17. In its early years, cable television was referred to as community antenna television (CATV) because of its initial development to provide television service to small communities that were unable to receive ordinary broadcast signals. See, e.g., Comment, *Pay Television: The Pendulum Swings Toward Deregulation*, 18 WASHBURN L.J. 86, 86 n.1 (1978).

18. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 148 (E.D.N.Y. 1984).

"[C]able companies offer, as a minimum level of service, what is referred to as basic service. While the content of basic service varies from one cable company to another, it generally consists of local broadcast television signals, and local government and public access programming." *Id.*

19. See *id.*; Comment, *supra* note 2, at 99-100; Comment, *supra* note 17, at 86 n.1.

To receive the premium cable services, viewers usually must connect a converter and a decoder to their television sets. A converter increases the channel capacity of the television set, and a decoder unscrambles the premium service signals so that they will be intelligible. Cable companies provide these devices to paying subscribers. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 148 (E.D.N.Y. 1984); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 378 (N.D. Ohio 1983); Comment, *supra* note 17, at 86 n.1. "These pay services offer programs and features not otherwise available to television viewers, such as first-run movies, special entertainment programs, boxing and other programs." *Ciminelli v. Cablevision*, 583 F. Supp. 144, 148 (E.D.N.Y. 1984).

20. North Carolina's theft of cable service statute is broad enough to encompass both types of theft. See N.C. GEN. STAT. § 14-118.5(a), (b) (Supp. 1984).

Theft of basic service occurs when a homeowner attaches a cable from his home to the system's trunk line or to the feeder line of a neighbor or when a homeowner who at some time in the past has received cable service and has a cable attached to his home that was installed by the cable company reconnects his television set to the cable television wire. Premium service is stolen by procuring "black-market" converters and decoders to attach to the cable wire inside the home. For a discussion of the various methods of stealing cable television service, see H.R. REP. NO. 934, 98th Cong., 2d Sess. 83 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4655, 4720; 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 26.01; Comment, *Electronic Piracy: Can the Cable Television Industry Prevent Unauthorized Interception?*, 13 ST. MARY'S L.J. 587, 592 (1982).

21. See Comment, *supra* note 20, at 587 n.1. ("[C]able television is any television service that is provided for a fee and interception of that service without compensation deprives the originator of a source of income."). One commentator referred to STV as "cable television" but acknowledged that this usage of the term was "actually a misnomer because STV is devoid of cable in its carriage of the television signal." Note, *National Subscription Television v. S & H TV: The Problem of Unauthorized Interception of Subscription Television—Are the Legal Airwaves Unscrambled?*, 9 PEPERDINE L. REV. 641, 641 n. (1981).

members of the public for compensation.²²

The statutory requirement that "wires or cables" be an integral part of the system automatically excludes the three over-the-air methods²³ for distributing pay television signals. There being no indication in the theft of cable service statute that a different definition is to apply, this Note will presume that the narrow, traditional definition of "cable television" expresses the intent of the general assembly and, therefore, that the theft statute does not apply to any over-the-air pay television signals.²⁴ This analysis is implicitly supported by a provision in the new statute that states: "The receipt, decoding or converting of a signal from the air by the use of a satellite dish or antenna shall not constitute a violation of this section."²⁵

North Carolina's 1984 amendment of its theft of cable service law is a total redraft of the prior statute.²⁶ In addition to strengthening the criminal sanctions against violators, it creates a civil cause of action against cable service thieves. The statute, codified as section 14-118.5 of the North Carolina General Statutes, defines and prohibits two general categories of conduct that contribute to the theft of cable service. First, the statute prohibits unauthorized connections to the cables or other equipment of a cable television system for the purpose of receiving cable service.²⁷ This basic provision is in all statutes that specifically prohibit cable service theft because the conduct prohibited is the actual gaining of unauthorized access to cable service. A second and extremely important pro-

22. N.C. GEN. STAT. § 160A-319 (1982). Section 160A-319 grants authority to municipalities to award franchises to cable companies for operation within the city.

Even though the definition of cable television system given in § 160A-319 is preceded by the language "[f]or the purposes of this section," because no definition was provided in either the original or the amended version of the theft of cable service statute, it is reasonable to infer that the general assembly intended for the definition in § 160A-319 to apply.

23. See *supra* notes 13-14 and accompanying text.

24. This definition is compatible with the preceding textual discussion of cable television. See *supra* notes 16-20 and accompanying text. For a discussion of whether North Carolina's theft of cable service statute should be extended to cover other types of pay television systems, see *infra* notes 80-84 & 128-37 and accompanying text.

25. N.C. GEN. STAT. § 14-118.5(f) (Supp. 1984). Cable companies frequently purchase premium viewing materials that are conveyed to the cable company "head-ends" in the form of over-the-air transmissions for processing to be sent to the cable television subscribers over the cable system. See, e.g., *Cablevision v. Annasonic Elec. Supply*, No. 83-5159 (E.D.N.Y. Feb. 10, 1984) (relevant part included as appendix in *Ciminelli v. Cablevision (Ciminelli II)*, 583 F. Supp. 158, 163 (E.D.N.Y. 1984)); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 378-79 (N.D. Ohio 1983); Comment, *supra* note 2, at 99-100. Given this common purchasing arrangement, § 14-118.5(f) apparently was included to indicate unambiguously that the new statute does not cover all signal transmissions of proprietary interest to cable companies but rather only actual cable transmissions.

26. Compare N.C. GEN. STAT. § 14-118.5 (1981) (earlier statute) with N.C. GEN. STAT. § 14-118.5 (Supp. 1984) (amendment).

27. See N.C. GEN. STAT. § 14-118.5(a) (Supp. 1984). The statute states:

Any person . . . who . . . knowingly and willfully attaches or maintains an electronic, mechanical or other connection to any cable, wire, decoder, converter, device or equipment of a cable television system or removes, tampers with, modifies or alters any cable, wire, decoder, converter, device or equipment of a cable television system for the purpose of intercepting or receiving any programming or service transmitted by such cable television system which person . . . is not authorized by the cable television system to receive, is guilty of [violating this statute].

Id.

hibition in section 14-118.5 makes illegal the act of "knowingly and willfully, without the authorization of a cable television system, distribut[ing], sell[ing], attempt[ing] to sell or possess[ing] for sale in North Carolina any converter, decoder, device, or kit, that is designed to decode or descramble any encoded or scrambled signal transmitted by [a] cable television system. . . ." ²⁸ This type of provision is in many state theft of cable service statutes. ²⁹

The 1984 amendment to section 14-118.5 provides for somewhat harsher criminal sanctions than did the earlier version. ³⁰ A person convicted of violating the 1978 statute was guilty of a misdemeanor and could be compelled to pay a fine of up to \$300, to serve a jail sentence of up to sixty days, or both. ³¹ The amended version of the statute provides different penalties for the two different violations. ³² If a person illegally attaches to or tampers with the cable or equipment of a cable company, then that person has committed a misdemeanor and may be fined up to \$500, placed in jail for up to thirty days, or both. ³³ On the other hand, if the defendant is convicted of selling or possessing for sale any of the enumerated devices, the maximum imprisonment increases to six months. ³⁴ Even though the criminal penalties permitted by the 1984 amendment strengthen the prior law, North Carolina's criminal penalties are still relatively mild compared to those allowed in some other states. ³⁵

The new statute, when contrasted with its predecessor, is unabashedly sympathetic to the plight of North Carolina cable companies in their battle against those who receive cable service without paying for it. ³⁶ The inclusion of a provision against the sale of decoding devices is quite significant for purposes of enforcing the policy behind the statute because as a practical matter it is much simpler to detect the public marketing of devices than it is to detect their illegal use in the home. ³⁷ Also, proscribing the activity of the sellers of such devices

28. *Id.* § 14-118.5(b). For a brief discussion regarding the importance of such devices, see *supra* note 19 and accompanying text.

29. See, e.g., CAL. PENAL CODE § 593d(b) (West Supp. 1984); GA. CODE ANN. § 46-5-3 (1981); Act of Sept. 26, 1980, art. 1, § 23, ILL. ANN. STAT. ch. 38, § 16-10(a)(4) (Smith-Hurd Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(A)(4) (West Supp. 1984-85); R.I. GEN. LAWS § 11-35-24 (1981).

30. See N.C. GEN. STAT. § 14-118.5(a), (b) (Supp. 1984).

31. See *id.* § 14-118.5(d) (1981).

32. See *id.* § 14-118.5(a), (b) (Supp. 1984).

33. *Id.* § 14-118.5(a).

34. *Id.* § 14-118.5(b). See *infra* notes 37-38 and accompanying text for the likely rationale behind imposing harsher sanctions on this type of conduct.

35. See, e.g., CAL. PENAL CODE § 593d (West Supp. 1984) (\$1,000 or 90 days in jail or both for unauthorized interception, and \$10,000 or jail term or both for selling devices); OKLA. STAT. ANN. tit. 21, § 1737(A) (West Supp. 1984-85) (\$1,000 or six months in jail or both).

36. As one would expect, the indications are that the cable industry has lobbied for protection from service thieves. See *supra* note 8.

37. See *State v. Scott*, 8 Ohio App. 3d 1, 6, 455 N.E.2d 1363, 1369 (1983). Commenting on the sufficiency of the evidence against the private homeowner defendant, the court said:

[T]he evidence . . . tended to prove mere possession of the [converter] device, not actual acquisition by the appellant of the cable television service. The evidence of possession consisted of . . . observations of the converter unit on the appellant's television set and appellant's admission of possession and that the unit was connected to his television set [N]o evidence [was] presented from which a jury could reasonably infer that appellant actually acquired the cable television service.

facilitates enforcement; an action against a single seller attacks the problem earlier and at its root.³⁸

Regardless of how extreme the threatened punishment, however, without aggressive enforcement by law enforcement officials, the punishment factor becomes illusory and the deterrent effect is diluted. It has been suggested that theft of cable services is considered a low priority crime by law enforcement authorities.³⁹ Considering the vast number of urgent, life-threatening crimes that occur, the limited resources of most law enforcement agencies, and the difficulty of detecting basic cable service theft,⁴⁰ this conclusion is not surprising.

Unquestionably, therefore, the most significant feature of the amended stat-

Id.; see also *infra* note 40 (discussing detection methods); 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04 (discussing methods employed by cable companies to discover unauthorized recipients of cable services).

Some of the electronic surveillance techniques now used by pay TV distributors to detect unauthorized interception devices in homes raise intriguing invasion of privacy questions. In *Movie Sys., Inc. v. Heller*, 710 F.2d 492 (8th Cir. 1983), an MDS distributor used electronic surveillance to discover that an individual was using a microwave antenna and a special converter to intercept MDS signals illegally. When sued by the MDS company, Heller counterclaimed, arguing that plaintiff's use of electronic surveillance was a violation of Heller's fourth and fourteenth amendment privacy rights. In rejecting defendant's privacy argument, the court said, "Heller's constitutional claim is without merit because the constitutional prohibitions of the fourth and fourteenth amendments do not apply to actions by private persons . . . [and] Heller has alleged no facts nor does the record reveal any facts which would support a finding of state action." *Id.* at 496. The court also rejected a state invasion of privacy claim on grounds that the state did not recognize a privacy cause of action. *Id.*

Such a claim could not, of course, be dismissed as not involving state action in cases in which a criminal defendant claimed a fourth amendment violation by police using electronic surveillance of cable theft. Use of electronic surveillance in the past has been found to violate the fourth amendment. See, e.g., *Katz v. United States*, 389 U.S. 347, 350-53 (1967) (holding that plaintiff's fourth amendment rights were infringed by the enforcement agent's use of an electronic device to listen to plaintiff's conversation in public telephone booth); see also 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04 (briefly mentioning possible invasion of privacy problems arising from electronic detection methods).

38. In effect, these statutory provisions prohibit activity (i.e., marketing of devices) that ultimately enables the actual theft of premium services to occur.

39. See N.Y. PENAL LAW § 165.15(4) commentary on 1983 amendment (McKinney Supp. 1984-85) ("The problem is not that the statute needed explication and tightening but that the public and law enforcement agencies are not particularly distressed about the problems facing the cable television entrepreneurs. Avoiding cable television charges is widely viewed in the same light as creative income tax calculation.").

A very plausible explanation for the lax enforcement of criminal sanctions against individual homeowners who illegally receive cable services is the difficulty in detecting offenses and the danger of a fourth amendment privacy violation by a law enforcement official. See *supra* note 37 and accompanying text. This reasoning is particularly strong in the case of a homeowner who subscribes to basic service, see *supra* notes 18 & 20 and accompanying text, but purchases a converter/decoder and illegally connects it so that he can receive premium service, see *supra* notes 19-20 and accompanying text, without paying the subscription fee. In this situation the only evidence of the criminal activity is inside the home.

There is no similarly persuasive argument to justify the lack of enforcement against those who illegally manufacture and sell cable converter/decoder devices. The detection problems are not nearly as acute in this context.

40. In spite of the difficulty of detecting unauthorized receipt of cable television services, "cable . . . companies are developing ways to detect unauthorized receivers. Detections are made through electronic surveillance, through spot, rooftop inspections for illegal antennas and earth stations, and through in-house inspection with the homeowner's permission, the latter usually made in conjunction with a 'service call.'" 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04.

The use of electronic surveillance to detect unauthorized receipt of cable services raises fourth amendment and state invasion of privacy issues. See *supra* note 37.

ute is its provision allowing cable companies to instigate civil suits against service thieves and those who aid them.⁴¹ This concept is relatively novel and is found in only a few state statutes.⁴² Under section 14-118.5(c), cable companies are authorized to bring civil suits to enjoin⁴³ violations of substantive prohibitions of the statute⁴⁴ and to recover damages.⁴⁵ The statute mandates that a cable company that establishes a violation be awarded the greater of "actual damages"⁴⁶ trebled⁴⁷ or a fixed default amount, which is dependent upon the type of violation.⁴⁸ Furthermore, section 14-118.5(d) clarifies the damage provision by stating, "It is not a necessary prerequisite to a civil action instituted pursuant to this section that the plaintiff has suffered or will suffer actual damages."⁴⁹ Thus, even if the cable company is unable to prove any real loss or legal

41. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984). Authorization of the civil suit should compensate for many of the deficiencies in criminal sanctions and criminal enforcement. See *supra* notes 35 & 39 and accompanying text. Although the detection problems, see *supra* note 37 and accompanying text, are still present, the remedies available in the civil action should provide an incentive for cable companies to devote substantial funds and manpower to the task of discovering cable service theft. An assessment of the ultimate impact in North Carolina of the newly created civil action is of course speculative, but the statute's patent slant in favor of cable companies, see *supra* notes 8 & 36 and accompanying text; *infra* notes 54-55 and accompanying text, would lead one to conclude that cable entrepreneurs will pursue legal remedies aggressively. Evaluating the reaction of cable companies to the theft of service problem, one commentator said:

[P]lay and cable companies, supported by state theft-of-cable service statutes, are waging a war on piracy. The battles are being fought through the media (public awareness programs, television commercials, and newspaper advertisements informing the public that use of unauthorized intercepting devices violates the law); through amnesty programs for consumers who turn in their unauthorized devices; and through prosecution.

2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04.

42. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.03[1] ("With the exception of a few states . . . , the applicable state theft of [cable] service laws only provide for criminal liability.").

Civil action provisions, however, are becoming more common in cable service theft statutes. See CAL. PENAL CODE § 593d(c)-(e) (West Supp. 1984); Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, § 16-13 (Smith-Hurd Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(C) (West Supp. 1984-85).

North Carolina's new statute, although certainly a product of this trend, is in many respects more progressive from the viewpoint of cable companies than most of its counterparts in other jurisdictions.

43. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984).

44. See *id.* § 14-118.5(a), (b).

45. *Id.* § 14-118.5(c)(1)-(2).

46. The statute does not define "actual damages." The term has, however, been defined by the North Carolina Supreme Court. "Actual damages means 'compensation for injuries and losses which are the direct and proximate result of the [wrong] . . . ' " *Godwin v. Vinson*, 254 N.C. 582, 587, 119 S.E.2d 616, 620 (1961). "[A]ctual damages refer to compensation for injury and losses which are the proximate and direct result of a wrong Thus, loss of profits may be recovered if plaintiff introduces evidence from which the amount of such loss can be ascertained by the jury with reasonable certainty." 5 N.C. INDEX 3D *Damages* § 2 (1977).

47. Treble damages are the maximum civil damages allowed in any state theft of cable service statute. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.03[1].

48. See N.C. GEN. STAT. § 14-118.5(c)(1)-(2) (Supp. 1984). When the culpable conduct is the actual theft of cable services, see *id.* § 14-118.5(a), then the default damage amount is \$300; if the defendant's conduct involves the manufacturing or selling of cable interception devices, see *id.* § 14-118.5(b), then the default damage amount is \$1000. *Id.* § 14-118.5(c)(1)-(2).

49. *Id.* § 14-118.5(d). For a discussion of the meaning of "actual damages," see *supra* note 46. Other treble damages theft of cable service statutes similarly state that a recovery by the plaintiff is not dependent upon proof of "actual damages." See, e.g., CAL. PENAL CODE § 593d(e) (West Supp. 1984); Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, § 16-13(d) (Smith-Hurd Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(E) (West Supp. 1984-85).

injury as a result of defendant's activity,⁵⁰ it shall nevertheless be granted the statutory default damage amount.⁵¹ Absent, however, from the North Carolina theft of cable service statute is a provision, found in the statutes of some other states, expressly providing for the recovery of attorney's fees and costs by a cable company in a successful civil action.⁵² Considering the comprehensive nature of the new statute, it seems doubtful that this absence was merely an oversight by the general assembly.⁵³

Even though the new North Carolina statute makes liable only those who knowingly and willfully violate its terms, there is a statutory presumption of knowledge on the part of the defendant once basic proof of a violation is introduced.⁵⁴ This *prima facie* presumption represents the general assembly's recognition of the extreme difficulty in many cases of proving that the defendant actually played a role in illegally gaining access to the cable system.⁵⁵ Cases in other jurisdictions, however, have raised serious questions about the constitu-

50. See *supra* note 46.

51. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984).

52. See, e.g., CAL. PENAL CODE § 593d(c)(2) (West Supp. 1984) (reasonable attorney's fees); Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, § 16-13(b) (Smith-Hurd Supp. 1984-85) (all costs plus reasonable attorney's fees to the prevailing party); N.M. STAT. ANN. § 63-10-2 (1978) (costs plus attorney's fees); OKLA. STAT. ANN. tit. 21, § 1737(C)(2) (West Supp. 1984-85) (attorney's fees).

