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# Repose for Manufacturers: Six Year Statutory Bar to Products Liability Actions Upheld—*Tetterton v. Long Manufacturing Co.*

During the mid-1970s an alleged "crisis" occured in the products liability field.[1] Liability insurance rates for manufacturers soared as the insurance industry complained of a nationwide outbreak of awards to plaintiffs in products liability suits.[2] Legislatures in many states reacted by enacting various provisions designed to limit this perceived unfairness to manufacturers.[3] A major consequence of this legislative action was the adoption in many states of statutes of repose[4] barring any products liability suit after the product had been on the market a specific number of years.[5]

In 1979 the North Carolina General Assembly enacted North Carolina General Statutes section 1-50(6),[6] which provides that "[n]o action for the recovery of damages for personal injury, death or damage to property based upon

1. Several courts and commentators have set forth the details of the "crisis." *See, e.g.*, Heath v. Sears, Roebuck & Co., 123 N.H. 512, 522, 464 A.2d 288, 293-94 (1983); Dworkin, *Product Liability of the 1980s: 'Repose is not the Destiny' of Manufacturers*, 61 N.C.L. REV. 33, 33-36 (1982); McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 579-80 (1981); Vargo, *Products Liability*, 15 IND. L. REV. 289, 289-90 n.2 (1982).

2. There is substantial doubt whether a crisis of the proportions asserted by the insurance industry ever existed. Almost certainly, it does not exist today. *See, e.g.*, Dworkin, *supra* note 1, at 59-61; Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 663-65 (1978); Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 243-44 (1978); Vargo, *supra* note 1, at 289-90 n.2 (concluding that the alleged "crisis" was false and unsubstantiated).

3. In 1979 the North Carolina General Assembly responded with the Products Liability Act. Act of May 28, 1979, ch. 654, 1979 N.C. Sess. Laws 687. The general assembly enacted chapter 99B of the North Carolina General Statutes, N.C. GEN. STAT. §§ 99B-1 to -4 (1979), which contains the substantive provisions of North Carolina products liability law. The general assembly also amended several sections of chapter 1 of the General Statutes. One amendment to chapter 1 was the addition of a six-year statute of repose in products liability actions in N.C. GEN. STAT. § 1-50(6) (1983). *See generally* Blanchard & Abrams, *North Carolina's New Product Liability Act: A Critical Analysis*, 16 WAKE FOREST L. REV. 171 (1980) (discussing details of the Act's adoption in addition to its substantive provisions).

4. A statute of repose functions mainly as a substantive element of a cause of action. It should be distinguished from a statute of limitations, which functions as a procedural limit on the enforcement of accrued causes of action. *See infra* notes 20-32 and accompanying text. A majority of products liability statutes of repose run after ten or twelve years. A few, however, run after six or eight years. *See infra* note 22.

5. The first statute of repose for products liability actions was adopted in Utah in 1977. McGovern, *supra* note 1, at 588 n.50 (discussing UTAH CODE ANN. § 78-15-3 (1977)). Among the other states that subsequently passed such statutes are Alabama, ALA. CODE § 6-5-502(c) (Supp. 1985); Arizona, ARIZ. REV. STAT. ANN. § 12-551 (1982); Colorado, COLO. REV. STAT. § 13-21-403(3) (Supp. 1985); Connecticut, CONN. GEN. STAT. ANN. § 52-577a (West Cum. Supp. 1986); Florida, FLA. STAT. ANN. § 95.031(2) (West 1979); Georgia, GA. CODE ANN. § 51-1-11(b)(2) (1982); Idaho, IDAHO CODE § 6-1303 (Supp. 1985); Illinois, ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd 1984); Indiana, IND. CODE ANN. § 34-4-20A-5 (Burns Cum. Supp. 1985); Kansas, KAN. STAT. ANN. § 60-513 (1983); Kentucky, KY. REV. STAT. § 411.310(1) (Supp. 1984); Nebraska, NEB. REV. STAT. § 25-224 (1979); New Hampshire, N.H. REV. STAT. ANN. § 507-D:2 (1983); North Carolina, N.C. GEN. STAT. § 1-50(6) (1983); North Dakota, N.D. CENT. CODE § 28-01.1-02 (Supp. 1985); Oregon, OR. REV. STAT. § 30-905(1) (1985); Rhode Island, R.I. GEN. LAWS § 9-1-13(b) (1985); South Dakota, S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982); Tennessee, TENN. CODE ANN. § 29-28-103 (1980); Washington, WASH. REV. CODE ANN. § 7.72.060(2) (Supp. 1986).

6. N.C. GEN. STAT. § 1-50(6) (1983).

or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption."[7] Because this statute bars[8] any products liability suit[9] for products on the market more than six years, it has evoked substantial criticism.[10] Attacks on the statute have focused largely on the potential constitutional deficiencies of section 1-50(6).[11]

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7. *Id.* In a products liability action in North Carolina a second statute of repose, N.C. GEN. STAT. § 1-52(16) (1983), is also applicable. The statute provides that although a cause of action for personal injury or property damage accrues at the time the injury becomes apparent or reasonably should have become apparent, no action may be brought more than 10 years after the last wrongful act of the defendant. This statute will have far less impact in the products liability field than § 1-50(6), however, because the six-year limitation of § 1-50(6) will bar most actions. The primary purpose of § 1-52(16) appears to have been adoption of the discovery rule, *see infra* note 69, rather than repose for manufacturers. *See* Note, Wilder v. Amatex Corp.: *A First Step Toward Ameliorating the Effects of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases*, 64 N.C.L. REV. 414, 422-23 (1986). The North Carolina Supreme Court has not ruled on the constitutionality of § 1-52(16). *See* Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985) (avoiding the constitutionality issue of § 1-15(b), the predecessor of § 1-52(16), by finding it inapplicable to cases of delayed manifestation disease). *But see* Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) (upholding the constitutionality of § 1-15(b)).

8. A primary focus of constitutional attacks on statutes of repose is that these statutes function as an absolute bar to otherwise valid claims. *See infra* note 93 and accompanying text.

9. The North Carolina Supreme Court has held that the statute of repose in § 1-50(6) establishes a condition precedent to the commencement of any action under chapter 99B of the North Carolina General Statutes. *See* Bernick v. Jurden, 306 N.C. 435, 446-47, 293 S.E.2d 405, 412-13 (1982).

10. For criticism of § 1-50(6), see Blanchard & Abrams, *supra* note 3, at 196-202 (suggesting that courts either rule the statute unconstitutional or limit its scope in application); Note, *Limitation of Actions: The Effect of* Lamb v. Wedgewood South Corp. *on Future Cases Determining the Constitutionality of G.S. 1-50(6)*, 19 WAKE FOREST L. REV. 1049, 1072 (1983) (arguing that the six-year limitation is arbitrary and may decrease a manufacturer's emphasis on safety).

Almost 100 years ago, in Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887), the North Carolina Supreme Court faced an issue analogous to the one raised by § 1-50(6). The majority in *Andres* upheld the lower court's application of a statute of repose giving creditors of deceased persons seven years after death to sue the estate. *Id.* at 158, 2 S.E. at 239. Justice Merrimon, dissenting, objected that the statute of repose in *Andres* barred plaintiff's action before it arose. Merrimon argued that the majority, by upholding the statute of repose, reached the "absurd result of barring a party's debt or demand before it becomes actionable." *Id.* at 159, 2 S.E. at 239. Rather than viewing the statute as invalid, however, Justice Merrimon read it as a statute of limitations barring a cause of action only after accrual, and not as a statute of repose that began at the decedent's death and barred an action irrespective of its accrual date. Based on the statutory language, Justice Merrimon's conclusion was questionable. However, he viewed his position as an "equitable construction of the act" designed to avoid the harsh result ensuing from application of the statute of repose. *Id.* at 170, 2 S.E. at 243.

11. For example, constitutional attacks may be based on: (1) equal protection of the law, *see infra* notes 40-66 and accompanying text; (2) state constitutional provisions guaranteeing open access to the judicial system for redress of injuries, *see infra* notes 78-103 and accompanying text; or (3) due process of law, *see infra* notes 111-28 and accompanying text.