53. There is a well-established rule in North Carolina that "a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). Therefore, it is unlikely that a trial judge would exercise discretion to award attorney's fees to a plaintiff who prevails in an action under North Carolina's theft of cable service statute.

54. The statute states:

Proof that any equipment, cable, wire, decoder, converter or device of a cable television system was modified, removed, altered, tampered with or connected without the consent of such cable system in violation of this section shall be *prima facie* evidence that such action was taken knowingly and willfully by the person or persons in whose name the cable system's equipment, cable, wire, decoder, converter or device is installed or the person or persons regularly receiving the benefits of cable services resulting from such unauthorized modification, removal, alteration, tampering or connection.

N.C. GEN. STAT. § 14-118.5(e) (Supp. 1984). An analogous presumption provision has been a part of North Carolina statutory law prohibiting the theft of electric, gas, and water services since 1977. See *Id.* § 14-151.1(b) (1981) (proof of tampering with meter is *prima facie* evidence of violation).

The theft of cable service statutes of some other states contain presumptions very much like the one found in North Carolina's new statute. See, e.g., Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, §§ 16-11(d), -12(d) (Smith-Hurd Supp. 1984-85); N.Y. PENAL LAW § 165.15(5) (McKinney Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(B) (West Supp. 1983-84); VA. CODE § 18.2-165.1 (1982).

55. In a New Jersey case involving a theft of utility services statute that contained a presumption very similar to North Carolina's, the court said, "It is apparent that . . . the presumption was adopted by the Legislature because of the practical impossibility of proving by direct evidence the actual participation of the consumer in the illegal activity." *State v. Curtis*, 148 N.J. Super. 235, 240, 372 A.2d 612, 615 (Crim. Ct. 1977). In *State v. Robinson*, 97 Misc. 2d 47, 56, 411 N.Y.S.2d 793, 799 (Crim. Ct. 1978), the court, discussing this presumption in its theft of utility services statute, stated:

This presumption was reinstated when the Legislature recognized the difficulty of obtaining proof of actual tampering. "Such proof can be produced only in the rare instance where one is caught red-handed altering the electrical circuit to by-pass a meter." . . . [citations omitted] If tampering was to be effectively deterred then the presumption was . . . essential.

Id. (quoting *State v. Mendez*, 94 Misc. 2d 447, 449, 404 N.Y.S.2d 977, 979 (Crim. Ct. 1978)). For a description of the practical effect upon plaintiff's case of not having the presumption, see *State v.*

tionality of such a statutory presumption.⁵⁶ Similar presumptions have been challenged primarily on the ground that they deny defendants their fourteenth amendment due process rights.⁵⁷

In *State v. Scott*⁵⁸ the Ohio Court of Appeals struck down as unconstitutional a provision in Ohio's theft of cable service statute⁵⁹ that provided for a prima facie presumption of intent.⁶⁰ The Ohio court distinguished between mandatory and permissive presumptions⁶¹ and held that the language of the Ohio statute unambiguously revealed that the presumption was mandatory.⁶² After noting that mere proof of the unauthorized possession of a device for receiving cable services compelled the fact-finder to find all the remaining essential elements of the offense, the court applied the test for determining the constitutionality of such presumptions and concluded that "we cannot say with substantial assurance that the presumed facts . . . [are] more likely than not to flow from the proved fact"⁶³

In assessing the constitutionality of the North Carolina statute's presumption of intent, it is important also to look to the line of authority that rejects the rationale and result in *Scott*. In *State v. Robinson*⁶⁴ the New York court upheld a presumption that was, for purposes of this analysis, substantially similar to the Ohio statutory provision in *Scott*.⁶⁵ Like the statutes in North Carolina and

Scott, 8 Ohio App. 3d 1, 5, 455 N.E.2d 1363, 1369 (1983); see also *supra* note 37 (discussing the difficulties in obtaining sufficient evidence against the homeowner defendant).

A careful reading of § 14-118.5(e), which does not refer to the distribution of devices, reveals that the presumption applies only to the type of conduct prohibited in § 14-118.5(a). In other words, the presumption applies only to the actual theft of cable service and not to the selling of converter/decoder devices, which is proscribed by § 14-118.5(b). The limited application of the presumption makes sense because the activity of selling mechanical devices is much easier to detect and prove than the use of such devices inside the home to steal cable services. See *supra* notes 37-38 and accompanying text.

56. See *State v. Curtis*, 148 N.J. Super. 235, 372 A.2d 612 (App. Div. 1977); *State v. Robinson*, 97 Misc. 2d 47, 411 N.Y.S.2d 793 (Crim. Ct. 1978); *State v. Scott*, 8 Ohio App. 3d 1, 455 N.E.2d 1363 (1983).

57. See *State v. Curtis*, 148 N.J. Super. 235, 239-40, 372 A.2d 612, 614-15 (App. Div. 1977); *State v. Robinson*, 97 Misc. 2d 47, 57, 411 N.Y.S.2d 793, 799 (Crim. Ct. 1978).

58. 8 Ohio App. 3d 1, 5, 455 N.E.2d 1363, 1369 (1983).

59. See Act of July 13, 1977, H.B. No. 271, 1977 Ohio Laws 2278 (repealed 1984).

60. See *id.* (repealed 1984).

61. *Scott*, 8 Ohio App. 3d at 4-5, 455 N.E.2d at 1368. A permissive presumption *permits* the factfinder to infer the "elemental fact" after the "basic fact" is established. With a mandatory presumption, the factfinder is *required* to "find" the "elemental fact" upon proof of the "basic fact." *Id.*

62. *Id.* at 4, 455 N.E.2d at 1368 (presumption is mandatory on its face). The statute construed in *Scott* stated:

The existence, on property in the actual possession of the accused, of any connection, wire, conductor, or any device whatsoever, which effects the use of cable television service without the same being reported for payment as to service, . . . shall be prima-facie evidence of intent to violate and of the violation of this section by the accused.

Act of July, 13, 1977, H.B. No. 271, 1977 Ohio Laws 2278 (repealed 1984).

63. *Scott*, 8 Ohio App. at 5, 455 N.E.2d at 1367-69; see also *MacMillan v. State*, 358 So. 2d 547, 549-50 (Fla. 1978) (declaring unconstitutional provision in theft of service statute providing for presumption of intent to violate).

64. 97 Misc. 2d 47, 411 N.Y.S.2d 793 (Crim. Ct. 1978).

65. See N.Y. PENAL LAW § 165.15(4) (McKinney Supp. 1984-85). The relevant portion of the New York statute states:

[P]roof . . . that telecommunications equipment, including, without limitation, any cable

Ohio, the New York statute provided that proof of an illegal connection to a utility service "shall be presumptive evidence" that the recipient of the service was responsible for the unlawful connection.⁶⁶ The *Robinson* court, however, interpreted the statutory language as creating a permissive, rather than a mandatory, presumption.⁶⁷ Furthermore, the *Robinson* court held that the presumption satisfied constitutional requirements because the defendant's receipt of the utility services as a result of the illegal tampering provided a sufficient "rational connection between the presumed fact and the proven fact."⁶⁸ In effect, the New York court in *Robinson* employed an analysis and reached a decision diametrically opposed to the analysis and decision in *Scott*.

As the *Scott* and *Robinson* cases illustrate, there are plausible and compelling arguments both for and against the constitutionality of the section 14-118.5(e) presumption. Should the new presumption be found unconstitutional, it would be possible to sever section 14-118.5(e) without invalidating the entire statute.⁶⁹ Although the remainder of the statute logically could stand without the presumption, the practical effect of severing the presumption provision would be to assure victory for many defendants.⁷⁰ Without the benefit of the presumption, plaintiffs or prosecutors would prevail only if they could present affirmative evidence that defendants "knowingly and willfully" tapped on to the cable system "for the purpose of intercepting or receiving . . . programming or service."⁷¹ In most cases this would be a difficult burden to satisfy.⁷²

The federal antitrust laws present a second potential challenge to the North Carolina theft of cable service statute; in prohibiting all parties except cable companies from selling and distributing converter and decoder devices, the stat-

television converter, descrambler, receiver, or related equipment, has been connected to the equipment of the supplier of the service without the consent of the supplier of the service, shall be presumptive evidence that the resident to whom the service which is at the time being furnished by or through such equipment has, with intent to avoid payment by himself or another person for a prospective or already rendered service, created or caused to be created with reference to such equipment, the condition so existing.

Id.

66. *See id.*

67. 97 Misc. 2d at 61, 411 N.Y.S.2d at 802 (rejecting defendant's argument that the statutory presumption effected a shift in the ultimate burden of proof).

68. 97 Misc. 2d at 59, 411 N.Y.S.2d at 800-01. Reaching the same result on a New Jersey statutory presumption in a substantially similar context, the court in *State v. Curtis* said:

[I]t is more likely than not that the customer [defendant] participated in the tampering resulting in the failure of the meter to record fully the current supplied to that customer Such an inference is rational when tested by human conduct and experience, for the only person who would usually be motivated to tamper with a meter is the one who would profit financially

148 N.J. Super. 235, 239-40, 372 A.2d 612, 615 (App. Div. 1977).

69. For a case in which the court declared a similar presumption unconstitutional, severed the stricken part, and allowed the remainder of the statute to stand, see *MacMillan v. State*, 358 So. 2d 547, 550 (Fla. 1978).

70. Of course, invalidation of the presumption would not substantially affect actions in which the defendant is accused of dealing in converter/decoder devices under § 14-118.5(b). *See supra* note 55 and accompanying text.

71. N.C. GEN. STAT. § 14-118.5(a) (Supp. 1984).

72. *See State v. Curtis*, 148 N.J. Super. 235, 240-41, 372 A.2d 612, 615 (App. Div. 1977); *see also supra* note 55 and accompanying text (discussing the need for a presumption provision).

ute might violate the antitrust laws by giving a monopoly in the marketing of such mechanisms to cable companies.⁷³ Such a challenge, however, probably would fail. Plaintiff in *Ciminelli v. Cablevision*⁷⁴ was prevented from selling converter and decoder devices by a New York statutory provision⁷⁵ similar to North Carolina's section 14-118.5(b).⁷⁶ He sued to enjoin enforcement of the state statute, arguing that it was preempted by the Sherman and Clayton federal antitrust statutes.⁷⁷ Using reasoning that would be applicable to an antitrust challenge to section 14-118.5(b), the United States District Court for the Eastern District of New York rejected the claim. The court noted that the state action immunity doctrine provides an exemption from the antitrust laws when "*the activities constitute the action of the state in its sovereign capacity.*"⁷⁸ Finding that the New York Legislature enacted the statute in its sovereign capacity and that the statute served a legitimate state interest, the court ended its inquiry and upheld the validity of the state law.⁷⁹ This same reasoning probably would protect North Carolina's statute from a similar antitrust challenge.

An apparent flaw in the North Carolina statute is its failure to cover the primary noncable forms of pay television.⁸⁰ Theft of pay television service statutes in some states prohibit the unauthorized interception of both over-the-air pay television signals and cable services.⁸¹ The phenomenal growth and promising future of noncable pay television systems⁸² raises the question whether the North Carolina General Assembly was shortsighted in not extending protection in section 14-118.5 to over-the-air pay television transmissions. If the general assembly was shortsighted, its omission could be remedied easily by either amending the statute to cover all pay television signals or by enacting a new statute specifically to protect over-the-air signals. The omission, however, was

73. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 152-58 (E.D.N.Y. 1984).

74. 583 F. Supp. 144 (E.D.N.Y. 1984).

75. See N.Y. PENAL LAW § 165.15(4) (McKinney Supp. 1984-85).

76. N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984).

77. *Ciminelli*, 583 F. Supp. at 152.

78. *Id.* at 156.

79. *Id.* at 157. The court said:

The evidence shows that faced with a growing problem of theft of cable television services, the State of New York, as sovereign, enacted legislation to combat the problem. . . . [W]e find no merit to the argument that [the statute] serves no legitimate state interest and instead authorizes defendants to violate the antitrust laws by declaring their action lawful. Thus, we conclude that the state action exemption applies to this cause of action.

Id.

80. See *supra* notes 21-25 and accompanying text.

81. See CAL. PENAL CODE § 593e (West Supp. 1985); TEX. PENAL CODE ANN. §§ 31.12, 31.13 (Vernon Supp. 1985).

82. See, e.g., Comment, *Subscription Television*, *supra* note 13, at 839; Comment, *Pay Television Piracy*, *supra* note 3, at 531.

Over-the-air systems are often commercially feasible when cable systems are not. "Unlike cable television, over-the-air pay TV does not require burdensome initial outlays of time and capital. [citations omitted] Laying underground or aboveground cable is a time-consuming and expensive process. [citations omitted]" *Id.* at 531 n.3. Generally, there must be at least 30 homes per mile to make an area potentially profitable for cable companies. See Comment, *supra* note 2, at 99 n.23; Note, *The Piracy of Subscription Television: An Alternative to the Communications Law*, 56 S. CAL. L. REV. 935, 935 n.3 (1983).

justifiable when the current version of the North Carolina theft of cable service statute was passed. Even though at that time theft of over-the-air signals was a substantial problem for STV and MDS operators, the willingness of the federal courts to grant relief for such piracy under the Communications Act of 1934⁸³ made it less urgent for state legislative bodies to provide a remedy. By contrast, the availability of comparable federal relief for cable companies was quite uncertain.⁸⁴

Soon after the new North Carolina theft of cable service statute was passed, however, Congress responded to those who argued that the main body of law regulating communications, the Communications Act of 1934,⁸⁵ was severely outdated and not capable of being adapted to modern communications technologies.⁸⁶ In October 1984 Congress passed the Cable Communications Policy Act of 1984⁸⁷ which significantly amended the Communications Act of 1934.⁸⁸ The 1984 amendments address the problem of piracy of both over-the-air and cable pay television signals. Although the 1984 statute does not resolve all the issues, it goes far toward clarifying the uncertainties and ambiguities of the 1934 Act as applied to modern pay television technologies.⁸⁹ Like the North Carolina theft of cable service statute, section 633 of the 1984 Act provides for criminal⁹⁰ and

83. 47 U.S.C. §§ 151-757 (1982) (amended 1984). An implied private cause of action under § 605 has been recognized for many years. *See* *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947) (holding that § 605 created an implied civil action under which plaintiff could sue defendant for secretly recording plaintiff's voice on the telephone and then "publishing" the communication by playing the tape in court). The courts have granted relief in private § 605 actions for the unauthorized interception of both STV and MDS signals. *See, e.g.,* *Movie Sys., Inc. v. Heller*, 710 F.2d 492 (8th Cir. 1983) (MDS signals); *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981) (STV signals).

84. Until 1984 there was much controversy over whether the 1934 Communications Act applied to the unauthorized theft of cable television service. *See, e.g.,* 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1][b]; Comment, *Decoding Section 605, supra* note 3, at 364-66 & n.20.

Although the Communications Act of 1934 had been interpreted by courts as creating a private cause of action and STV and MDS operators had been allowed to recover against thieves of their over-the-air signals, *see supra* note 83 and accompanying text, the Act was not applied to cable until the year immediately preceding passage of the 1984 amendment to the North Carolina cable theft statute. In 1984 two federal district courts granted relief to cable companies in private civil actions under § 605. *See* *Cablevision v. Annasonic Elec. Supply*, No. 83-5159 (E.D.N.Y. Feb. 10, 1984) (included as appendix in *Ciminelli v. Cablevision (Ciminelli II)*, 583 F. Supp. 158, 163-64 (E.D.N.Y. 1984)); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376 (N.D. Ohio 1983).

85. 47 U.S.C. §§ 151-757 (1982) (amended 1984).

86. *See, e.g.,* Comment, *Subscription Television: Should the Government Prohibit Unauthorized Reception?*, 18 CAL. W.L. REV. 291, 291 (1982); Comment, *supra* note 2, at 97.

87. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779 (to be codified at 47 U.S.C. §§ 151-757).

88. 47 U.S.C. §§ 151-757 (1982) (Communications Act as it appeared before the 1984 amendments).

89. *See supra* note 84 and accompanying text.

90. A person who intentionally intercepts cable services or assists another in doing so in violation of § 633 will face a fine of up to \$1,000 or a prison term of six months or less or both. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(b)(1)). When the violation of § 633 is intentional and "for the purposes of commercial benefit or private financial gain," the defendant "shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned for not more than 2 years, or both, for any subsequent offense." *Id.* (to be codified at 47 U.S.C. § 553(b)(2)). "Private financial gain" is defined so as to require more than the mere avoidance of fee payments by a private individual who pirates cable services for viewing in the "individ-

private civil actions against thieves of cable television service⁹¹ and explicitly includes within its purview the manufacturers and distributors of unauthorized cable interception devices.⁹²

The civil action created by section 633(c)(1) is very broad in scope and may be pursued in any state court or federal district court.⁹³ The class of potential plaintiffs in a section 633 civil action is defined expansively to include "[a]ny person aggrieved by any violation of [the substantive portion of section 633]."⁹⁴ Civil remedies include injunctive, compensatory, and punitive relief.⁹⁵ Compensatory relief may include attorney's fees in addition to damages, which may be either the "actual damages" suffered by the plaintiff plus any additional profits earned by the violator as a result of the violation or a statutory default amount.⁹⁶ Section 633 accords a great deal of discretion to the trial court. If the court finds that the defendant violated section 633 "willfully and for purposes of commercial advantage or private financial gain," then the court may add to the civil compensatory damages a punitive award of up to \$50,000.⁹⁷ Conversely, if the court "finds that the violator was not aware and had no reason to believe that his acts constituted a violation of . . . section [633], the court in its discretion may reduce the award of damages to a sum of not less than \$100."⁹⁸

ual's dwelling unit." Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(c)(5)).

91. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796-97 (to be codified at 47 U.S.C. § 553). The substantive prohibition is found in § 633(a)(1):

No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

Id. (to be codified at 47 U.S.C. § 553(a)(1)).

Section 633 applies only "to theft of a service from the point at which it is actually being distributed over a cable system." See H.R. REP. NO. 934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4655, 4720.

92. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553). Section 633(a)(2) states:

For the purpose of this section, the term 'assist in intercepting or receiving' shall include the manufacture or distribution of equipment intended by the manufacturer or distributor . . . for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).