To date, the courts of ten states have considered the constitutionality of a products liability statute of repose similar to § 1-50(6). The statute has been held constitutional in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Thorton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981); Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981); Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985); and Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194, *rev. denied*, 297 Or. 82, 679 P.2d 1367 (1984). The statute has been held unconstitutional in Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Battillia v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980), *overruled by*, Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984); Davgaard v. Baltic Coop. Bldg. Supply Assoc., 349 N.W.2d 419 (S.D. 1984); and Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

Federal courts have also considered the constitutionality of products liability statutes of repose. *See* Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983) (constitutional), *cert. denied*, 467

In *Tetterton v. Long Manufacturing Co.*[12] the North Carolina Supreme Court upheld section 1-50(6) under a variety of constitutional attacks.[13] This Note analyzes the court's rejection of the constitutional challenges to section 1-50(6) and discusses the possibilities for successful constitutional challenges to the application of section 1-50(6) in fact situations not present in *Tetterton*. It concludes that, although there are limited circumstances in which the statute could be found unconstitutional as applied to particular plaintiffs, the primary hope for mitigating the unfairness of section 1-50(6) lies in legislative modification.

In *Tetterton* plaintiff's husband was killed while operating an allegedly defective tobacco harvester manufactured by defendant, Long Manufacturing Company. His death occured on July 8, 1981, and plaintiff filed suit on October 6, 1981, almost six years and seven months after the tobacco harvester was first purchased for use.[14] The trial court granted summary judgment for defendant on the ground that plaintiff's action was barred by section 1-50(6).[15] The North Carolina Court of Appeals affirmed.[16]

The sole issue on appeal to the North Carolina Supreme Court was the constitutionality of section 1-50(6).[17] Plaintiff challenged the statute on the grounds that it violated three constitutional provisions: (1) equal protection of the law; (2) the "exclusive emoluments" clause of the North Carolina Constitu-

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U.S. 1231 (1984); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983) (constitutional); Pitts v. Unarco Indus., Inc., 712 F.2d 276 (7th Cir. 1983) (constitutional); Groth v. Sandoz, Inc., 601 F. Supp. 453 (D. Neb. 1984) (constitutional); Ellison v. Northwest Eng'g Co., 521 F. Supp. 199 (S.D. Fla. 1981) (unconstitutional based on state supreme court decision which was subsequently overruled); Kline v. J.I. Case Co., 520 F. Supp. 564 (N.D. Ill. 1981) (constitutional).

12. 314 N.C. 44, 332 S.E.2d 67 (1985).

13. Other courts had ruled on the constitutionality of § 1-50(6) before *Tetterton*. The North Carolina Court of Appeals initially held § 1-50(6) unconstitutional in Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982), on the ground that it violated the state constitutional guarantee of open access to courts. *See infra* notes 79-103 and accompanying text. On appeal, the supreme court strongly suggested in dicta that it believed § 1-50(6) to be constitutional, but did not reach the issue directly because it found the statute inapplicable to plaintiff's claim. Bolick v. American Barmag Corp., 306 N.C. 364, 371, 293 S.E.2d 415, 421 (1982). Based on the dicta in *Bolick* and the supreme court's decision in Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983) (upholding constitutionality of six-year statute of repose for injuries caused by improvements to real estate), the court of appeals soon reversed its initial ruling in *Bolick* and held § 1-50(6) constitutional. Colony Hill Condominium I Assoc. v. Colony Co., 70 N.C. App. 390, 396, 320 S.E.2d 273, 277 (1984); Davis v. Mobilift Equip. Co., 70 N.C. App. 621, 622, 320 S.E.2d 406, 406 (1984). Two federal courts also have upheld the constitutionality of § 1-50(6) based on the North Carolina Supreme Court's dicta in *Bolick*. Brown v. General Elec. Co., 584 F. Supp. 1305 (E.D.N.C. 1983), *aff'd*, 733 F.2d 1085 (4th Cir.), *cert. denied*, 105 S. Ct. 189 (1984). The supreme court had an opportunity to speak definitively on the constitutionality of § 1-50(6) in Moore v. Moody, 304 N.C. 719, 285 S.E.2d 811 (1982), but did not do so because it found the petition for writ of certiorari improperly granted.

14. *Tetterton*, 314 N.C. at 46, 332 S.E.2d at 68.

15. *Id.*

16. Tetterton v. Long Mfg. Co., 67 N.C. App. 628, 313 S.E.2d 250 (1984), *aff'd*, 314 N.C. 44, 332 S.E.2d 67 (1985). The court of appeals refused to address the constitutionality of § 1-50(6) because it found that the issue had been neither affirmatively raised nor ruled on in the lower court. *Id.* at 630, 313 S.E.2d at 251. The supreme court, however, found that the record did indicate that the statute's constitutionality was challenged at trial and thus, was properly before the court on appeal. *Tetterton*, 314 N.C. at 47, 332 S.E.2d at 69.

17. Plaintiff admitted that her action was barred should the constitutionality of the statute be upheld. *Tetterton*, 314 N.C. at 48-49, 332 S.E.2d at 69-70.

tion; and (3) the "open courts" guarantee of the North Carolina Constitution. Plaintiff also contended that section 1-50(6) was unconstitutionally vague.[18] In a unanimous opinion,[19] the court upheld the statute against each of these four challenges.

Section 1-50(6) is a statute of repose.[20] Such a statute creates substantive elements of the litigant's legal rights[21] by setting a specific time period,[22] usually measured from the date a product is first sold for consumption,[23] after which no cause of action in products liability may accrue.[24] Passage of a period of time shorter than that established by the statute is thus a condition precedent to the accrual of a plaintiff's cause of action.[25] If the plaintiff's injury occurs after the

18. *Id.* at 48, 332 S.E.2d at 69.

19. Justice Vaughn did not participate in the decision. *Id.* at 59, 332 S.E.2d at 75.

20. McGovern identifies four meanings that courts have applied to the term "statute of repose." First, repose generally may be used to refer to any limitation on the bringing of a legal action. McGovern, *supra* note 1 at 582-83; *see also* Rosenberg v. Town of North Bergen, 61 N.J. 190, 201, 293 A.2d 662, 667 (1972) (stating that "[a]ll statutes limiting in any way the time within which a judicial remedy must be sought are statutes of repose"). Second, repose is used as a general term covering several statutes, including statutes of limitations, that promote finality in legal relationships. McGovern, *supra* note 1, at 583. Third, repose may be used to refer to that part of a statute of limitations that places an outer limit on the applicability of the statute. *Id.* at 583-84. The final meaning attached to repose, and the one used in this Note, draws a clear distinction between a statute of repose and a statute of limitations. A statute of limitations begins to run at the time of accrual of a cause of action but a statute of repose begins to run at a time unrelated to accrual and may bar an action before it accrues. *Id.* at 584-86.

21. North Carolina courts have clearly recognized that § 1-50(6) is a substantive rather than a procedural limitation. *See* Bernick v. Jurden, 306 N.C. 435, 446-47, 293 S.E.2d 405, 412-13 (1982) (viewing § 1-50(6) as a "statute of repose in that it places a cap or outer limit on the time period within which a products liability action may be brought irrespective of when the claim accrues"); Bolick v. American Barmag Corp., 54 N.C. App. 589, 594-95, 284 S.E.2d 188, 192 (The court found that "[b]ecause G.S. 1-50(6) attempts to bar absolutely claims arising out of defects or failures in relation to products after a period measured from a date *other than* the date of accrual of those claims, it does not constitute a statute of limitation." Rather, "[i]t abolish[es] certain claims recognized prior to its enactment."), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982).

22. The period is twelve years in Arizona, Florida, New Hampshire, and Washington. It is ten years in Alabama, Colorado, Connecticut, Idaho, Georgia, Illinois, Indiana, Kansas, Nebraska, North Dakota, Rhode Island, and Tennessee. Kentucky and Oregon have an eight-year products liability statute of repose. The period is six years in North Carolina, South Dakota, and Utah. For a list of citations to the statutes with these provisions, see *supra* note 5.

23. In Arizona, Colorado, Georgia, Kentucky, Nebraska, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, and Utah, the statute of repose begins on the date the product is first sold for consumption. In Florida, Idaho, Illinois, Indiana, and South Dakota, the period begins on the date of delivery to the initial user. In Connecticut and New Hampshire the key date is when the defendant parts with control of the product. In Alabama the period begins after the product is first put to use, and in Kansas it is started by the act giving rise to the cause of action. For a list of citations to statutes with these provisions, see *supra* note 5.

24. One court has held that the distinction between a statute of repose and a statute of limitations is unimportant. *See* Carter v. Hartenstein, 248 Ark. 1172, 1174, 455 S.W.2d 918, 920 (1970) (the distinction "is largely a question of semantics and manipulation of legal theory"), *cert. denied*, 401 U.S. 901 (1971). The distinction is critical for constitutional analysis, however, because courts usually impose a less demanding constitutional standard to a substantive statute of repose than to a procedural statute of limitations. *See infra* notes 112-29 and accompanying text. Occasionally, a court fails to appreciate the distinction between a statute of repose and a statute of limitations and reviews the constitutionality of a statute of repose as if it were a statute of limitations. *See, e.g.*, Joseph v. Burns, 260 Or. 493, 491 P.2d 203 (1971).