Id. (to be codified at § 553(a)(2)). The manufacturer or distributor is liable (or guilty) under § 633 only if he created or sold the devices with the intention that they would be used to intercept signals in violation of § 633(a)(1). See H.R. REP. NO. 934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4655, 4720-21; 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 8.03 (Special Supp. 1985).

93. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796-97 (to be codified at 47 U.S.C. § 553(c)).

94. *Id.* (to be codified at 47 U.S.C. § 553(c)(1)).

95. *Id.* (to be codified at 47 U.S.C. § 553(c)).

96. *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(A)). The default amount is between \$250 and \$10,000, determined on a case by case basis. *Id.* (to be codified at 47 U.S.C. § 553(c)(2)(C), (c)(3)). In proving profits earned by the defendant as a direct result of the cable service theft, the plaintiff only has to show the defendant's gross revenues, and the burden then shifts to the defendant to establish "his deductible expenses and the elements of profit attributable to factors other than the violation." *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(A)(i)).

97. *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(B)).

98. *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(C)). Compare this broad discretion given to the

Of tremendous importance to states like North Carolina that have adopted statutes proscribing the unauthorized reception of cable television signals and the marketing of devices designed to facilitate such service thefts is section 633(c)(3)(D) of the 1984 federal statute. Section 633(c)(3)(D) specifically states that the federal statute does not preempt state laws that prohibit the theft of cable television service.⁹⁹ Also, the legislative history of the 1984 Act indicates that section 633 was not intended to circumscribe or preempt the application of what was previously known as section 605 of the Communications Act of 1934 or other existing laws that provide remedies for the theft of cable service.¹⁰⁰ Thus, neither the availability of a state claim nor the federal case law predicated on the Communications Act of 1934 was affected by the 1984 changes.¹⁰¹

Since the new federal statute has not preempted North Carolina's theft of service statute, it is useful to compare the statutes' provisions in determining

judge under the federal statute to increase or decrease the damage award with the rigid method for calculating damages under the North Carolina theft of cable service statute. See *supra* notes 45-51 and accompanying text.

99. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796-97 (to be codified at 47 U.S.C. § 553(c)(3)(D)). The official legislative history explains the rationale behind § 633(c)(3)(D):

The Committee recognizes that a number of states have enacted statutes which provide criminal penalties and civil remedies for the theft of cable service, and the Committee applauds those efforts. [Such state laws] are not affected by this section, even if such laws impose higher penalties or sanctions than those set forth in this section. The Committee believes that this problem is of such severity that the Federal penalties and remedies contained herein must be available in all jurisdictions (and enforceable in state or Federal court) as part of the arsenal necessary to combat this threat.

H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4721.

It is apparent, therefore, that North Carolina's theft of cable service statute is not preempted by the new federal law.

100. See H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4720 ("Nothing in this section is intended to affect the applicability of existing Section 605 [§ 705(a) after the 1984 Act] to theft of cable service, or any other remedies available under existing law for theft of service.").

101. See *supra* note 84. In addition to the Communications Act of 1934, the Omnibus Crime Control and Safe Streets Act of 1968 occasionally has been mentioned as a potential source of relief for cable companies plagued by cable television signal thieves. See Comment, *supra* note 2, at 117-18; Comment, *Decoding Section 605*, *supra* note 3, at 363 n.3, 365-66 & n.20. The 1968 Act's provisions prohibit both the unauthorized interception of wire and oral communications and the manufacture and distribution of devices designed to facilitate unauthorized interception of such communications. See 18 U.S.C. §§ 2511-2512 (1982).

Even though some commentators practically take for granted that the Crime Control Act's protection of wire communications affords cable companies a cause of action against service thieves and those who assist them, see Comment, *supra* note 2, at 117-18; Comment, *Decoding Section 605*, *supra* note 3, at 363 n.3, 365-66 & n.20, there is no case support for such a position. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[2]. In fact, two federal district courts have explicitly rejected the Omnibus Crime Control and Safe Streets Act of 1968 as a means for providing remedies to cable television operators harmed by thefts of service. See *Cablevision v. Annasonic Elec. Supply*, No. 83-5159 (E.D.N.Y. Feb. 10, 1984) (included as appendix in *Ciminelli v. Cablevision* (Ciminelli II), 583 F. Supp. 158, 163-164 (E.D.N.Y. 1984)); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 382-83 (N.D. Ohio 1983). The original motivation for passing the Crime Control Act apparently was to prohibit "wire-tapping and electronic surveillance by persons other than duly authorized law enforcement officials." *Id.* at 382; see S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112-13; 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[2]. Other than the actual language of the statute, which has been strictly interpreted with the Act's purpose in mind, there is little reason to believe that the Act can be used by cable companies to protect their economic interests against service thieves. See *id.*

which claim is best for different plaintiffs. There are two major differences between the North Carolina statute and section 633 of the 1984 federal statute. First, the federal act, unlike the North Carolina statute,¹⁰² does not contain a provision creating a *prima facie* presumption of unlawful activity upon proof that the defendant actually received the benefit of the illegally obtained services. This apparent advantage to a plaintiff in an action under North Carolina statute's section 14-118.5 over a plaintiff in a federal action becomes somewhat illusory, however, when one compares the definitions of the substantive offenses under the two statutes. The North Carolina statute describes the offense as an intentional act of connecting to a cable system or tampering with a cable system for the purpose of receiving cable service;¹⁰³ the new federal statute, however, defines a violation as the mere unauthorized interception or receipt of cable services.¹⁰⁴ On its face, the North Carolina statute requires a higher degree of proof of active wrongdoing by the defendant. The absence of a statutory presumption in section 633, therefore, may not make the North Carolina statute a more attractive basis for an action than section 633. Second, the North Carolina statute, in section 14-118.5(b), makes it unlawful for a party to distribute or sell devices "designed to decode or descramble any encoded or scrambled signal transmitted by [a] cable television system."¹⁰⁵ The language of the North Carolina statute does not clearly require proof that the defendant distributor or seller of interception devices specifically anticipated and intended that the devices would be used to intercept cable signals illegally. Section 633(a)(2) of the new federal statute, by contrast, requires proof that a manufacturer or distributor of devices capable of illegally intercepting cable signals actually intended for the devices to be used in such an illegal manner.¹⁰⁶

Although both the North Carolina statute and the new federal statute create causes of action for theft of cable services, North Carolina's statute apparently does not extend to theft of over-the-air pay television services.¹⁰⁷ The federal statutes, on the other hand, have been applied to STV and MDS systems¹⁰⁸ and should continue to apply in the future. Applicability of the federal statutes to interception of aerial signals by satellite dishes, however, is more complex. Section 605 of the Communications Act of 1934, before the 1984 amendments, generally had proved inadequate to deal with the issue whether the

102. See *supra* notes 54-72 and accompanying text.

103. See N.C. GEN. STAT. § 14-118.5(a) (Supp. 1984); see also *supra* note 27 and accompanying text (giving language of § 14-118.5(a)).

104. See Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(a)(1)); see also *supra* note 91 (giving language of § 633(a)(1)).

105. See N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984); see also *supra* note 28 and accompanying text (giving language of § 14-118.5(b)).

106. See Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(a)(2)); see also *supra* note 92 (giving language of § 633(a)(2)). Of course, this analysis and distinction between the new federal statute and North Carolina's theft of cable service statute would be irrelevant if the devices defendant was accused of manufacturing or selling had no legitimate uses.

107. See *supra* notes 21-25 and accompanying text; notes 80-84 and accompanying text.

108. See *supra* note 83 and accompanying text.

use of satellite dish antennas to intercept satellite transmissions was legal.¹⁰⁹ While "[a] federal district court in Florida [had] held that satellite transmissions of live NFL football games transmitted to a specific audience were protected under Section 605 from unauthorized reception by earth stations owned and operated by a restaurant for commercial benefit,"¹¹⁰ there apparently was no recovery under section 605 against a private individual using a home satellite dish for noncommercial purposes.¹¹¹

The 1984 federal cable act redesignated section 605 in the Communications Act of 1934 as section 705(a) and added provisions to this section.¹¹² Section 705(b) provides an exemption from liability under section 705(a) for the interception for private use of certain "satellite cable programming" signals.¹¹³ "Satellite cable programming" is narrowly defined by the statute as signals transmitted by satellite "primarily . . . for the direct receipt by cable operators for their retransmission to cable subscribers."¹¹⁴ Under the section 705(b) ex-

109. See, e.g., 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1]; Comment, *supra* note 2, at 103. In enacting its theft of cable service statute, the North Carolina General Assembly resolved the issue by simply specifying that the use of satellite antennas would not be a violation of the statute. See N.C. GEN. STAT. § 14-188.5(f) (Supp. 1984); see also *supra* note 25 and accompanying text (giving language of § 14-118.5(f)).

110. 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1] (referring to National Football League v. The Alley, Inc., No. 83-0701 (S.D. Fla. 1983)).

111. See *id.*

112. See Pub. L. No. 98-549, §§ 5-6, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802-04 (to be codified at 47 U.S.C. § 605). The use of the phrase "section 705" in this discussion refers to § 705 of the Communications Act of 1934 as it appears after the 1984 amendment. Section 705 of the Communications Act of 1934 corresponds to 47 U.S.C.A. § 605 (Supp. 1985).

Section 705(d) creates criminal and civil actions and remedies identical to those found under § 633(b) and (c). See *supra* notes 90-98 and accompanying text. Prior to the 1984 Act, private civil actions under § 605 [§ 705(a) after 1984 Act amendments] were merely implied. See 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 8.02[2] (Special Supp. 1985); *supra* note 83.

113. See Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(b)).

Although § 705 does not clearly state that the interception of aerial pay television signals by satellite dish antennas is generally unlawful, such a conclusion is compelled by the narrow exemption created by § 705(b). The logical implication of the integrated statutory scheme is that the interception of aerial signals by satellite dish antennas is illegal unless the interception satisfies the exemption requirements of § 705(b).

114. Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(c)(1)). The official legislative history explains that:

The interception of the "satellite cable programming" must in fact be directly from the satellite feed in order to come within the terms of the exemption to liability set forth in subsection (b). Unauthorized interception of such programming in its retransmitted form, where the form of retransmission is otherwise protected under subsection (a) or other relevant law, is clearly prohibited. Thus, if the programming interception is transmitted, for instance, by means of . . . MDS . . . or STV, liability for such interception shall apply regardless of whether [the conditions for the § 705(b) exemption have been met].

H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4748-49. Limiting the § 705(b) private interception exemption for satellite transmissions to those satellite transmissions intended primarily for receipt by cable companies comports with Congress' desire not to affect prior case law under § 605 [§ 705(a) after 1984 Act amendments]. It seems somewhat arbitrary, however, to give the benefit of the § 705(b) exemption to private individual satellite antenna owners whose antennas happen to intercept signals categorized by the statute as "satellite cable programming" while at the same time denying the exemption to satellite owners whose satellite antennas intercept other signals. The inequity of this situation would be much less severe if satellite antenna owners were able to ascertain whether the signals being intercepted by their antennas were eligible for the § 705(b) exemption; then, the satellite antenna owners could determine whether their

emption, no violation occurs when "satellite cable programming" signals are intercepted for private viewing if the signals are not scrambled and if a marketing system has not been created to allow individual satellite antenna owners to pay for the right to intercept the signals.¹¹⁵ North Carolina's cable television theft statute specifically excludes satellite dish antennas from its prohibitions.¹¹⁶ Because the "purpose of section 705(b) is to facilitate a marketplace solution to the specific situation in which an individual using a backyard [satellite dish antenna] intercepts . . . unencrypted satellite cable programming,"¹¹⁷ section 705(b) would likely preempt any state statutes governing this type of interception.¹¹⁸

The North Carolina General Assembly reacted intelligently to the growing contemporary problem of theft of cable television service by enacting a comprehensive amendment to the state's theft of cable service statute.¹¹⁹ The statute's current provisions indicate that the general assembly made a realistic appraisal of the scope of the theft problem and the plight of cable companies victimized by service thieves. Cable companies that take advantage of the new civil action¹²⁰ will have the benefit of a logical presumption that the recipient of the illegally

activities were in violation of § 705(a) and could make conscious choices about how to structure their behavior.

115. See Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(b)); H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4745-46.

116. See *supra* note 109; note 25 and accompanying text.

117. H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4747.

118. The expansive nonpreemption language of § 633(c)(3)(D), *supra* note 99 and accompanying text, is limited by its terms to provisions of title VI. The nonpreemption language of title VII found in § 705(d)(6) is not broad enough to encompass state laws governing signal interception by satellite antennas. Section 705(d)(6) explicitly states that the new federal statute does not preempt state or local laws prohibiting "the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by [§ 705(a)]." Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2803 (to be codified at 47 U.S.C. § 605(d)(6)). Furthermore, § 633(c)(3)(D), which provides that nothing in title VI of the federal statute bars states from enacting and enforcing laws "regarding the unauthorized interception or reception of any cable service or other communication service," *id.* at 2797 (to be codified at 47 U.S.C. § 553(c)(3)(D)), clearly does not prevent title VII's provisions concerning satellite signal reception from preempting state statutes attempting to regulate the unauthorized receipt of satellite transmissions. It is logical, therefore, to presume that state statutes prohibiting interception of satellite signals could not define as illegal an activity permitted under § 705(b). See *supra* notes 113-15 and accompanying text. If the federal statute did not preempt state statutes dealing with aerial signal interception by satellite dish antennas, at least to the extent of the exemption provided in § 705(b), then each state could effectively thwart the purpose underlying § 705(b). See *supra* notes 117-18 and accompanying text. In this regard, it is important to remember the very narrow scope of the § 705(b) exemption for satellite antenna interceptions. See *supra* notes 114-15 and accompanying text.

Any potential conflict between North Carolina's theft of cable service statute and the § 705(b) exemption in the federal act is avoided because of the explicit provision in the North Carolina statute that excludes satellite dish antennas from its prohibitions. See N.C. GEN. STAT. § 14-118.5(f) (Supp. 1984); *supra* note 109; notes 25 & 116 and accompanying text. The possibility of such a conflict, however, certainly would become relevant should the North Carolina General Assembly adopt a statute to regulate or prohibit the interception of aerial signals by satellite dish antennas.

119. See N.C. GEN. STAT. § 14-118.5 (Supp. 1984).

120. See *id.* § 14-118.5(c); *supra* notes 41-53 and accompanying text.

obtained service was responsible for the theft,¹²¹ and a plaintiff who successfully establishes the elements of a civil claim is entitled to recover substantial statutory damages even if actual damages cannot be proved or are less than the statutory amount.¹²² Also, by including as permissible defendants distributors and sellers of devices designed to enable unauthorized access to cable television services,¹²³ the North Carolina General Assembly has attempted to maximize the efficiency and enforceability of the statute's provisions.

The significance of the North Carolina theft of cable service statute is somewhat overshadowed by the adoption of the new federal statute¹²⁴ aimed at the same activity. Because the federal statute expressly provides, however, for the coexistence of state causes of action governing theft of cable service,¹²⁵ it is clear that the North Carolina statute has not been preempted. Even though there are a few obvious differences between the federal and the North Carolina theft of cable service statutes,¹²⁶ the ramifications of these distinctions and the relative benefits of proceeding under each statute will be realized only as the statutes are interpreted by courts. The existence of the new federal statute, however, should not cause North Carolina judges to give a restrictive construction to North Carolina's theft of cable service statute, nor should the terms of the federal law be looked upon as a limitation when applying the North Carolina statute.¹²⁷

Section 14-118.5 may be criticized on grounds that it should not be limited to protection of cable television signals but should also encompass over-the-air pay television signal transmissions. Such criticism is at least partially persuasive. Denying protection under state law to MDS and STV signals, which are fully covered by section 705(a) of the federal Communications Act,¹²⁸ while granting protection to cable television signals, may no longer be justifiable because the disparity that once existed in the protection given cable television signals and over-the-air pay television signals by federal law has now been eliminated.¹²⁹ If the intent of the general assembly was to protect MDS and

121. See N.C. GEN. STAT. § 14-118.5(e) (Supp. 1984); *supra* notes 54-55 and accompanying text.

122. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984); *supra* notes 45-51 and accompanying text.

123. See N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984); *supra* note 28 and accompanying text.

124. See *supra* note 91.

125. See *supra* note 99 and accompanying text.

126. For a brief discussion of some of the basic differences between the two statutes, see *supra* notes 98 & 102-06 and accompanying text. Another distinction is that the federal statute provides for the recovery of attorney's fees and costs by a prevailing plaintiff whereas the North Carolina statute does not. See Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(c)(2)(C)); N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984).

127. See *supra* note 99.

128. See *supra* notes 83 & 114 and accompanying text.

129. See *supra* notes 80-84 and accompanying text.

The over-the-air pay TV delivery systems, especially MDS, are expected to continue to grow and expand, see *supra* notes 13-14, and the injury suffered by MDS and STV operators who are victimized by service thefts is analogous to the injury inflicted upon cable television operators whose services are stolen. Also, the federal case law developed under old § 605 [current § 705(a)] provides complete protection to MDS and STV signals, see *supra* notes 83 & 114, in much the same way that § 633 provides unadulterated protection to cable television signals. See *supra* notes 90-98 and accompanying text. There are no categorical exceptions to or exemptions from the MDS and STV

STV companies as well as cable providers, the definition of "cable system" in the existing statute¹³⁰ could be amended to include them. An even better solution, whatever the general assembly's original intent, would be to enact a separate statute, providing remedies similar to those in the new theft of cable service statute, for thefts of over-the-air pay television signals involving devices other than satellite dish antennas.¹³¹

Given, however, the nature of the unique statutory scheme in the new federal statute dealing with the interception of aerial signals by satellite antennas¹³² and considering the potential constitutional implications of such regulation,¹³³ it

signal protection under § 705(a) as there are for satellite to cable company signals under § 705(b), see *supra* notes 113-15 and accompanying text; see also *infra* notes 132-37 and accompanying text (discussing prudence of not enacting state statute to regulate interception of signals by satellite antennas at least until § 705(b)'s exception provisions are litigated).

130. See *supra* notes 21-25 and accompanying text.

131. The proposed statute would apply primarily to the interception of over-the-air signals by decoder and converter devices. Therefore, an interception system composed of a satellite antenna combined with a decoder or converter would be covered by the statute because of the use of the descrambling device.