25. Several courts and observers analyzing the constitutionality of statutes of repose have noted this characteristic. *See, e.g.*, Universal Eng'g Corp. v. Perez, 451 So. 2d 463 (Fla. 1984); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Bolick v. American

statute of repose period has run, the plaintiff has an injury for which the law affords no remedy.[26]

For purposes of constitutional analysis, a statute of repose may be distinguished from a statute of limitations.[27] A statute of limitations is a procedural limitation on substantive rights. Rather than beginning at a time set by statute, a statute of limitations begins to run on the date a plaintiff's cause of action accrues.[28] A statute of limitations prescribes a time period after accrual during which suit must be brought, or the legal rights will be lost.[29]

In limited situations a statute of repose may also function procedurally rather than substantively.[30] When a cause of action arises before the end of the statute of repose period, the statute functions as a procedural bar to an action.[31] For example, if a plaintiff is injured by a defective product in North Carolina five years after its initial purchase date, section 1-50(6) gives that person one year in which to file suit. As with a statute of limitations, any action beyond this time is procedurally barred.[32]

The basic purpose of any statute of repose is practical in nature, focusing exclusively on the defendant's convenience.[33] As the *Tetterton* court observed,

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Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982); Davis v. Mobilift Equip. Co., 70 N.C. App. 621, 320 S.E.2d 406 (1984); Dworkin, *supra* note 1, at 42-45.

26. The widely perceived unfairness of statutes of repose in barring access to courts for an otherwise compensable injury is a common factor in decisions finding them unconstitutional. *See infra* note 93 and accompanying text.

27. Courts are generally reluctant to overturn a statute of repose because it reflects the legislature's definition of substantive legal rights. *See infra* notes 113-16 and accompanying text. In reviewing a statute of limitation, however, courts generally impose the somewhat more demanding test of reasonableness. *See infra* notes 117-28 and accompanying text.

28. A statute of limitations cannot begin to run until a plaintiff's injury is complete and he or she is entitled to bring suit. Raftery v. Vick Constr. Co, 291 N.C. 180, 183-84, 230 S.E.2d 405, 407 (1976). Although the plaintiff's right to institute an action generally arises when the injury is complete, the statute of limitations could be tolled until some later date under the discovery rule. *See infra* note 70.

29. *See* Wilson v. Iseminger, 185 U.S. 55, 62 (1902) (stating that "all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts"); Oole v. Oosting, 82 Mich. App. 291, 297, 266 N.W.2d 795, 799 (1978) (observing that a "statute of limitation is one which requires a person who has a cause of action to bring suit within a specified period of time"), *aff'd sub. nom.*, O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 146 (Okla. 1977) (holding that a "true statute of limitations works on the *remedy* rather than the *right* and governs the time within which a legal proceeding must be instituted after a *cause of action accrues*").

30. Because a statute of repose may serve a dual function—substantive and procedural—it has also been referred to as a "hybrid statute of limitation." *See, e.g.*, Terry v. New Mexico State Hwy. Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982); Smith v. American Radiator & Standard Sanitary Corp., 38 N.C. App. 457, 254 S.E.2d 33 (1978). For convenience, however, this Note will use the term "statute of repose" to describe laws such as § 1-50(6) that run independently of accrual of a cause of action.

31. *See* Terry v. New Mexico State Hwy. Comm'n, 98 N.M. 119, 121, 645 P.2d 1375, 1377 (1978).

32. It is still unclear whether § 1-50(6) is constitutional in all cases in which it serves a procedural function. The court in *Tetterton* only upheld the statute as a substantive element of accrual of a cause of action. *See infra* notes 111-28 and accompanying text.