STV and MDS signals generally require a decoder or descrambler device for intelligible interception. See *supra* notes 13-14.

Even if the North Carolina General Assembly rejects the idea of enacting a statute making illegal the unauthorized interception of aerial signals by devices other than satellite dish antennas, it should at least consider proscribing the manufacture, distribution, sale, and possession for sale of such aerial signal interception devices. See CAL. PENAL CODE § 593e (West Supp. 1985).

Adopting a separate statute to cover the interception of aerial pay television signals is preferable to merely expanding the scope of the cable service statute because of the differences in the technologies and modes of delivery of the over-the-air systems on the one hand and of cable television systems on the other. The issues and problems that arise in each context, although definitely similar, are not identical and could possibly merit very different treatment.

132. Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802-03 (to be codified at 47 U.S.C. § 605(b)); see *supra* notes 113-15 and accompanying text.

133. Although the amendment of the Communications Act of 1934 to prohibit some types of satellite signal transmission interception by satellite dish antennas may have been necessary in order to protect those who have a proprietary interest in such signals, some commentators have warned that such a change in the law inevitably will create new privacy concerns. See, e.g., Piscitelli, *Home Satellite Viewing: A Free Ticket to the Movies?*, 35 FED. COM. L.J. 1, 36 (1983). Their argument is predicated on the fact that, unlike unauthorized decoder and converter devices, satellite dish antennas have many legitimate uses. *Id.*; see also 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1][b] (noting that interception of "community-sponsored and advertiser-sponsored programming" is a totally legitimate function of satellite dish antennas). Therefore, the existence on a person's property of a satellite dish is not an absolute assurance that it is used to receive protected transmissions. See Piscitelli, *supra*, at 35. From this basis, the critics assert that the means required to confirm the use of home satellite dish antennas for illegal purposes pose major constitutional questions regarding the privacy rights of the antenna owners. *Id.*

Conceding the logical appeal of such arguments, upon closer scrutiny it is difficult to distinguish between the invasion of privacy implications of the methods employed to detect the use of a decoder or converter device inside the home, see *supra* note 37, and the methods employed to detect the use of a satellite antenna to gain access to protected signals. The fact that satellite antennas have some legitimate uses and that decoder and converter devices do not is largely irrelevant to the present analysis since converter and decoder devices are generally out of public view inside the home, and often electronic surveillance is required to detect unauthorized interception of pay TV signals by converter and decoder devices. Such use of electronic surveillance by a cable company to discover a decoder device being employed to gain illegal access to MDS signals has been upheld against a constitutional privacy challenge by at least one court. See *Movie Sys., Inc. v. Heller*, 710 F.2d 492, 496 (8th Cir. 1983); *supra* notes 37 & 40 and accompanying text. The point of this discussion is not to suggest that there are no valid constitutional objections to the use of electronic surveillance or other techniques to discover the illegal interception of pay television signals by decoder devices or by satellite antennas, but rather to recognize that the privacy issues presented by each method of signal

would be prudent for the state to refrain from regulating the use of satellite dish antennas to intercept over-the-air signals at least until the new federal law has had an opportunity to develop. While the unauthorized interception of MDS and STV signals under the federal statute¹³⁴ is unconditionally illegal¹³⁵ and thus no major conflicts between the federal and state laws prohibiting the unauthorized interception of such signals would exist, section 705(b) creates a relatively complex exception when satellite antennas are used to intercept unscrambled aerial signals. The enactment at the present time of a state statute regulating the interception of signals by satellite antennas would only contribute to the inevitable confusion that will occur as the federal statute is applied¹³⁶ and would raise questions of substantive conflict between the federal and state statutes.¹³⁷

Finally, it appears that the North Carolina General Assembly erred in not including within the prohibitions of section 14-118.5(b) the actual manufacture of devices designed to decode scrambled cable television signals. Section 14-118.5(b) prohibits the distribution, sale, attempt to sell, and possession for sale of the enumerated devices;¹³⁸ the failure to proscribe the manufacture of such devices seems an illogical omission and could create an unnecessary loophole.

North Carolina's new theft of cable television service statute offers a number of significant weapons to cable television companies in their fight against cable service pirates. The statute is progressive and well-designed; by creating a civil action with the potential for a recovery of treble damages, prospects for achieving the ultimate goal of deterring cable theft activity appear to be excellent.

WALTER D. FISHER, JR.

interception are substantially similar. Thus, the privacy concerns are no more compelling in one situation than in the other and therefore should not be a catalyst for singling out satellite dish antennas for preferential treatment.

134. Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(a)).

135. See *supra* notes 83 & 112-115 and accompanying text.

136. For example, there will almost certainly be a great deal of controversy over what constitutes a "marketing system" under § 705(b)(2) in determining whether the § 705(b) exemption is available.

137. See *supra* note 118 and accompanying text.

138. See N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984).

***Cannon v. Miller*: The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina**

Two facts were certain: that on October 15, 1979, Haywood Cannon and his wife Rachel were separated, and that on May 20, 1981, they were divorced.¹ The circumstances of Rachel's relationship with Jeffrey Miller were less clear. Few would have approved had it begun before Rachel's separation from Haywood, but perhaps the relationship began innocently after the Cannons' marriage had finally failed. This moral distinction, however, does not make a difference under the tort law of North Carolina. In either event, the law offers "heart balm"² to Haywood. If Rachel and Jeffrey had engaged in sexual relations before the divorce, Haywood could recover damages in an action for criminal conversation—despite the couple's separation.³ If the relationship began before the separation, Haywood was likely to prevail in an action for alienation of affections.⁴ These causes of action are ancient and are entrenched in the law of North Carolina.⁵ The North Carolina Court of Appeals, however, abolished these causes of action in the recent case of *Cannon v. Miller*,⁶ temporarily destroying Haywood's hope of recovery. Haywood's chances for recovery, however, were restored three months later when the North Carolina Supreme Court vacated the court of appeals' decision on procedural grounds and remanded the case for trial.⁷ The supreme court made its reversal without reaching the merits of the case and without reviewing the viability of causes of action for alienation of affections and criminal conversation. This Note analyzes the court of appeals' decision in *Cannon* and concludes that, despite the court of appeals' misperception of its ability to abolish the causes of action,⁸ the merits of the case were correctly resolved.

1. *Cannon v. Miller*, 71 N.C. App. 460, 460-61, 322 S.E.2d 780, 783 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985).

2. "The poetic name 'Heart Balm' refers to a financial soothing of the pocketbook of a victim in compensation for an unfortunate *affaire de coeur*." K. REDDEN, *MODERN LEGAL GLOSSARY* 241 (1980). A heart balm action is a legal term of art referring to civil actions for loss of romantic love. *Id.* See *infra* notes 16-50 and accompanying text.

3. See *infra* notes 36-50 and accompanying text.

4. See *infra* notes 18-35 and accompanying text.

5. *Bishop v. Glazener*, 245 N.C. 592, 595, 96 S.E.2d 870, 873 (1957). The court in *Bishop* stated:

The existence of a cause of action for damages in favor of a husband against one who wrongfully and maliciously alienates the affections of his wife depriving him of his conjugal rights to her consortium has long been recognized in England and this country. This is a fundamental common law right.

Id.

6. 71 N.C. App. 460, 322 S.E.2d 780 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985).

7. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). The supreme court allowed plaintiff's petition for discretionary review for "the sole purpose of vacating the decision of the Court of Appeals purporting to abolish the causes of action for Alienation of Affections and Criminal Conversation." *Id.* The supreme court stated that the court of appeals had "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court." *Id.*

8. See *supra* note 7.

In *Cannon* the North Carolina Court of Appeals abolished the causes of action for alienation of affections and for criminal conversation. Plaintiff husband, acting *pro se*, brought both actions against Jeffrey Miller, a Pitt County attorney, seeking a total of \$250,000 in compensatory and punitive damages.⁹ In support of his action for alienation, he alleged that his wife had taken a job as deputy clerk at the Pitt County Courthouse in May 1979, that she had become acquainted with defendant that summer, and that by late September or early October defendant had persuaded his wife to have sexual relations. Plaintiff alleged that defendant's activity " 'affected the will' of [his] wife and caused her 'to transfer her love, loyalty, and devotion from this plaintiff to the defendant' " and that "the influence was so strong that plaintiff's wife showed an 'obvious loss' of the genuine love and affection that had existed during the marriage until that time."¹⁰ To support his action for criminal conversation, plaintiff alleged that defendant had engaged in sexual relations with plaintiff's spouse at various times before the divorce.¹¹

Defendant responded by filing a motion to dismiss on the grounds that the causes of action were unconstitutional, or, alternatively, were contrary to the public policy of North Carolina. This motion was denied.¹² The court did, however, grant defendant's motion for summary judgment based on affidavits and exhibits (the Cannons' divorce records) which indicated that the marriage had been unhappy and that defendant's relationship with the spouse had begun after the separation.¹³ Plaintiff appealed, and defendant cross-appealed the denial of his motion to dismiss. After holding that summary judgment had been improperly granted,¹⁴ the court of appeals agreed with defendant that the actions should have been dismissed. The court based its holding on its conclusion that alienation of affections and criminal conversation are archaic concepts that serve no purpose in modern society.¹⁵

Criminal conversation and alienation of affections are tort actions that seek to protect the marital relationship against intentional interference by third parties. Along with seduction and breach of promise to marry, they are commonly—and derisively—termed "heart balm" actions since they purport to award money damages for emotional harm.¹⁶ The specific interest protected is one spouse's right to the other's consortium.¹⁷ Though these actions often are brought against the same defendant and arise from the same set of events, they are historically separate and involve different elements of proof.

Actions for alienation of affections evolved from a husband's common-law right to recover from anyone who intentionally "enticed" his wife to leave the

9. *Cannon*, 71 N.C. App. at 460, 322 S.E.2d at 783.

10. *Id.* at 461, 322 S.E.2d at 783.

11. *Id.*

12. *Id.* at 461-62, 322 S.E.2d at 783.

13. *Id.* at 462, 322 S.E.2d at 783-84.

14. *Id.* at 463-70, 322 S.E.2d at 784-88.

15. *Id.* at 497, 322 S.E.2d at 803-04.

16. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 124, at 929 (5th ed. 1984).

17. See *infra* notes 18-35 and accompanying text.

home, with the result that he lost his wife's society and services.¹⁸ The action of enticement was based on general common-law rules governing the master-servant relationship and the view that the wife was the husband's servant.¹⁹ This principle was first articulated in the 1745 English case of *Winsmore v. Greenbank*,²⁰ and was commonly followed in this country,²¹ except in Louisiana.²² North Carolina recognized the action of enticement in the 1849 case of *Barbee v. Armstead*.²³

Early actions in enticement had little to do with the emotional state of marriage; rather, they sought to protect a husband's right to his wife's consortium. Consortium, in its traditional sense, has been defined as "a bundle of legal rights to the alliterative trio of the services, society, and sexual intercourse of the wife."²⁴ The wife's duty to the husband derived from her legally inferior position, which essentially made her the husband's servant. One commentator describing the wife's status observed:

It appears . . . that the foundation of the husband's right of action for the loss of *consortium* is based on the idea that the wife is her husband's servant, since an interference with the service of a servant is an actionable trespass. The wife is *sub virga viri sui*, is classified with the servants, and both wife and servants are considered chattels. The very nature of the relationship and the duties which it imposed on the wife together with her inferiority and subservience easily gave to the husband proprietary interest in her, and in turn led to proprietary actions for the loss of her services.²⁵

Actions for enticement, however, have little utility in an age in which the wife is viewed as a partner in marriage rather than as her husband's servant. Thus, enticement gave way to its modern counterpart, the action for alienation of affections. The tort of alienation was first recognized in New York in 1866²⁶

18. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 207, at 553-54 (4th ed. 1980); W. PROSSER & W. KEETON, *supra* note 16, § 124, at 917-18; Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 992-94 (1935).

19. Comment, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 327-28 (1981).

Originally, a master could recover for physical injury to a servant if loss of services resulted. Since a wife was viewed as a servant, a husband could also sue for the loss of the wife's services when she was injured by the defendant. Later, to meet the labor crisis in fourteenth century England resulting from the Black Death, a remedy was provided against anyone who enticed servants away from their masters. Thus, the sources of the original [action for alienation] had in common either physical injury to the servant or physical removal (enticement) of the servant from the premises of the master.

Id.

20. 125 Eng. Rep. 1330 (1745) (recognized husband's right against one who intentionally "persuaded, procured, or enticed" wife to leave home).

21. *Cannon*, 71 N.C. App. at 470-71, 322 S.E.2d at 788.

22. See *Moulin v. Monteleone*, 165 La. 169, 115 So. 447 (1927) (refusing to recognize an action for alienation of affections since damages would be essentially punitive, and such damages are not allowed in civil cases under Louisiana law).

23. 32 N.C. (10 Ired.) 530 (1849).

24. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 916.

25. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930).

26. *Heermance v. James*, 47 Barb. 120 (N.Y. App. Div. 1866).

and eventually was adopted by all states except Louisiana.²⁷ The basis of this tort is the deprivation of the wife's affection for the husband, that is, a "loss of love, society, companionship and comfort."²⁸ Expanding the concept of consortium to include emotional interests was a natural result of the conflict between the older, strictly proprietary basis of enticement and newer, egalitarian ideas about the legal status of women, morality, and the function of the family.²⁹ A 1919 Colorado decision aptly described the new emphasis on affection rather than on services: "There are two primary rights in the case; one is the right of the plaintiff to the body of his wife and the other to her mind, unpolluted."³⁰

The plaintiff is required to establish three elements to sustain a cause of action in alienation of affections:³¹ (1) a valid marriage, (2) the loss of affection or consortium,³² and (3) the wrongful and malicious conduct³³ of the defendant that caused³⁴ the loss of affection. Adultery is not a necessary element to a cause of action in alienation since the interest protected is a spouse's right to marital affection, not an exclusive right of sexual intercourse. Indeed, one commentator has noted that in-laws are more likely to be defendants than are "wicked lover[s]."³⁵

Criminal conversation³⁶ is simply a civil action for adultery. Like the early action for enticement, criminal conversation was not concerned with emotional damage to a marriage; rather, the interest protected was the "defilement of the

27. See *supra* note 22.

28. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 918.

29. See *id.* at 916; Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *supra* note 25. But cf. 2 R. LEE, *supra* note 18, § 207, at 554 ("the basis of the action is not merely a loss of affections but rather a loss of consortium"); Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 472 (1934) ("the gist of [the action] is not the loss of affections but rather the loss of consortium").

30. Sullivan v. Valiquette, 66 Colo. 170, 172, 180 P. 91, 91 (1919).

31. Litchfield v. Cox, 266 N.C. 622, 146 S.E.2d 641 (1966); Bishop v. Glazener, 245 N.C. 592, 96 S.E.2d 870 (1957); Ridenhour v. Miller, 225 N.C. 543, 35 S.E.2d 611 (1945); Hankins v. Hankins, 202 N.C. 358, 162 S.E. 766 (1932).

32. A partial loss of affections is sufficient. 2 R. LEE, *supra* note 18, § 207, at 554.

33. To prove malice it is not necessary to show a "spiteful, malignant, or revengeful disposition"; rather, one need only prove unjustifiable conduct injurious to another. Cottle v. Johnson, 179 N.C. 426, 429, 102 S.E. 769, 770 (1920).

Special rules apply when in-laws are defendants. See 2 R. LEE, *supra* note 18, § 207, at 558-59.

The relation of parent and child justifies the parent in giving counsel and advice in regard to the child's marital affairs so long as the parent acts in good faith. The law recognizes and respects not only the marital relation, but likewise the natural affection between a parent and child. The rights of parents end at the border of good faith. When parents advise and interfere with the marital relations of their children, the presumption is that they have acted in good faith and for the child's welfare. A parent has a privilege which is overcome only by proof of its abuse. The privilege has been extended to other near relatives who are justified in giving advice in personal matters.

Id. at 559.

34. The standard for causation is lenient. A spouse need only demonstrate that the defendant's conduct was the controlling or effective cause even though other causes may have contributed to the alienation. Bishop v. Glazener, 245 N.C. 592, 96 S.E.2d 870 (1957).

35. 2 R. LEE, *supra* note 18, § 207, at 559. See generally, Brown, *supra* note 29, at 480-87 (discussion of in-laws as defendants in alienation actions).

36. The term "conversation" probably derives from the action's former status as an ecclesiastical crime. The term "conversation" was used euphemistically for intercourse. See W. PROSSER, *THE LAW OF TORTS* § 124, at 875 n.75 (4th ed. 1971).

marriage bed, the blow to family honor, and the suspicion cast upon the legitimacy of the offspring."³⁷ Thus, the essence of the criminal conversation action is the husband's exclusive right to sexual relations with the wife, based both on a need to maintain pure bloodlines for inheritance purposes and on principles of morality.³⁸ To establish a valid claim in criminal conversation, the husband has to prove (1) a valid marriage and (2) sexual intercourse between the defendant and the plaintiff's wife.³⁹ In modern practice, actions for criminal conversation are functionally indistinguishable from actions for alienation.⁴⁰ Each serves as heart balm, and the two are frequently brought together.⁴¹

Because of the husband's legal superiority to the wife and the proprietary nature of his right to consortium, alienation of affections and criminal conversation were virtually strict liability torts. Consent and connivance of the husband were the only recognized defenses to either tort.⁴² A wife's consent was considered irrelevant; because of the fictional legal unity of the spouses, the wife was not legally capable of giving consent to a compromise of her husband's marital rights.⁴³ The plaintiff's own adultery was not a defense,⁴⁴ nor was his subsequent condonation of his wife's behavior.⁴⁵ Even a valid separation agreement would not necessarily bar an action for alienation.⁴⁶ Similarly, mere separation was no defense to criminal conversation.⁴⁷ In modern practice the same rules limiting available defenses apply.

Originally, only the husband could bring an action for alienation or for criminal conversation. His exclusive right was based on the common law's recognition of his—and only his—right to consortium. As a virtual servant, the wife's role in the marriage did not entitle her to a reciprocal interest in the husband's consortium.⁴⁸ Even if she had such an interest, she was unable to enforce it; women were not permitted to bring actions independently until passage of the

37. 2 R. LEE, *supra* note 18, § 208, at 567; *see also* Powell v. Strickland, 163 N.C. 393, 403, 79 S.E. 872, 876 (1913) ("the wrong relates to . . . the dishonor of [the] marriage bed, . . . the suspicion cast upon [the] legitimacy of the offspring, . . . [and] the invasion and deprivation of . . . exclusive marital rights and privileges").

38. Lippman, *supra* note 25, at 654-55; Comment, *Piracy on the Matrimonial Seas—The Law and The Marital Interloper*, 25 Sw. L.J. 594 (1971).

39. Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938); Cottle v. Johnson, 179 N.C. 426, 428-29, 102 S.E. 769, 770 (1920); Powell v. Strickland, 163 N.C. 393, 402, 79 S.E. 872, 876 (1913).

40. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 919.

41. *Id.*

42. 2 R. LEE, *supra* note 18, § 208, at 571; W. PROSSER & W. KEETON, *supra* note 16, § 124, at 921; *cf.* Barker v. Dowdy, 223 N.C. 151, 25 S.E.2d 404 (1943) (condonation of wife's adultery does not constitute a defense of connivance).

43. Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938); Chestnut v. Sutton, 207 N.C. 256, 257, 176 S.E. 743, 743 (1934); Cottle v. Johnson, 179 N.C. 426, 428-29, 102 S.E. 769, 770 (1920); Scott v. Kiker, 59 N.C. App. 458, 464, 297 S.E.2d 142, 147 (1982).

44. *See* Bryant v. Carrier, 214 N.C. 191, 194, 198 S.E. 619, 621 (1938).

45. Barker v. Dowdy, 223 N.C. 151, 152, 25 S.E.2d 404, 404 (1943).

46. *See* Sebastian v. Kluttz, 6 N.C. App. 201, 213-14, 170 S.E.2d 104, 111-12 (1969).

47. Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938).

48. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 915-16; Lippman, *supra* note 25, at 654-56.

Married Women's Property Acts.⁴⁹ Most states, including North Carolina, now permit women to bring actions for alienation of affections or criminal conversation.⁵⁰

Most commentators view alienation of affections and criminal conversation actions as devices to maintain family harmony and deter wrongful outside interference with the marriage.⁵¹ Few would contend that these are unworthy goals. Yet the actions' effectiveness in achieving the desired ends is at best questionable, and the potential abuses and shortcomings of the actions are real and dangerous. A policy decision to retain these actions must be based on a conclusion that they are sufficiently effective to outweigh their inherent disadvantages. The North Carolina Court of Appeals sided with the majority of jurisdictions and commentators⁵² in concluding that the balance of factors demanded abolition:

Unarguably, the integrity of the marriage relation and the preservation of marital harmony are interests deserving of judicial protection. Yet, we find general agreement among the authorities who have examined the issue that, *on balance*, the social harm engendered by the existence of these torts . . . outweigh[s] the meritorious goals purportedly served by the actions.⁵³

Thus, even though the court was willing to concede the existence of cases in which a spouse had suffered genuine wrong, it concluded that "equity to the plaintiff is not the only consideration."⁵⁴ The court's decision to abolish these

49. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 916; Lippman, *supra* note 25, at 656. The wife's incapacity to sue was described bluntly in *Hipp v. E.I. DuPont de Nemours & Co.*, 182 N.C. 9, 12, 108 S.E. 318, 319 (1921):

At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave or any other property; that is to say by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative and the wife could not maintain an action for injuries sustained by her husband.

Blackstone gave this explanation:

We may observe, that in these relative injuries notice is only taken of the wrong done to the *superior* of the parties related [husband] by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the *inferior* [wife] by such injuries is totally unregarded. One reason for this may be this: that the *inferior* hath no kind of property in the company, care, or assistance of the *superior*, as the *superior* is held to have in those of the *inferior*; and therefore the *inferior* can suffer no loss or injury.

3 W. BLACKSTONE, COMMENTARIES *143 (emphasis added).

During the latter half of the 19th century all states enacted statutes, generally known as Married Women's Property Acts, which removed much of the wife's legal disability. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 7.2 (1968). Consequently, married women were allowed to acquire, own, and transfer property, to make contracts, to be employed, and keep their earnings, and to sue and be sued. *Id.*

50. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 916; *see, e.g.*, *Townsend v. Holderby*, 197 N.C. 550, 149 S.E. 855 (1929); *Brown v. Brown*, 124 N.C. 19, 32 S.E. 320 (1899).

51. *See, e.g.*, Feinsinger, *supra* note 18, at 988-89; Holbrook, *supra* note 29, at 4-6; Comment, *supra* note 19, at 327; Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?*, 56 N.D.L. REV. 239, 250-52 (1980); Comment, *supra* note 38, at 613; Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585 (1977) [hereinafter cited as Comment, *Alienation of Affections: Flourishing Anachronism*].

52. *See infra* notes 84-93 and accompanying text.

53. *Cannon*, 71 N.C. App. at 491, 322 S.E.2d at 800 (emphasis added).

54. *Id.*

actions was based on its recognition of four significant drawbacks in allowing actions for alienation and criminal conversation: the potential for abuse, the lack of deterrent effect, the difficulty of determining causation, and the inappropriateness of recovery for emotional harm predicated on a property theory.⁵⁵

First, the court stressed the great potential for abuse inherent in the alienation of affections and criminal conversation actions. Because these torts often connote sexual misbehavior, the chance of blackmail always exists, as does the possibility of unfounded claims that will damage reputation.⁵⁶ The threat of bringing either action also may induce defendants to accept unfavorable extrajudicial settlements.⁵⁷ In the event that such claims go to trial, the tinge of immorality may distort the process of determining damages; connotations of misbehavior may cause " 'emotion and moral indignation to prevail over considerations of private or public injury in the assessment of damages.' " ⁵⁸

Second, the court in *Cannon* found no significant deterrent force in alienation of affections or criminal conversation actions. The possibility of an adverse judgment and award does not enter into the minds of transgressors. Nor does the policy of punishing only the outside party correspond to the reality of marital disintegration. The court noted that deterrence rests on the unrealistic assumption of a harmonious husband-wife relationship that is destroyed by a malicious intruder.⁵⁹ It is more likely that " '[the] defendant becomes enmeshed with [the] plaintiff's spouse without preconceived design, [and when] there is such design, juries can scarcely be expected to . . . distinguish the pursuer from the pursued.' " ⁶⁰ Under such circumstances the threat of a civil action can have little deterrent effect.⁶¹ Furthermore, the publicity and stress of litigation associated with the action would destroy any chance of reconciliation.⁶² Indeed, the court felt that the practical effect of money damages was to allow a plaintiff a

55. *Id.* at 491-92, 322 S.E.2d at 800-01.

56. *Id.* See H. CLARK, *supra* note 49, § 10.2, at 267; Feinsinger, *supra* note 18, at 996. Another commentator made this assessment: "[T]he threat of exposure, publicity, and notariety [sic] is more than sufficient to breed corruption, fraud, and misdealings on the part of unscrupulous persons in bringing unjustified and malicious [sic] suits." Comment, *Criminal Conversation: Civil Action for Adultery*, 25 BAYLOR L. REV. 495, 500 (1973).

57. *Cannon*, 71 N.C. App. at 491, 322 S.E.2d at 800.

58. *Id.* at 481, 322 S.E.2d at 794 (quoting Feinsinger, *supra* note 18, at 1009).

59. *Id.* at 480, 322 S.E.2d at 793; see also H. CLARK, *supra* note 49, § 10.2, at 267. Clark states:

[T]he action for alienation is based on psychological assumptions that are contrary to fact [V]iable, contented marriages are not broken up by the vile seducer of the Nineteenth Century melodrama, though this is what the suit for alienation assumes. In fact the break-up is the product of many influences. It is therefore misleading and futile to suppose that the threat of a damage suit can protect the marital relationship.

Id.

60. *Cannon*, 71 N.C. App. at 479, 322 S.E.2d at 793 (quoting Feinsinger, *supra* note 18, at 995).

61. *Id.* at 478-79, 322 S.E.2d at 793; see also *Bearbower v. Merry*, 266 N.W.2d 128, 137 (Iowa 1978) (McCormick, J., dissenting). Judge McCormick stated in *Bearbower*

Many authoritative studies have been made of the nature of marriage and the cause, prevention, and cure of marital failure. I have searched among them in vain for any support for the . . . assumption that the existence of the alienation tort is a deterrent to marital breakdown or a device for protecting the family unit.

Id. (McCormick, J., dissenting).

62. *Cannon*, 71 N.C. App. at 492, 322 S.E.2d at 800-01.

"'forum for vindictiveness and posturing self-justification.'"⁶³

A third flaw of heart balm actions is that the tort concept of causation is too simplistic to reflect the dynamics of the usual marital breakup.⁶⁴ In actions for alienation, the plaintiff must establish that the defendant was the controlling cause of the loss of affections.⁶⁵ To do so effectively it is necessary to conduct a full inquiry into the marital history, the quality of the couple's relationship, and the couple's deepest motives.⁶⁶ Such investigations are difficult to conduct and the results usually are inconclusive. The ability of psychologists to determine the cause of a particular marital breakdown is questionable;⁶⁷ moreover, the presence of the third party in a romantic triangle may not be causally related to the decision to engage in extramarital activities.⁶⁸ Indeed, the inability to determine causation may tempt juries to resolve the issue on moral grounds.⁶⁹

Last, alienation of affections and criminal conversation actions reflect a property basis for recovery that has no relevance to modern understandings of psychology or social values. The court stated that these actions have never shaken free from their proprietary origins.⁷⁰ When the right to bring heart balm actions was extended to women, the actions were not restructured to reflect greater equality between spouses, changes in sexual mores, and newer views of the family's function.⁷¹ The retention of the rule against spousal consent as a defense illustrates this point.⁷² The rule is based on the fictional unity of man and wife,⁷³ and logically cannot be justified since the fiction has been discarded. Nevertheless, the rule against consent as a defense has been extended to both

63. *Id.* at 487, 322 S.E.2d at 798 (quoting *Bearbower v. Merry*, 266 N.W.2d 128, 138 (Iowa 1978) (McCormick, J., dissenting)). Clark has characterized these actions, in part, as a "forced sale . . . of affections." H. CLARK, *supra* note 49, § 10.2, at 267.

64. *See Cannon*, 71 N.C. App. at 478-80, 322 S.E.2d at 793-94; Comment, *supra* note 38, at 613-14.

65. *See supra* note 34 and accompanying text.

66. H. CLARK, *supra* note 49, § 10.2, at 265-66; *see also* Feinsinger, *supra* note 18, at 995 ("An expert social scientist would scarcely undertake to designate any one cause of disorganization as 'controlling' in a given case, yet the law confidently relies on the jury to make such a selection.").

67. W. GOODE, *THE FAMILY* 161-62 (2d ed. 1982).

From the beginning of divorce research, analysts have tried to pin down the 'causes' of divorce, but with little success. Inquiries have reported what legal grounds the divorcing couple uses, what complaints they make about each other outside that legal action, and many of the factors associated with higher or lower rates of marital dissolution. It seems unlikely that we shall locate any simple set of causes.

. . . A few marriages doubtless end because of some single large cause, such as the husband's violence or the wife's neurosis, but very likely most modern divorces are the result of many diverse difficulties. These create a continuing cumulative process of conflict during which both spouses gradually come to reject both the relationship and each other.

Id.

68. A. FROMME, *THE PSYCHOLOGIST LOOKS AT SEX AND MARRIAGE* 207-25 (1950).

69. Comment, *supra* note 38, at 614.

70. *Cannon*, 71 N.C. App. at 492, 322 S.E.2d at 801; *see also* Brown, *supra* note 29, at 472 ("Consortium is a property right, and it would seem to follow that the action for alienation of affections is to be treated as one for a tort to property; even though . . . the damages are based primarily upon personal injuries to the plaintiff.").

71. *See supra* notes 30-34 and accompanying text.

72. *See supra* note 43 and accompanying text.

73. *Id.*

husband and wife. Many commentators have noted that after the legal inferiority of women—the very basis for alienation and criminal conversation—had been eliminated by the Married Women's Property Acts, the courts could easily have abolished the actions as unwarranted.⁷⁴ Instead, the courts chose to extend the actions to women on a theory of the wife's equal interest in the marriage.⁷⁵ The effect was to grant a proprietary interest in consortium to the wife as well as the husband.⁷⁶

The court of appeals in *Cannon* was offended by the notion of a proprietary interest in love or affection: "common sense dictates that by definition these are 'rights' which can only be voluntarily given to one spouse by the other."⁷⁷ Since "spousal love and all its incidents do not constitute property that is subject to 'theft' or 'alienation,'" ⁷⁸ the court concluded that actions for alienation of affections and criminal conversation have become "removed from the realm of social reality."⁷⁹

It is difficult to quarrel with the court of appeals' conclusion in *Cannon* that actions for alienation of affections and for criminal conversation should be abolished. The ubiquitous possibilities for abuse, the absence of deterrent force, the difficulty in assigning blame, and the patent backwardness of permitting a proprietary interest in a spouse's affections clearly outweigh any utility these actions may have in protecting the interests of the rare, totally innocent party who has suffered a bona fide wrong. Nor would any measure short of eliminating both actions have been meaningful. Retaining alienation of affections or criminal conversation actions while allowing for a defense of consent would have been tantamount to abolition given the consensual nature of the torts.⁸⁰ A decision to retain alienation of affections while eliminating criminal conversation would have amounted to preserving a civil action for adultery, with the added element of lost affections;⁸¹ problems with abuse, causation, and deterrence would have remained. Conversely, retention of only the emotionally neutral action of criminal conversation would have required a proprietary approach to spousal relations that few would accept. Such an approach would have had the advantage of ending questionable actions against meddlesome in-laws,⁸² but would not have resolved questions of abuse, deterrence, causation, and the property basis for recovery. Finally, limiting recovery to actual damage only could have protected a defendant from an irrational jury and could not have afforded protection

74. Feinsinger, *supra* note 18, at 990; Lippman, *supra* note 25, at 662; Comment, *supra* note 19, at 328-30.

75. See, e.g., *Knighten v. McClain*, 227 N.C. 682, 44 S.E.2d 79 (1947).

76. *Cannon*, 71 N.C. App. at 476-77, 322 S.E.2d at 791.

77. *Id.* at 477, 322 S.E.2d at 792.

78. *Id.* at 492, 322 S.E.2d at 801.

79. *Id.* at 477, 322 S.E.2d at 792.

80. See Comment, *supra* note 19, at 339-40.

81. See Note, *Hunt v. Hunt: The Status of the "Heartbalm" Torts in South Dakota*, 27 S.D.L. REV. 160, 169 (1982) (criticizing South Dakota Supreme Court's decision to abolish criminal conversation but to retain alienation of affections).

82. See Comment, *Alienation of Affections: Flourishing Anachronism*, *supra* note 51, at 599-600.

against the other shortcomings of the action described above.⁸³

The court of appeals' decision is in accord with the current national trend away from heart balm actions. To date, twenty-seven states and the District of Columbia have either abolished alienation actions by statute or have prohibited monetary recovery in such suits,⁸⁴ while two states have reduced the statute of limitations to one year⁸⁵ and another state has eliminated punitive damages.⁸⁶ Twenty-one states and the District of Columbia have legislatively abolished actions for criminal conversation or have prohibited monetary recovery in such suits;⁸⁷ four states have shortened their statutes of limitations,⁸⁸ and at least three others have limited the amount of damages recoverable.⁸⁹ In eight states it is a crime even to file a complaint alleging one or both causes of action.⁹⁰ Other states have judicially abolished criminal conversation and alienation.⁹¹ The

83. *See id.* at 600.

84. ALA. CODE § 6-5-331 (1975); ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1984-85); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572b (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); FLA. STAT. ANN. § 771.01 (West 1984) (monetary damages not permitted); GA. CODE ANN. § 51-1-17 (1982); IND. CODE ANN. § 34-4-4-1 (Burns 1973 & Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 167 (1964); MD. FAM. LAW CODE ANN. § 3-103 (1984); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MINN. STAT. ANN. § 553.02 (West Supp. 1985); MONT. CODE ANN. § 27-1-601 (1983); NEV. REV. STAT. § 41.380 (1979); N.H. REV. STAT. ANN. § 460.2 (1983) (monetary damages not permitted); N.J. STAT. ANN. § 2A:23-1 (West 1952) (monetary damages not permitted); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page 1981); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1984-1985) (with insignificant exceptions); OR. REV. STAT. § 30.840 (1983); PA. STAT. ANN. tit. 48, § 170 (Purdon 1965) (with insignificant exceptions); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1984) (monetary damages not permitted); VA. CODE § 8.01-220 (1984); W. VA. CODE § 56-3-2a (Supp. 1984); WIS. STAT. ANN. § 768.01 (West 1981); WYO. STAT. § 1-23-101 (1977) (monetary damages not permitted).

85. ARK. STAT. ANN. § 37-201 (Supp. 1981); R.I. GEN. LAWS § 9-1-14 (Supp. 1984).

86. ILL. ANN. STAT. ch. 40 ¶¶ 1901-07 (Smith-Hurd 1980) (limited to actual damages).

87. ALA. CODE § 6-5-331 (1975); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572f (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); FLA. STAT. ANN. § 771.01 (West 1984) (monetary damages not permitted); GA. CODE ANN. § 51-1-17 (1982); IND. CODE ANN. § 34-4-4-1 (Burns 1973 & Supp. 1983); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MINN. STAT. ANN. § 553.02 (West Supp. 1984); NEV. REV. STAT. § 41.380 (1979); N.J. STAT. ANN. § 2A:23-1 (West 1952) (monetary damages not permitted); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page 1981); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1983-1984) (with insignificant exceptions); OR. REV. STAT. § 30.850 (1983); TEX. FAM. CODE ANN. § 4.05 (Supp. 1985); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1984) (monetary damages not permitted); VA. CODE § 8.01-220 (1984); WIS. STAT. ANN. § 768.01 (West 1981); WYO. STAT. § 1-23-101 (1977) (monetary damages not permitted).

88. ARK. STAT. ANN. § 37-201 (Supp. 1981) (one year); KY. REV. STAT. § 413.140(1)(c) (1972 & Supp. 1984) (one year); MO. ANN. STAT. § 516.140 (Vernon 1952 & Supp. 1984) (two years); TENN. CODE ANN. § 28-3-104 (1980) (one year).

89. ILL. ANN. STAT. ch. 40 ¶¶ 1951-57 (Smith-Hurd 1980) (limited to actual damages); S.C. CODE ANN. § 15-37-50 (Law. Co-op 1976) (limitation on recoverable costs); WASH. REV. CODE ANN. § 4.84.040 (1962) (limitation on recoverable costs).