33. Several courts have recognized that statutes of repose are designed solely for the benefit of potential defendants. This fact alone, however, does not usually affect the statute's constitutionality despite the impact on plaintiffs whose actions may be completely barred. *See* Wayne v. Tennessee Valley Auth., 730 F.2d 392, 404 (5th Cir. 1984) ("[T]he very purpose of a statute of repose is to create a settled time when such losses can no longer be subject to claims. Ample authority estab-

statutes of repose shield a defendant from liability after a certain time and prevent the prosecution of claims after evidence is likely to be unreliable.[34] At least two additional arguments have been made to justify products liability statutes of repose. First, some courts and observers have argued that greater predictability of liability losses will result in lower prices for consumers and lower insurance rates for manufacturers.[35] Second, manufacturers cite the special legal problems involved in disproving the existence of a "defect" after a considerable passage of time. Statutes of repose avoid the possibility that a jury will find older products to be defective in a modern background rather than in the context of technology at the time of the product's manufacture.[36]

Several arguments have been made in opposition to products liability statutes of repose. First, some courts have simply rejected the justifications given for the statute.[37] Second, some courts and observers have expressed a fear that manufacturers put less emphasis on safety when sheltered with the protection of a statute of repose.[38] Third, and most important, because statutes of repose may completely bar recovery for otherwise compensable injuries, some courts and

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lishes a governmental right to do this even though harsh results can occur under any such arbitrary time limit."); Bagby Elevator & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Howell & Graves, Inc. v. Curry, 242 Ala. 122, 5 So. 2d 105 (1941); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

34. *Tetterton*, 314 N.C. at 54, 332 S.E.2d at 73. Courts reviewing the constitutionality of statutes of repose invariably list these two justifications as their primary purpose. *See, e.g.*, Wayne v. Tennessee Valley Auth., 730 F.2d 392, 404 (5th Cir. 1984); Pitts v. Unarco Indus., Inc., 712 F.2d 276, 281 (7th Cir. 1983); Hargraves v. Brackett Stripping Mach. Co., 317 F. Supp. 676, 682-83 (E.D. Tenn. 1970).

35. Scalf v. Berkel, Inc., 448 N.E.2d 1201, 1204 (Ind. Ct. App. 1983) (finding that products liability statute of repose is aimed at "skyrocketing product liability insurance costs fueled by huge increases in the number of product liability claims, large increases in the amounts of settlements and awards, and indications that the victim of an allegedly defective product was favored over the maker of that product in the tort process"); McGovern, *supra* note 1, at 594; Note, *supra* note 10, at 1056; *see also supra* notes 1-2 and accompanying text (discussing the existence of an alleged crisis in insurance rates due to increasing liability of manufacturers).

36. *See* McGovern, *supra* note 1, at 589; Note, *supra* note 10, at 1056.

37. For example, some courts and observers have persuasively criticized the contention that defendant manufacturers cannot disprove liability several years after manufacture. They have pointed out that proof related problems fall hardest on plaintiffs who bear the burden of proof. *See, e.g.*, Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979); Note, *supra* note 10, at 1056-57.

Under an equal protection analysis, see *infra* notes 40-67, simply rejecting the proposed justification given for the products liability statute of repose may be a sufficient reason for striking the statute down as unconstitutional. *See, e.g.*, Lankford v. Sullivan, Long & Hagerty, Inc., 416 So. 2d 996 (Ala. 1982) (striking down products liability statute of repose because it lacked sufficient relation to the legislative intention to reduce insurance rates); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983) (striking down products liability statute of repose because it does not decrease liability insurance rates); Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) (finding products liability statute of repose could not decrease liability insurance rates in the state).

38. *See, e.g.*, Kennedy v. Cumberland Eng'g Co., 471 A.2d 195, 200 (R.I. 1984) (striking down statute as unconstitutional and noting that manufacturers might conclude it is "more economical to allow the product to stay in the field of commerce until the ten-year bar applies than to correct the defect"); Berry v. Beech Aircraft Corp., 717 P.2d 670, 683 (Utah 1985) (The court noted that the state's six-year statute of repose was "likely to produce an incentive for manufacturers not to take adequate safety precautions in the manufacture and design of products having a useful life of more than six years, thereby increasing the already substantial number of persons who have been injured or killed by shoddy design or workmanship."); McGovern, *supra* note 1, at 598; Note, *supra* note 10, at 1057.

commentators have viewed them as too intrusive on the right of injured parties to compensation.[39]

Plaintiff in *Tetterton* began her attack on section 1-50(6) by arguing that the statute violated the equal protection clauses of the North Carolina Constitution[40] and the fourteenth amendment to the United States Constitution.[41] She asserted that the statute "impermissibly distinguishes between manufacturers and suppliers as sellers of products who are protected from liability beyond the specific six-year period and retail businesses and private individuals as sellers of the identical products who are not granted the same protections."[42]

The court in *Tetterton* found no equal protection violation because it interpreted the statute as applying equally to products liability actions against both manufacturers and retailers. The court found that the Products Liability Act, of which section 1-50(6) is a part,[43] was explicitly intended to apply to actions against manufacturers and retailers.[44] Because both classifications received the protection of the statute under the court's interpretation, there was no equal protection violation.[45]

The question that the *Tetterton* court did not directly address is whether

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39. *See, e.g.*, Heath v. Sears, Roebuck & Co., 123 N.H. 512, 525, 464 A.2d 288, 295-96 (1983) (characterizing barring a cause of action before it arises as "the 'Alice in Wonderland' effect" of a statute of repose because only in Alice in Wonderland does an end occur before its cause); Wilkinson v. Harrington, 104 R.I. 224, 238, 243 A.2d 745, 753 (1968) (holding that "[t]o require a man to seek a remedy before he knows of his rights, is palpably unjust"); Phillips, *supra* note 2, at 665-66; Note, *supra* note 10, at 1056.

Two factors often present in products liability actions intensify some courts' objections to statutes of repose. First, plaintiffs often may not be aware of when the product in question was first purchased for consumption. They may assume they have the entire statute of limitation period in which to bring suit when in fact the statute of repose may bar any suit soon after accrual. *See* Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984) (statute unconstitutional when plaintiff, unaware of the product's original purchase date, assumed three-year statute of limitation period applied but statute of repose barred action in one year).

Second and more important, plaintiffs' injuries may not manifest themselves until after the statute of repose period has run. The perceived injustice of a statute of repose is most evident in these cases of delayed manifestation diseases. An action may be barred simply because the injuries caused by a defective product do not become readily evident. *See, e.g.*, Braswell v. Flintkote Mines, Ltd., 723 F.2d 527, 533 (7th Cir. 1983) (Swygert, J., dissenting) (characterizing a bar to a plaintiff's action before discovery of injuries is possible as "a mockery of justice"), *cert. denied*, 467 U.S. 1231 (1984); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 523-24, 464 A.2d 288, 294-95 (1983); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195, 198 (R.I. 1984); *see also infra* notes 68-73 and accompanying text (arguing that courts are more likely to find products liability statutes of repose unconstitutional as applied to plaintiffs with delayed manifestation diseases).

40. "No person shall be denied the equal protection of the laws . . . ." N.C. CONST. art. I, § 19.

41. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ." U.S. CONST. amend. XIV.

42. *Tetterton*, 314 N.C. at 49-50, 332 S.E.2d at 70.

43. *See supra* note 3.

44. *Tetterton*, 314 N.C. at 50, 332 S.E.2d at 70-71. The court noted that a " '[p]roduct liability action' includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the *manufacture*, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, *selling*, advertising, packaging or labeling of any product." *Id.* (quoting N.C. GEN. STAT. § 99B-1(3) (1985)).

45. Equal protection is violated only if a law arbitrarily grants protection to one class of persons while denying such protection to another class. Without a statutorily created classification, no equal protection violation is possible. *See* City of Cleburne, Tex. v. Cleburne Living Center, 105 S. Ct. 3249, 3254 (1985).

section 1-50(6) would be upheld if attacked on other equal protection grounds. For example, similar statutes of repose have been challenged on the ground that they create an impermissible distinction between manufacturers of durable and nondurable goods[46] or between plaintiffs injured before and plaintiffs injured after the statutory period.[47] The statute clearly creates these classifications; therefore, courts could not dispose of these issues by finding, as the supreme court did in *Tetterton*, that no classification was created.[48]

The clear implication of the *Tetterton* decision, however, is that the court would uphold the statute under such challenges. The court established a difficult standard of review for a plaintiff challenging section 1-50(6).[49] The court recognized that "there is a strong presumption that an enactment of the legislature is constitutional."[50] Thus, any doubt about the statute's validity, the court held, should be resolved in favor of the statute.[51] Although a few courts appear

46. Manufacturers of nondurable goods get little if any protection from products liability statutes of repose because their products usually cause injury, if at all, during the first few years after sale. Durable goods, on the other hand, may be expected to cause injury many years after sale because by definition they have a longer useful life. *See* Pitts v. Unarco Indus., Inc., 712 F.2d 276, 280 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983); Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1004 (Ala. 1982) (Torbert, C. J., concurring).