90. FLA. STAT. ANN. §§ 771.01 to -.05 (West 1964); IND. CODE ANN. §§ 34-4-4-1 to -3 (Burns 1973 & Supp. 1984); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1980) (alienation only); MONT. CODE ANN. §§ 27-1-601 to -604 (1983); N.J. STAT. ANN. §§ 2A:23-1 to -3 (West 1952); N.Y. CIV. RIGHTS LAW §§ 80-a to 81 (McKinney 1976); WIS. STAT. ANN. §§ 768.01 to -.03 (West Supp. 1981); WYO. STAT. §§ 1-23-101 to -103 (1977).

91. Four state supreme courts have abolished criminal conversation: *Bearbower v. Merry*, 266 N.W.2d 128 (Iowa 1978); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980); *Fadgen v. Leyker*, 469 Pa. 272, 365 A.2d 147 (1976); *Hunt v. Hunt*, 309 N.W.2d 818 (S.D. 1981).

Two courts have eliminated actions in alienation of affections: *Funderman v. Mickelson*, 304

supreme courts of four states, although disapproving of these actions, have left the question of abolition to the legislatures.⁹² The trend away from heart balm actions is also reflected among the commentators. Indeed, it is difficult to find recent commentary that advocates the retention of alienation or criminal conversation.⁹³

The importance of the *Cannon* decision, however, goes beyond the narrow issues of alienation of affections and criminal conversation. It reflects a trend in North Carolina's domestic relations law toward removing fault as an element in the dissolution of marriage. With insignificant exceptions, divorce is available to either spouse regardless of fault.⁹⁴ Equitable distribution of marital property proceeds on the presumption that an equal division is fair unless certain factors relating to the needs or contribution of one spouse are present;⁹⁵ fault is not among the factors.⁹⁶ Similarly, although a showing of fault is a prerequisite to alimony,⁹⁷ the award is limited to dependent spouses⁹⁸ and the amount is governed by need.⁹⁹ Adultery, however, is still a bar to alimony,¹⁰⁰ and a trial judge may reduce an award in light of a dependent spouse's fault.¹⁰¹ Even so, these recognitions of fault constitute only a limitation on the supporting spouse's obligations and not a remedy for marital misconduct.

Because of the decreased role of fault in the dissolution of marriage and its attendant economic consequences, the maintenance of actions for alienation of affections and for criminal conversation seems incongruous. If the aggrieved spouse has few rights against the offending spouse arising from marital fault, clearly the aggrieved spouse should have fewer rights against a third party. The court of appeals' decision in *Cannon*, therefore, could have harmonized North

N.W.2d 790 (Iowa 1981); *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980). *But see* *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983) (affirming cause of action but requiring plaintiff to show that the causal effect of defendant's conduct outweighed all other causes, including conduct of plaintiff and spouse).

92. *Gorder v. Sims*, 306 Minn. 275, 237 N.W.2d 67 (1975) (alienation retained); *Kremer v. Black*, 201 Neb. 467, 268 N.W. 582 (1978) (criminal conversation retained); *Dube v. Rochette*, 11 N.H. 129, 262 A.2d 288 (1970) (alienation retained); *Felsenthal v. McMillan*, 493 S.W.2d 729 (Tex. 1973) (criminal conversation retained).

93. *See, e.g.*, H. CLARK, *supra* note 49, § 10.2; Comment, *supra* note 19; Note, *supra* note 51; Note, *supra* note 81; Comment, *supra* note 38; Comment, *Alienation of Affection: Flourishing Anachronism*, *supra* note 51. *But see* Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAWYER 426 (1972) (author advocates elimination of criminal conversation but retention of alienation of affections with adultery as an element).

94. N.C. GEN. STAT. § 50-6 (1984) (providing for divorce after one year's separation); *see also id.* § 50-5.1 (special provision for divorce based on a spouse's insanity).

95. *Id.* § 50-20(c).

96. *Id.* The North Carolina Court of Appeals recently has ruled that marital fault is not a proper consideration under section 50-20(c)(12). *See Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E.2d 161 (1984). For a discussion of *Hinton*, *see* Note, *Hinton v. Hinton—Equitable Distribution Without Consideration of Marital Fault*, 63 N.C.L. REV. 1204 (1985).

97. N.C. GEN. STAT. § 50-16.2 (1984).

98. *Id.*

99. *Id.* § 50-16.5 (1985); *see also* *Lemons v. Lemons*, 22 N.C. App. 303, 206 S.E.2d 327 (1974) (alimony awarded not as punishment for broken marriage, but for demonstrated need).

100. N.C. GEN. STAT. § 50-16.6(a) (1984).

101. *Id.* § 50-16.5(b).

Carolina's tort law with the state's policy of deemphasizing fault in divorce if it had been allowed to stand. Because of the supreme court's summary reversal of *Cannon*, however, actions for alienation of affections and criminal conversation are still part of the law in North Carolina. Thus, a spouse is given an acknowledgment of fault in tort that the divorce statutes deny.

Similarly, the decision could have eliminated an unfair disparity in the law of interference with family relationships. Unlike a spouse, a child has no cause of action against a third party who causes the alienation of a parent's affections. In the 1949 case of *Henson v. Thomas*,¹⁰² the North Carolina Supreme Court ruled that since a parent is under no legal obligation to love his or her children, a child could not hold a third party liable for the parent's withdrawal of affections. The court distinguished between the parent-child relationship and a marriage, noting that a spouse's right to maintain actions for alienation and criminal conversation was recognized only because of the "common law conception of the husband's property right in the person of his wife."¹⁰³ Unquestionably, the parent-child relationship is as important to society as the marital relationship. It is illogical to allow a cause of action in one situation and to withhold it in another.

Cannon was not a subtle decision, nor was it a difficult one. The court of appeals may have misperceived its authority to change the law, but it did not fail to recognize the need to do so. Alienation of affections and criminal conversation originate from the need to discourage or vindicate violations of proprietary interests that no longer exist; these actions are ill-suited to protecting the emotional interests that characterize the ideal modern marital relationship. Marriages must stand or fall according to their own strengths and weaknesses. There is no reason for the state to provide a forum in which the estranged spouse can bitterly assign fault to a failed marriage. *Cannon*, nevertheless, has been remanded to Pitt County Superior Court for trial. There the parties will litigate the complex questions of marital breakdown in a tort action rooted in the medieval concept that a wife is her husband's chattel. Eventually the North Carolina Supreme Court will be able to decide *Cannon* or a similar case on the merits of abolishing actions for alienation of affections and criminal conversation. When that opportunity arises, the court of appeals' decision in *Cannon* should be persuasive in closing North Carolina's courts to disputes such as the one between Haywood Cannon and Jeffrey Miller.

JAMES LEONARD

102. 231 N.C. 173, 56 S.E.2d 432 (1949).

103. *Id.* at 174, 56 S.E.2d at 433.

***Azzolino v. Dingfelder*: North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims**

The recent development of medical processes to detect genetic defects in unborn fetuses,¹ in combination with the recognition of a woman's legal right to obtain an abortion,² has caused a reformulation of the physician's duty of due care in the area of prenatal malpractice torts. Recognition of this duty has led to the development of new claims for relief, most notably those termed "wrongful birth"³ and "wrongful life."⁴

This Note examines the development of these new tort claims and analyzes the North Carolina Court of Appeals' decision in *Azzolino v. Dingfelder*.⁵ It concludes that the court's novel formulation of damages is potentially detrimental to those it is designed to benefit and is an unwarranted abandonment of established case law.

In October 1979 Michael Azzolino was born with a permanent genetic disorder known as Down's syndrome or mongolism.⁶ Michael's mother had received prenatal care at the Haywood-Moncre Community Health Center (the Clinic), a family health care facility operated by Orange-Chatham Comprehensive Health Services, Inc. (OCCHS).⁷ During her visits to the Clinic, Mrs. Azzolino was under the care of Jean Dowdy, a registered nurse employed by the Clinic as a family nurse practitioner, and Dr. James R. Dingfelder, a board-certified obstetrician-gynecologist on the staff at North Carolina Memorial Hospital in Chapel Hill.⁸ Dr. Dingfelder's duties at the Clinic included providing prenatal care for patients and supervising the work of the family nurse practitioners.⁹

During the first trimester of her pregnancy Mrs. Azzolino asked Nurse Dowdy about the advisability of having amniocentesis performed.¹⁰ Nurse

1. These procedures include amniocentesis, ultrasonography, roentgenography, and fetoscopy. See Elias & Verp, *Prenatal Diagnosis of Genetic Disorders*, 12 OBSTET. GYNECOL. ANN. 79 (1983). For a discussion of amniocentesis and ultrasonography, see *infra* note 10.

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. For a discussion of the wrongful birth claim, see *infra* notes 25-59 and accompanying text.

4. For a discussion of the wrongful life claim, see *infra* notes 60-81 and accompanying text.

5. 71 N.C. App. 289, 322 S.E.2d 567 (1984), *disc. rev. granted*, 313 N.C. 327, 327 S.E.2d 887 (1985).

6. Normal human genes have 46 chromosomes, arranged in 23 pairs. Down's syndrome is a chromosomal abnormality caused by the presence of a third chromosome in the twenty-first pair. Individuals afflicted with Down's syndrome suffer moderate to severe mental retardation as well as physical abnormalities such as a small, somewhat flattened skull, a short, flat-bridged nose, and squared hands with shortened fingers. Reduced "sensory acuity levels," especially in the ability to smell and taste, are common, as are coordination and reflex difficulties. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1290 (26th ed. 1981); D. GIBSON, DOWN'S SYNDROME 6, 8-10 (1978).

7. *Azzolino*, 71 N.C. App. at 292, 322 S.E.2d at 571.

8. Through a contractual arrangement between the University of North Carolina School of Medicine and the Clinic, Dr. Dingfelder spent one-half day per week at the Clinic. *Id.*

9. *Id.*

10. Amniocentesis is a diagnostic procedure in which amniotic fluid (the fluid surrounding the fetus in the womb) and fetal cells present in the fluid are aspirated with a syringe and tested for

Dowdy advised Mrs. Azzolino not to undergo the procedure.¹¹ During a later appointment, Mrs. Azzolino questioned Dr. Dingfelder about amniocentesis, stating that she had heard there was a need for such testing in pregnant women over the age of thirty-five.¹² She was thirty-six at that time and was concerned about the risk of having a deformed child. Dr. Dingfelder informed her that amniocentesis was not necessary for women below age thirty-seven.¹³ He did not perform amniocentesis on Mrs. Azzolino, nor did he advise her of the existence of a genetic counseling facility in Chapel Hill. If amniocentesis had been performed, the genetic abnormality of the fetus would have been discovered in time for Mrs. Azzolino to exercise her legal right to obtain an abortion.¹⁴

On October 13, 1981, the Azzolinos filed a medical malpractice action naming Dr. Dingfelder, Nurse Dowdy, and OCCHS as defendants.¹⁵ Three distinct claims for relief, as well as a claim for punitive damages, were stated in the complaint. In the first cause of action plaintiff parents set forth a "wrongful birth" claim. They alleged that the individual defendants negligently had failed to provide Mrs. Azzolino with complete and correct information with respect to amniocentesis and the availability of genetic counseling. They further alleged that if Mrs. Azzolino had been advised properly, she would have undergone amniocentesis and would have discovered that her child, if born, would suffer from Down's Syndrome. They alleged that given this knowledge Mrs. Azzolino would have had the fetus aborted.¹⁶ In the second cause of action the child, Michael Azzolino, set forth a "wrongful life" claim. He alleged that the negligence of the physician caused him to be born afflicted with Down's Syndrome instead of being aborted while still a fetus, "thereby damaging him by virtue of his very existence."¹⁷ In the final cause of action Michael's half siblings claimed damages due to the fact that the financial and emotional hardships resulting from having a Down's Syndrome child in the family deprived them of the full measure of parental comfort, care, and society.¹⁸

Defendants filed motions to dismiss all three claims for relief stated in the

biochemical and chromosomal defects. Amniocentesis usually is performed in conjunction with an ultrasonic examination, a procedure that allows the physician to determine the position of the fetus within the womb, thus reducing the risk that a vital organ of the fetus will be injured when the needle is inserted into the amniotic sac. See Elias & Verp, *supra* note 1, at 79-80. Amniocentesis is the standard test performed to detect Down's syndrome and has an accuracy rate of over 99%. See *Berman v. Allen*, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979); *Azzolino*, 71 N.C. App. at 317, 322 S.E.2d at 586.

11. Nurse Dowdy's advice apparently was based solely on her belief that the problem of genetic defects should be left "in God's hands." *Azzolino*, 71 N.C. App. at 311, 322 S.E.2d at 582. Nurse Dowdy's only other discussion of amniocentesis with Mrs. Azzolino was to state the potential harmful consequences of what she termed "a very dangerous procedure." *Id.* In fact, the increased risk of either fetal or maternal injury produced by amniocentesis is less than one percent. See Elias and Verp, *supra* note 1, at 83.

12. *Azzolino*, 71 N.C. App. at 313, 322 S.E.2d at 583.

13. *Id.*

14. *Id.* at 314, 322 S.E.2d at 584.

15. *Id.* at 317, 322 S.E.2d at 586.

16. *Id.*

17. *Id.* at 292, 322 S.E.2d at 571.

18. *Id.*

complaint. These motions were granted for the second and third claims.¹⁹ Defendants' motion for partial summary judgment on the issue of punitive damages also was allowed,²⁰ leaving the parents' wrongful birth claim the sole cause of action remaining for trial. At the close of plaintiffs' presentation of evidence, defendants successfully moved for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure.²¹

Wrongful birth and its related causes of action were not recognized at common law.²² Consequently, when these claims first were asserted in the 1960s, there was some confusion as to the terminology involved.²³ At present, the claims for relief in prenatal malpractice cases in which the defect itself was not caused by the defendant's negligence are divided into six categories.²⁴ By far the

19. *Id.* at 293, 322 S.E.2d at 572.

20. *Id.*

21. A motion for directed verdict is properly granted only if the plaintiff fails to present evidence sufficient to support a favorable finding on all the essential elements of his claim for relief. In a tort action these essential elements are duty, breach of duty, proximate cause, and actual damages. *Id.* at 310-11, 322 S.E.2d at 582.

That the directed verdicts were granted in favor of each defendant individually is important because it separated the claims for appeal. An adverse finding against one defendant therefore would not necessarily affect the others. See *infra* note 96.

22. See *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858, *cert. denied*, 379 U.S. 945 (1963); *Azzolino*, 71 N.C. App. at 294, 322 S.E.2d at 573.

23. The term "wrongful life" first was used in *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858, *cert. denied*, 379 U.S. 945 (1963). This claim would now be termed one for dissatisfied life. See *infra* note 24. Later courts have added to this confusion. See *Robak v. United States*, 658 F.2d 471, 475 (7th Cir. 1981) (wrongful pregnancy referred to as wrongful birth); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 772, 233 N.W.2d 372, 375 (1975) (confusing wrongful life or wrongful birth with wrongful pregnancy); see also W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 55, at 370 & n.34 (W. Keeton 5th ed. 1984) (*Zepeda* referred to as a wrongful life claim). For a discussion of the distinction between wrongful birth, wrongful life, wrongful pregnancy, and dissatisfied life claims, see *infra* note 24.

24. The six claims are wrongful birth, wrongful life, wrongful pregnancy, unplanned life, dissatisfied life, and claims by the deformed infant's siblings. See *infra* text accompanying notes 25-59 (discussion of wrongful birth); *infra* text accompanying notes 60-81 (discussion of wrongful life). Wrongful pregnancy is the parents' cause of action against the defendant physician for some negligent act that results in the birth of a healthy, but unplanned, child. See *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (unsuccessful abortion); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (tranquilizers negligently substituted for oral contraceptives); *Clegg v. Chase*, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977) (failed tubal ligation). Wrongful pregnancy is sometimes called wrongful conception. See *Holt, Wrongful Pregnancy*, 33 S.C.L. REV. 759 (1982). Unplanned life is the filial counterpart to the parents' wrongful pregnancy claim. These two claims generally are joined. See *Rogers, Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 718-20 (1982). Dissatisfied life is the claim brought by an illegitimate child against his father, claiming injury by virtue of his status as an illegitimate child. See *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1963); *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

The courts of at least five jurisdictions have faced claims brought by the siblings of an unplanned child, alleging damages to the extent that the new child diminished their share of parental society, care, and financial support. This claim could be termed an "unplanned sibling" claim. See *White v. United States*, 510 F. Supp. 146 (D. Kan. 1981); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); *Aronoff v. Snider*, 292 So. 2d 418 (Fla. App. 1974); *Miller v. Duhart*, 637 S.W.2d 183 (Mo. App. 1982); *Sala v. Tomlinson*, 73 A.D.2d 724, 422 N.Y.S.2d 506 (1979); *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974). In *Azzolino* the North Carolina Court of Appeals rejected a similar claim by the siblings of a deformed child. See *Azzolino*, 71 N.C. App. at 306, 322 S.E.2d at 578-79. No court has recognized a cause of action for either the dissatisfied life or unplanned sibling claims. See *Rogers, supra*, at 729 & n.119 (dissatisfied life claims successful); *Azzolino*, 71 N.C. App. at 303-04, 322 S.E.2d at 578 (unplanned sibling claims unsuccessful).

most important of these claims are those for wrongful birth and wrongful life.

Wrongful birth is a claim for relief brought by the parents of a child born with genetic defects²⁵ or other abnormalities²⁶ discoverable during the first trimester of pregnancy.²⁷ A negligent act of the mother's doctor²⁸ is alleged to have caused this defect to go undiscovered until after the birth of the child. The plaintiff parents claim that but for the negligence of the doctor, they would have obtained a legal abortion and avoided the burdens of caring for a deformed child. Although not a traditional cause of action, wrongful birth fits into the traditional tort framework²⁹ as a medical malpractice claim.

The first case to address a wrongful birth claim squarely was *Gleitman v. Cosgrove*,³⁰ a 1967 New Jersey Supreme Court decision. In *Gleitman* defendant doctor negligently made the erroneous statement that the mother's contraction of German measles during pregnancy would not harm the fetus. Full information on the risk of German measles was within the professional knowledge of defendant's speciality.³¹ The mother alleged that she might have secured an abortion had she been aware of the risk of birth defects resulting from her condition.³² Plaintiff parents sought damages for the mental anguish and severe fi-

25. Examples of parental suits for undiscovered genetic defects include *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1980) (Down's syndrome); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978) (Tay-Sachs disease); *Call v. Kazirian*, 135 Cal. App. 2d 189, 185 Cal. Rptr. 103 (1982) (Down's syndrome); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981) (cystic fibrosis); *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979) (Down's syndrome); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (Down's syndrome); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (polycystic kidney disease), *aff'd sub nom. Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984) (Down's syndrome); *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982) (Tay-Sachs disease).

26. Most nonhereditary fetal defects are caused by a disease contracted or a drug taken by the woman during pregnancy. The most common defect-producing disease is rubella, or German measles. See *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Although often filed as products liability claims, suits based on defects produced by the drug diethylstilbestrol (DES) can be viewed as wrongful life claims. As in all wrongful life claims, if the defendant had not performed the negligent act complained of—distributing a dangerous drug designed to prevent miscarriage—the plaintiff child probably would not have been born. A leading case in this area is *Sindell v. Abbott Laboratories*, 26 Cal. 3d 558, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1981). See *Abrahams & Musgrove, The DES Labyrinth*, 33 S.C.L. REV. 663 (1982).

27. The timing of the defect's discoverability is important because it determines the availability of an abortion to terminate the pregnancy. Since a woman has an absolute right to obtain an abortion during the first trimester of pregnancy, the birth of an infant suffering from a defect discoverable during the first trimester is due to the choice of the child's mother, or to the negligence of the mother's physician. See *infra* note 77.

28. To support a claim for relief, the negligent act or omission could have been the fault of the doctor, a nurse, a lab technician, or some other provider of prenatal health care. This negligence could have taken several forms. See *infra* text accompanying notes 43-48.

29. The elements of a tort claim are the presence of a duty owed by the defendant to the plaintiff, a breach of that duty, a close causal relationship between the breach of duty and the injury to the plaintiff, and actual injury or damages suffered by the plaintiff. *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981); W. PROSSER & W. KEETON, *supra* note 23, § 30, at 164-65.

30. 49 N.J. 22, 227 A.2d 689 (1967).

31. *Id.* at 25-26, 227 A.2d at 690-91.

32. *Id.* at 26, 227 A.2d at 691. This allegation by the mother might have given defendant a strong defense. By claiming that but for defendant's assurances she "might" have had an abortion,

nancial burdens associated with raising a deformed child.³³

The court denied recovery on three grounds. First, it stated that the parents' claim did not demonstrate the essential element of proximate cause,³⁴ because the child's defect resulted from the disease contracted by his mother and not from any act of defendant, the court concluded that causation could not be shown. The court noted that the result would have been different if plaintiff parents had shown an "act or omission which result[ed] in impairment to what otherwise would [have been] a normal, healthy child."³⁵ Second, the court stated that even if the parents had been informed of the possible risks to the fetus, their only alternative to having the child was abortion, a procedure subject to criminal sanction in New Jersey.³⁶ Since the doctor could not have been negligent in refusing to perform a criminal abortion, he could not have been negligent in failing to advise the parents to consider such an abortion.

Third, the court reasoned that had the parents been able to obtain an abortion lawfully, their claim would fail for lack of ascertainable damages.³⁷ Damages in a tort action are compensatory and are "measured by comparing the condition plaintiff would have been in had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence."³⁸ In a wrongful birth claim the parents allege that but for the negligence of the mother's doctor, their deformed child would not have been born. This claim would require the court to assign a value to the "intangible, unmeasurable, and complex"³⁹ benefits of parenthood that plaintiff parents would not have experienced had they obtained an abortion, and to compare this value with the alleged burdens incurred in raising a child with birth defects. For the parents to state a recognizable injury, the burden of parenthood must outweigh the benefits. The court believed that such a determination was impossible.⁴⁰

A major portion of the court's reasoning in *Gleitman* was invalidated by the landmark abortion decision *Roe v. Wade*.⁴¹ In ruling that a state has no legitimate interest in prohibiting abortions during the first trimester of pregnancy,⁴² the Supreme Court not only effectively nullified the "inherent sanctity of life" argument, but also eliminated the causation problem. Because a woman's right to have an abortion is a fundamental right, the decision implied that liability can

plaintiff mother made proof of causation difficult. The implication of her statement is that she might not have elected to obtain an abortion. Later plaintiffs have avoided this problem by alleging that but for the negligence of the defendant, an abortion "would" have been obtained. See, e.g., *Azzolino*, 71 N.C. App. at 292, 322 S.E2d at 571.

33. *Gleitman*, 49 N.J. at 26, 227 A.2d at 691.

34. *Id.* at 28, 227 A.2d at 692.

35. *Id.*

36. *Id.* at 31, 227 A.2d at 693-94. The court's claim in *Geitman* is premised on the idea of the inherent sanctity of human life, an idea also noted in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

37. *Gleitman*, 49 N.J. at 29-30, 227 A.2d at 693.

38. *Id.* at 29, 227 A.2d at 692.

39. *Id.* at 29, 227 A.2d at 693.

40. *Id.*

41. 410 U.S. 113 (1973).

42. *Id.* at 164.

attach to all acts or omissions that abridge that right. The failure to inform a woman of special conditions that might produce a deformed infant would operate to discourage her from making an informed decision as to whether to exercise her right to obtain an abortion. Therefore, a woman's doctor has a duty to inform her of such high risk conditions. This duty would be breached if the doctor (1) failed to inform the woman that a diagnostic procedure existed,⁴³ (2) failed to inform the woman of a high-risk condition for which no diagnostic testing was available,⁴⁴ (3) informed the woman of the diagnostic test but negligently failed to perform the test,⁴⁵ (4) informed the woman of the diagnostic test but negligently advised her not to undergo the test,⁴⁶ (5) performed the diagnostic test in a negligent manner, obtaining an incorrect result,⁴⁷ or (6) performed the diagnostic test but failed to inform the woman of the test results.⁴⁸ Any of these failures would deprive the woman of information essential to an informed decision as to whether to obtain an abortion, thus proximately causing the birth of the deformed infant.

The problem of unprovable damages noted in *Gleitman* still exists even in the wake of *Roe*, but it apparently has caused few problems for the courts. This development may be reflective of the trend toward allowing recovery of damages for purely psychic injuries begun with *Dillon v. Legg*⁴⁹ in 1968. The increased certainty with which psychiatrists have been able to measure mental anguish is considered to be a major factor in allowing recovery for damages once thought too speculative to be proved.⁵⁰

Most of the wrongful birth cases decided since *Roe* have tended to accept wrongful birth as a variety of the traditional negligence action.⁵¹ As in all medical malpractice claims, the physician's duty of due care is created by virtue of his professional relationship with the patient.⁵² The defendant's conduct in comparison to the accepted standard of professional behavior determines whether that duty has been breached. Other jurisdictions also employ an objective standards test, frequently couched in terms of the customary community standards

43. See *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977).

44. See *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981).

45. There appears to be no reported case illustrating this type of negligent behavior. Imposing liability in this instance would be consistent with the general pattern of imposing liability for failure to present a pregnant woman with information relevant to her consideration of obtaining an abortion. See *infra* notes 75-77 & 86-87 and accompanying text.

46. See *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984).

47. See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978).

48. Although there is no reported authority illustrating this type of negligent behavior, imposing liability would be logically consistent with cases imposing liability for failure to present a pregnant woman with information relevant to her decision to either obtain an abortion or give birth. See *infra* notes 75-77 & 86-87 and accompanying text.

49. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

50. See W. PROSSER & W. KEETON, *supra* note 23, § 54, at 361-62.

51. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

52. See Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. REV. 711, 713 (1984).

for behavior.⁵³ As noted above,⁵⁴ interference with the woman's right to obtain an abortion is sufficient to establish proximate cause. The only substantial area of disagreement among jurisdictions that have considered wrongful birth claims has been the question of the proper measure of damages.

Damage awards in wrongful birth cases can be divided into four categories. First, the court can award parents all the costs they will have to bear as a result of the defendant's negligent act. These costs would include the normal expenses of raising an ordinary child, the extraordinary expenses to be incurred for the care and treatment of an impaired child, and the mental anguish suffered by the parents as a consequence of caring for their deformed child.⁵⁵ Second, the court can approach the issue of causation in a slightly broader fashion. Instead of focusing solely on the fact that but for the defendant's negligent act this particular deformed child would not have been born, courts can consider the expectations of the plaintiffs. Some courts have reasoned that since the plaintiffs in a wrongful birth suit intended to become parents, they also must have intended to bear the ordinary expenses of their child. The normal expenses of raising a child, therefore, are deducted from any award for damages. Thus, only the parents' mental anguish and the extraordinary expenses involved in raising an impaired child will be awarded.⁵⁶

Third, some courts allow the plaintiff parents to recover only for the ex-

53. See *State v. Ulin*, 113 Ariz. 141, 143, 548 P.2d 19, 21 (1976) ("recognized standards of good medical practice in the community"); *Hickman v. Employers' Fire Ins. Co.*, 311 So. 2d 778, 779 (Fla. 1975) (to be liable doctor must act "clearly against the course recognized as correct by his profession"); *Jackovach v. Yocum*, 212 Iowa 914, 925, 237 N.W. 444, 449 (1931) ("usual and customary practice among physicians and surgeons in the same or similar localities"); *Goheen v. Graber*, 181 Kan. 107, 111-12, 309 P.2d 636, 637 (1957) ("reasonable degree of learning and skill ordinarily possessed by members of his profession . . . in the community where he practices or similar communities"); *Cervantes v. Forbis*, 73 N.M. 445, 448, 389 P.2d 210, 213 (1964) ("recognized standards of medical practice in the community"); *Harbeson v. Parke-Davis, Inc.*, 78 Wash. 2d 460, 467, 656 P.2d 483, 489 (1983) ("degree of skill expected of the average . . . practitioner, in the class to which defendant belongs").

54. See *supra* text accompanying notes 42-48.

55. Only one court has adopted this formulation of damages in a wrongful birth action. See *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law). An offset for the normal costs of child care is a sounder rule for the reasons stated in the text accompanying note 56. The *Robak* rule is better suited to wrongful pregnancy claims since in those cases no child was expected or desired by the plaintiff parents. About half of the courts faced with wrongful pregnancy claims have allowed damages consistent with *Robak*. The others have disallowed recovery for normal expenses of child raising because of the "offsetting benefit" rule. The different approaches to this problem and the courts that have adopted each position are noted in *Hartke v. McKelway*, 526 F. Supp. 97, 104 (D.D.C. 1981). For a discussion of the "offsetting benefit" rule, see *infra* note 56.

56. See *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983). The parents' mental anguish is a compensable injury because there is a general public policy "to compensate parents not only for pecuniary loss but also for emotional injury." *Id.* at 475, 656 P.2d at 493.

The *Eisbrenner* court used RESTATEMENT (SECOND) OF TORTS § 920 (1979) to justify deducting from damages the normal expenses of raising a child. Section 920 states:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

The court concluded that the various benefits of parenthood would offset at least part of any award for the parents' mental anguish. *Eisbrenner*, 106 Mich. App. at 367-68, 308 N.W.2d at 214.

traordinary expenses involved in raising the deformed child.⁵⁷ Although they accept the idea of offsetting the award by the normal costs of raising a child, they will not recognize an award for the parents' mental anguish. These jurisdictions believe that mental anguish damages are not sufficiently ascertainable. Last, some courts have awarded damages only for the mental anguish of the parents, with no compensation given for the costs of raising a child. At least three different rationales have been offered in support of such an award.⁵⁸ The extraordinary medical and educational expenses of the impaired child are so clearly a proper subject of recovery, however, that no jurisdiction which recognizes the wrongful life cause of action denies that additional recovery.⁵⁹

The other major cause of action in the area of prenatal malpractice torts is the wrongful life claim. Unlike wrongful birth, in which the parents sue directly as plaintiffs, a wrongful life action is brought in the name of the impaired child. This difference has made most courts, including those that recognize an action for wrongful birth, unwilling to accept wrongful life claims.⁶⁰ Analysis of the four elements of a traditional tort claim as applied to wrongful life cases highlights several different criticisms of the claim.

First, the very nature of the claim has caused some courts to decide that it is not a traditional tort. In a wrongful life claim, the plaintiff child alleges that the defendant physician negligently permitted the child to be born, thereby causing the child to suffer life with a permanent disability. The child's very existence is alleged to constitute its injury. Given the high value society places on human

57. See *Moore v. Lucas*, 405 So. 2d 1022 (Fla. App. 1981); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). The reluctance of these states to award damages for mental anguish is not limited to wrongful birth cases. In the area of bystander tort, in which a witness to a tort committed against a third person recovers for mental anguish, the leading case allowing recovery, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), had not been followed by any of the four states in question at the time the above noted cases were decided. The *Dillon* rule since has been adopted in Texas. See *Landrith v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978).

58. See *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984), *disc. rev. granted*, 313 N.C. 327, 327 S.E.2d 887 (1985). In *Berman* the court considered the complete educational expenses of the child without isolating the additional costs of educating an impaired child. It held that "such an award would be wholly disproportionate to the culpability involved, and . . . would . . . constitute a windfall to the parents." *Berman*, 80 N.J. at 432, 404 A.2d at 14. Although the *Karlsons* court stated that an award for mental anguish would be proper, it does not seem to have considered an award for the child's expenses. *Karlsons*, 57 A.D.2d at 78-79, 394 N.Y.S.2d at 936-37. In *Azzolino* the court concluded that "the unusual nature of the wrongful life and wrongful birth actions" required that only the child be allowed to recover for these extraordinary expenses. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

59. The New Jersey Supreme Court allowed the parents to recover extraordinary child support expenses in *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981). The New York Court of Appeals allowed similar recovery in *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The court of appeals in *Azzolino* also permitted the child to sue for these expenses. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

60. See, e.g., *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *aff'd sub nom. Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

life⁶¹ and the lack of any common-law precedent for wrongful life claims,⁶² some courts have concluded that no legally recognized wrong has been committed.

Second, *Roe v. Wade*,⁶³ the decision that provided the rationale for the parents' wrongful birth claim, also has created an impediment to the recognition of wrongful life actions. In *Roe* the Court held that a fetus was not protected by the fourteenth amendment because a fetus is not a person.⁶⁴ It therefore can be argued that the physician owes no duty to the fetus, since a duty is defined as "that [obligation] which a person owes to another."⁶⁵ Without the essential element of duty, the plaintiff can not maintain a negligence action. Prior to *Roe*, the "no duty" argument was not raised, probably because the fetus was treated as a person in state abortion statutes.⁶⁶

Third, some courts have held the plaintiff child unable to prove causation.⁶⁷ The child's defect was not actually produced by the defendant's negligent act, but by some external factor such as disease or a genetic trait present in the child's mother. These courts, therefore, are unwilling to impose liability on a physician for a condition he did not "cause." The physician "caused" the child's deformity only in the sense that he prevented the child's destruction as a fetus.⁶⁸ The idea that such destruction is a reasonable alternative to life—however tortured—is rejected by these courts.

Last, by far the most troublesome aspect of a wrongful life claim is assigning a value to the alleged damages. The traditional tort damage award—placing the injured party in the position he would have occupied "but for" the acts of the defendant—is inapplicable. If the defendant had not acted in a negligent manner, the plaintiff would not have been born. To determine damages the court must compare the current position of the plaintiff—living with a permanent impairment—with the position the plaintiff would have been in had the defendant not been negligent—aborted while still a fetus. This determination necessarily requires the court to place a value on "the utter void of nonexistence"⁶⁹ and has caused some courts to rule that wrongful birth claims fail for lack of ascertainable damages.⁷⁰

Not all courts have found these difficulties insurmountable. The highest

61. See *supra* note 36.

62. See *supra* note 22 and accompanying text.

63. 410 U.S. 113 (1973).

64. *Id.* at 158.

65. BLACK'S LAW DICTIONARY 453 (5th ed. 1979).

66. See *Roe*, 410 U.S. at 158 n.55. The Court noted certain inconsistencies with this argument. *Id.* at 157-58 n.54.

67. See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

68. *But cf.* notes 42-48 and accompanying text (a woman has a fundamental right to obtain an abortion).

69. *Gleitman v. Cosgrove*, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).

70. See *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 59 Wis. 2d 766, 233 N.W.2d 372 (1975).

courts of three states have recognized wrongful life as an example of the traditional medical malpractice claim.⁷¹ Various theories have been used to overcome each of the objections previously raised against wrongful life claims.

Two theories have been proposed in support of the existence of a duty owed by the woman's doctor to her unborn fetus. A major argument against the finding of such a duty can be negated if the fetus is assumed to be a person. Despite the *Roe* holding, a fetus is recognized as a legal person for several purposes,⁷² including the well-established proposition that an infant can recover damages for other prenatal torts.⁷³ There is no reason this rule should not apply in wrongful life cases. Second, even if the fetus is not recognized as a person, the duty owed to its mother would extend to it as well. This idea is taken from section 311 of the Restatement (Second) of Torts.⁷⁴ The physician's duty is not to prevent the birth of an impaired child but rather to inform the parents so that they can make an intelligent decision as to "whether life is best for the child."⁷⁵

Determining whether there has been a breach of duty is a question of fact to be addressed at trial.⁷⁶ The threshold determination in wrongful life cases is whether the child's defect was such that a reasonable physician would have known of its presence by the end of the first trimester.⁷⁷ Failure to perform diagnostic tests that would have discovered the impairment is a breach of the duty of due care.

71. See *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

72. See *Roe v. Wade*, 410 U.S. 113, 161-62 (1973). These rights, however, are contingent upon the live birth of the child. See *infra* note 73.

73. The right of a child to sue for prenatal injuries first was recognized in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946). All jurisdictions now permit a child to recover for prenatal injuries produced by a direct act of the defendant, but only if the child is born alive. See W. PROSSER & W. KEETON, *supra* note 23, § 55, at 368. If a plaintiff chooses to bring a wrongful life claim under this theory, the threshold requirement of live birth will, by definition, always be satisfied.

74. RESTATEMENT (SECOND) OF TORTS § 311 (1965) provides:

Negligent Misrepresentation Involving Risk of Physical Harm

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other

(b) to such third persons as the actor should expect to be put in peril by the action taken.

Comment b to this section is particularly illustrative of the wrongful life action. It provides that

it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine.

Id. comment b.

75. *Azzolino*, 71 N.C. App. at 298, 322 S.E.2d at 574.

76. See W. PROSSER & W. KEETON, *supra* note 23, § 37, at 237.

77. Since *Roe v. Wade* a pregnant woman has had an absolute right to obtain an abortion in the first trimester of pregnancy. If the defect in the fetus is not discoverable until after the first trimester, the physician cannot be held liable for negligence, since nothing he could have done would have provided the woman with more complete information as to the desirability of an abortion. Liability will attach in cases of a defect that the physician negligently fails to discover during the first trimester because at that time the woman could have pursued abortion as an alternative to allowing the birth of the child.

The element of causation, once considered unprovable in wrongful life cases,⁷⁸ no longer is considered a major obstacle. The defendant's argument that the mother's condition is the actual cause of the child's injury, although literally true, does not reach the essence of the complaint. The plaintiffs do not claim that the physician produced the genetic condition in the child's mother. Nor do they argue that the defect in the fetus was produced by some negligent act of the defendant. Instead, they allege that the defendant's acts precluded any parental decision to abort the fetus⁷⁹ and that this negligence caused the birth of a deformed infant whose very life constitutes injury.

Determining the proper measure of damages has been difficult for the courts that have recognized the wrongful life claim. By claiming that his injury results from the very fact of life itself, the child is claiming, in effect, that not having been born would have been preferable to living with a deformity. This claim for the general damages resulting from life with a deformity has never been recognized.⁸⁰ Some courts, however, have allowed the child's claim for the extraordinary expenses for education, medical treatment, and special care necessitated by his impairment.⁸¹ Such special damages are both compensatory in nature and sufficiently ascertainable to be awarded without undue speculation.

*Azzolino v. Dingfelder*⁸² presented the first opportunity for a North Carolina court to evaluate the wrongful life, wrongful birth, and unplanned sibling claims.⁸³ Following a review of the purposes and functions of the motion to dismiss,⁸⁴ the court considered Michael Azzolino's wrongful life claim in light of the essential elements of a traditional negligence action. First, the court determined that the defendants owed Michael a duty. This duty arose not only from an extension of defendants' duty to Michael's mother, but also from Michael's independent right to damages for other prenatal torts. Thus, both rationales used by other jurisdictions to establish a duty to the child were

78. See *supra* note 67 and accompanying text.

79. *Azzolino*, 71 N.C. App. at 306, 322 S.E.2d at 580.

80. See W. PROSSER & W. KEETON, *supra* note 23, § 55, at 371.

81. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982); *Procanik v. Cillo*, 97 N.J. 339, 351, 478 A.2d 755, 762 (1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 479, 656 P.2d 483, 495 (1983). For examples of other attempts to develop a formula for measuring damages in prenatal torts cases, see Note, *Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 AM. J. LAW & MED. 211 (1979); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970).

82. 71 N.C. App. 289, 322 S.E.2d 567 (1984), *disc. rev. granted*, 313 N.C. 327, 327 S.E.2d 887 (1985).

83. Prior to discussing the merits of the allegations, the court had to decide whether a timely appeal had been filed by Michael. Defendants claimed that Michael's right to appeal was forfeited because it was not exercised within 10 days of the granting of the motion to dismiss. The court ruled that while an appeal could have been made at that time, it was only necessary after the granting of the directed verdict against the parents' claims. The directed verdict marked the date of final judgment because the claims of Michael and his parents were not separate and distinct. *Id.* at 294, 322 S.E.2d at 572.

84. The court noted that the sole function of the motion to dismiss is to test the complaint for legal sufficiency, compelling the trial court to treat the allegations of the challenged pleading as true. The motion should not be granted unless "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 295, 322 S.E.2d at 573.

adopted by the court.⁸⁵

Second, the court considered the question whether this duty had been breached. Because defendants' duty to the mother required disclosure of "material information about genetic risk," failure to disclose such information evidenced a breach of the duty of due care.⁸⁶ The lack of this information effectively precluded the rational exercise of the mother's right to obtain an abortion. Interference with this right established the third essential element of the claim, proximate cause.⁸⁷ The evidence of causation was particularly strong in this case.⁸⁸

Last, the court considered the joint questions of actual injury and appropriate damages.⁸⁹ Like all other jurisdictions that have considered the matter, the court concluded that the claim for general damages was speculative.⁹⁰ The court, however, also determined that Michael's claim for special damages was cognizable at law. These special expenses include "the extraordinary costs of special treatment, teaching, care, medical services, aid and assistance [required] for the child because of his impairment."⁹¹ Unlike the other jurisdictions that allow both the wrongful birth and wrongful life claims, the court in *Azzolino* ruled that these special damages could be recovered only by the child.⁹²

The court next considered what might be called the "unplanned sibling" claim. The court noted that five other jurisdictions had considered and disallowed similar claims.⁹³ Fatal flaws were noted in each of the three theories plaintiffs used to justify their claim.⁹⁴ The court concluded that "there is no basis in law or logic for such an action."⁹⁵

Finally, the court considered the parental claim of wrongful birth. Favorable resolution of the wrongful life claim virtually predetermined the outcome of the wrongful birth claim.⁹⁶ The elements of duty, breach, and proxi-

85. See *supra* notes 72-75 and accompanying text.

86. *Azzolino*, 71 N.C. App. at 297, 322 S.E.2d at 574.

87. See *supra* notes 42-48 and accompanying text.

88. Mrs. Azzolino testified that "if she had been told there was a 50% chance of injury to the fetus occurring and a one in 2,000 chance of having a child with Down's Syndrome, she still would have had amniocentesis." *Azzolino*, 71 N.C. App. at 317, 322 S.E.2d at 586. Evidence also was presented to demonstrate that Mrs. Azzolino had obtained abortions on two earlier occasions. The evidence supported her contention that she would have had an abortion in this instance if the risks had been explained to her. *Id.*

89. *Id.* at 299, 322 S.E.2d at 576.

90. *Id.* at 300, 322 S.E.2d at 576. See *supra* text accompanying note 80.

91. *Azzolino*, 71 N.C. App. at 301, 322 S.E.2d at 576.

92. The other jurisdictions to allow this claim permit either the child or the parents to recover the special damages. See *supra* note 71.

93. *Azzolino*, 71 N.C. App. at 303, 322 S.E.2d at 578; see *supra* note 24.

94. First, the court rejected the negligence theory because the doctor owed no duty to the deformed child's siblings. Second, a claim based on nuisance theories was ruled to be applicable only in instances of unreasonable interference with a real property right. Last, the court ruled that a claim based on the loss of parental consortium is not recognized in North Carolina. *Azzolino*, 71 N.C. App. at 304-06, 322 S.E.2d at 578-79.

95. *Id.* at 304, 322 S.E.2d at 578.

96. The court's ruling in plaintiffs' favor on the wrongful birth and wrongful life claims was based solely on the evidence of Doctor Dingfelder's negligence. Because he treated Mrs. Azzolino within the scope of his employment at the Clinic, the doctrine of respondeat superior could have

mate cause found to exist in the child's cause of action are all derived from the initial duty owed by the physician to the mother. A few distinctions, however, merit attention. First, North Carolina has adopted a statute pertaining to the standard of care applicable to medical malpractice actions.⁹⁷ A key provision of this statute is that liability will not exist unless the physician's act was "not in accordance with the standards of practice among members of the same health care profession . . . situated in the same or similar communities"⁹⁸ The enactment of the "same or similar community" rule "presumably reflects the belief, based in large part on the well-worn distinction between the country doctor and the big city doctor, that the quality of medical practice differs with the character of communities and that the standard of care, to be fair, must reflect this difference."⁹⁹ In *Azzolino* defendant physician sought to use this rule to limit his duty of care to the performance of the services the Clinic could have been expected to provide.¹⁰⁰ The court was not persuaded by this argument, and held defendant to the standard of care exercised at North Carolina Memorial Hospital.¹⁰¹

Second, the court justified its recognition of the wrongful birth claim with reference to its earlier recognition of the wrongful pregnancy claim.¹⁰² Although the court did not articulate its reasoning on this point, one possible argument is obvious. If damages are to be awarded in wrongful pregnancy cases for the birth of a healthy but unwanted child, it seems inequitable not to afford similar relief to the parents of a child born with a serious deformity. Third, the court recognized the public policy of holding negligent individuals liable for the consequences of their actions.¹⁰³

Last, the court once again was faced with the question of the appropriate measure of damages. After reviewing the approaches taken by other jurisdic-

supported a finding against OCCHS. The court of appeals therefore ruled that the directed verdicts in favor of the clinic and OCCHS were erroneously granted. *Id.* at 318-19, 322 S.E.2d at 586-87. The directed verdict in favor of Jean Dowdy was upheld because plaintiffs were unable to establish the essential element of proximate cause. *Id.* at 312, 322 S.E.2d at 583.

97. N.C. GEN. STAT. §§ 90-21.11 to -21.14 (1981).

98. *Id.* § 90-21.12; see Byrd, *supra* note 52, at 723.

99. Byrd, *supra* note 52, at 713. The *Azzolino* court quoted and relied on this passage. See *Azzolino*, 71 N.C. App. at 315, 322 S.E.2d at 585.

100. *Azzolino*, 71 N.C. App. at 315, 322 S.E.2d at 585.

101. *Id.* The use of North Carolina Memorial Hospital (NCMH) as the relevant community was important for finding a breach of duty. Testimony of other physicians practicing at NCMH indicated that while genetic testing would be recommended for women age 37 and over, such testing would be performed on younger women if they showed "high concern" about genetic defects of the fetus. "High concern" was defined as "sufficient concern to have talked to their obstetrician or someone" *Id.* at 315, 322 S.E.2d at 584-85. Doctor Dingfelder apparently believed that the other physicians at the Clinic would have performed amniocentesis only on women over age 37. Not performing amniocentesis on Mrs. Azzolino therefore would have been in accordance with the accepted practice at the Clinic, though it may have been negligent for someone practicing in the NCMH community. *Id.* at 315-16, 322 S.E.2d at 585.

102. See *Jackson v. Bumgardner*, 71 N.C. App. 107, 321 S.E.2d 541 (1984), *disc. rev. granted*, 312 N.C. 797, 325 S.E.2d 486 (1985) (arguments heard April 8, 1985); *Pierce v. Piver*, 45 N.C. App. 111, 262 S.E.2d 320, *appeal dismissed*, 300 N.C. 375 (1980) (The decision dismissing the appeal was not included in the Southeastern Reporter.).

103. *Azzolino*, 71 N.C. App. at 307-08, 322 S.E.2d at 580.

tions,¹⁰⁴ the court decided that an award for the complete cost of raising the child would be "wholly disproportionate to the culpability involved and would place an unreasonable financial burden on health care providers."¹⁰⁵ The court also noted that an award for punitive damages would be inappropriate.¹⁰⁶ Having earlier decided to allow only the child to maintain an action for extraordinary support expenses, the court ruled that the parents could recover damages "only for the mental anguish which they have endured and will continue to endure as a result of the birth of the impaired child."¹⁰⁷ This division of damages marks a change from the established law of this state and may be detrimental to the interests of those persons it is designed to protect.

It is a settled rule in North Carolina and other states that the tortious action of a third party which produces injury to a minor child creates two distinct claims for relief. These claims are:

- (1) the right of the child to recover for his mental and physical pain and suffering, and the impairment of earning capacity after attaining majority; and (2) the right of the parent to recover for loss of services of the child during minority, and other pecuniary expenses incurred or likely to be incurred by the parent as a consequence of the injury, including expenses of medical treatment.¹⁰⁸

If wrongful birth and wrongful life claims are recognized as essentially similar to accepted traditional torts, the traditional damages rules should not be summarily discarded. As noted above, the child's claim for general damages has been rejected uniformly as not susceptible to nonspeculative proof.¹⁰⁹ This conclusion leaves only the parents' claim for the extraordinary expenses of raising an impaired child.¹¹⁰ These damages traditionally have been recoverable by the parents as an incident of their duty to provide for the support of their child. The court noted in *Azzolino* that "it is the child who suffers if the money is not there to pay for the care that he needs."¹¹¹ Apparently believing that this situation was unusual, the court held these special damages recoverable only by the child. Although it is true that a child born with a deformity would suffer if the proper care were not provided, the same could be said about a child who was born healthy but became impaired shortly after birth as the result of a defendant's conduct. Even if unusual circumstances qualify the child's action for special damages, there is no reason to deny the parents' traditional claim. Allowing either the parents or the child to bring an action for extraordinary support expenses would bring North Carolina into agreement with the other jurisdictions that have recognized both the wrongful life and wrongful birth claims.¹¹²

104. *Id.* at 308, 322 S.E.2d at 581; see *supra* notes 55-59 and accompanying text.

105. *Azzolino*, 71 N.C. App. at 309, 322 S.E.2d at 581.

106. *Id.* at 320, 322 S.E.2d at 587-88.

107. *Id.* at 309, 322 S.E.2d at 581.

108. 3 R. LEE, N.C. FAMILY LAW § 241, at 218 (4th ed. 1981).

109. See *supra* text accompanying note 80.

110. Although not a traditional element of damages, the modern trend is to allow recovery for the parents' mental anguish. See *supra* notes 49-50 and accompanying text.

111. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

112. See *supra* note 71 (list of cases from these jurisdictions).

Several policy considerations support the majority rule recognizing the parental claim for extraordinary support expenses of a child born with a deformity. First, the recognition of this parental claim is evidence of the high value society places on the family unit. Taking the right to sue for the child's injuries away from the parents only lessens the esteem accorded the family relationship. The court's refusal to allow the parents to recover extraordinary support expenses is tantamount to claiming that the special relationships within the family are no longer worthy of protection.¹¹³

Second, the parents' duty to provide care and support for their children long has been recognized in this State.¹¹⁴ This duty has been cited as a major reason for allowing the parents' claim for damages.¹¹⁵ Nothing in the *Azzolino* opinion suggests that this traditional duty has changed. There is, therefore, no reason to abandon such a fundamental rule of damage recovery.

As an alternative to the traditional rule of parental recovery, the court in *Azzolino* proposed creation of a guardianship for the benefit of the child.¹¹⁶ Guardianships often are formed when a child obtains a large sum of money or other valuable property.¹¹⁷ Although this form of fiduciary relationship has the advantage of ensuring the existence of the funds necessary for the care of the child, several potential drawbacks should be noted. First, the formalities of a fiduciary relationship can transform even simple transactions, such as the payment of the child's expenses and the sale of investment securities, into cumbersome procedures.¹¹⁸ Second, such proceedings can be expensive. Annual accountings must be filed with the court. The costs of preparing such records, as well as the fiduciary's commission, are payable from the ward's property.¹¹⁹ These requirements diminish the amount of money available for the child's support. Last, although the opinion is unclear, there is some doubt whether the parents could qualify as the child's guardians. If the court were not troubled by the parents' inability to handle the damage award in a prudent manner, the

113. Among the damages traditionally recoverable following injury to an unemancipated minor child is the value of the services and earnings of the child lost due to the injury. Such recovery follows from an interference with a unique parental right. See 3 R. LEE, *supra* note 108, § 241, at 220. Recovery by a third-party guardian, see *infra* text accompanying note 116, is inconsistent with this traditional obligation.

114. See *Floyd v. Atlantic Coast Line R.R.*, 167 N.C. 55, 59-60, 83 S.E. 12, 14 (1914).

115. See 3 R. LEE, *supra* note 108, § 241, at 221.

116. *Azzolino*, 71 N.C. App. at 302, 322 S.E.2d at 577.

117. See G. BOGERT, *THE LAW OF TRUSTS* § 17, at 37 (5th ed. 1973).

118. A guardian, like a trustee, is a fiduciary with certain powers and duties prescribed by statute.

The powers of a guardian are ordinarily narrower than those of a trustee. . . . In many states a guardian can make no investment without the authority of the court which appointed him, nor can he without such authority sell land of his ward. The authority of a guardian does not extend beyond the jurisdiction of the court which appointed him . . .

1 A. SCOTT, *THE LAW OF TRUSTS* § 7, at 73 (3d ed. 1967).

In North Carolina, payment of support costs from the ward's property is subject to the formalities specified in N.C. GEN. STAT. § 33-6 (1984). The special proceedings involved in the sale of property are outlined in N.C. GEN. STAT. §§ 33-31, -33 (1984). The guardian's power of investment is defined in N.C. GEN. STAT. §§ 36A-1, -2 (1984).

119. The annual accounting procedure is set forth in N.C. GEN. STAT. § 33-39 (1984). The guardian's commission is provided for in N.C. GEN. STAT. § 33-43 (1984).

guardianship itself would not be necessary. These doubts also could disqualify the parents as guardians. There is judicial precedent for disallowing parents as guardians on the grounds that the interests of the two relationships are naturally inconsistent.¹²⁰ These criticisms are not intended to suggest that the use of a guardianship is necessarily improper, or that it would be improper in this instance. Indeed, special circumstances may merit the creation of a fiduciary relationship.¹²¹ This criticism of the court's decision in *Azzolino*, however, is directed to the general rule that a guardianship is *required* in wrongful life cases. A more logical rule would allow the trial judge, the authority most familiar with the special circumstances of each case, to use his discretion in ordering the creation of a guardianship.¹²²

In a case of first impression, the North Carolina Court of Appeals has chosen to recognize claims for relief based on wrongful birth and wrongful life. This enlightened holding brings the state in line with the progressive jurisdictions that have considered these claims. Despite its assertion that wrongful birth and wrongful life are forms of the traditional medical malpractice claim the court adopted a nontraditional and insupportable formulation of damages. Action should be taken on appeal to allow the parents to recover in their own names the extraordinary support costs attributable to their impaired child.

DOUGLAS EDWARD PECK

120. See *White v. Osborne*, 251 N.C. 56, 110 S.E.2d 449 (1959).

121. One such circumstance would be the parents' inability to manage large sums of money. Another factor would be uncertainty as to the collection of the entire judgment. This latter factor was the rationale used to require the appointment of a nonparental guardian in *White v. Osborne*, 251 N.C. 56, 59-60, 110 S.E.2d 449, 451-52 (1959).

122. The trial judge could use his discretionary power to supervise the creation of a private support trust managed by a professional trustee, such as a bank. A private trust, properly administered, would provide the same security as a guardianship, but reduced judicial oversight would result in substantial savings in administrative costs. See Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 334 (1960).