47. Because courts generally recognize that finality in legal affairs is a legitimate legislative purpose, *see supra* notes 33-34 and accompanying text, this classification can probably survive an attack on equal protection grounds. It would only violate equal protection of the law, if at all, under the more demanding middle level approach adopted by some courts. *See* Dworkin, *supra* note 1, at 55. For a discussion of review standards applied by courts in equal protection attacks on statutes of repose, see *infra* notes 54-60 and accompanying text.

48. A common problem when a plaintiff attacks a statute of repose on the ground that it arbitrarily distinguishes between potential classes of defendants is standing. To have standing to attack a statute's constitutionality in federal court, a party must have so concrete an interest in the outcome of the suit that he or she has suffered an "injury in fact." *See* McClanahan v. American Gilsonite Co., 494 F. Supp. 1334, 1342 (D. Colo. 1980). A party generally does not have standing to assert the constitutional rights of third persons. Singleton v. Wulff, 428 U.S. 106, 113-16 (1976). State courts may also invoke the standing principle to avoid addressing a constitutional challenge to a statute. *See, e.g.*, Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 121, 645 P.2d 1375, 1377 (1982).

Courts are split on whether plaintiffs have standing to attack a statute of repose on the ground that it impermissibly distinguishes between potential classes of defendants. Standing was denied in Adair v. Koppers Co., 541 F. Supp. 1120 (N.D. Ohio), *aff'd*, 741 F.2d 111 (6th Cir. 1982); McCarty v. Goldstein, 151 Colo. 154, 376 P.2d 691 (1962); Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982). However, standing was found in McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980) and in Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982).

The majority of courts seem to decide the standing issue on the basis of whether they want to address the constitutional question raised. For courts not wishing to rule on the equal protection status of a statute of repose, standing is often a convenient theory. Many courts raise the standing issue but then fail to resolve it, apparently intent on upholding or striking down the statute. *See, e.g.*, Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 511 (8th Cir. 1983). As *Tetterton* illustrates, some courts do not address the standing question either because it was not raised or because they want to address the constitutional issue in spite of any standing problems.

49. The North Carolina Supreme Court has traditionally applied a very high standard of review to constitutional challenges to state statutes. *See, e.g.*, Lamb v. Wedgewood S. Corp., 308 N.C. 419, 433, 302 S.E.2d 868, 876 (1983); A-S-P Assoc. v. City of Raleigh, 298 N.C. 207, 214, 258 S.E.2d 444, 449 (1979); Painter v. Wake County Bd. of Educ., 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975); Wilson v. City of High Point, 238 N.C. 14, 23, 76 S.E.2d 546, 552 (1953).

50. *Tetterton*, 314 N.C. at 49, 332 S.E.2d at 70.

51. *Id.*

to be more active in reviewing statutes of repose,[52] a majority of courts impose a standard of review similar to that set forth in *Tetterton*.[53]

Courts generally use one of two levels of analysis for reviewing an equal protection challenge to products liability statutes of repose.[54] The most commonly used standard is the two-part rational basis test.[55] This test requires that the legislative purpose[56] behind the statute be "rational" and that the classification used to achieve this purpose bear a reasonable relation to the legislative objective.[57] A few courts, however, have applied a more demanding middle tier

52. *See, e.g.*, Davgaard v. Baltic Coop. Bldg. Supply Assoc., 349 N.W.2d 419, 425 (S.D. 1984) (holding that "[o]ur constitution . . . is solid core upon which all our state laws must be premised").

53. *See, e.g.*, Barwick v. Celotex Corp., 736 F.2d 946, 955 (4th Cir. 1984); Braswell v. Flintkote Mines, Ltd., 723 F.2d 527, 531 (7th Cir. 1983), *cert. denied*, 467 U.S. 1231 (1984); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976).

54. No court has applied the highest level of equal protection analysis, strict scrutiny, to a statute of repose. Strict scrutiny is limited to cases involving a suspect classification or a classification infringing on a fundamental right such as speech, voting, or interstate travel. Strict scrutiny is not used for reviewing economic regulations. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954); *see also* Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978) (refusing to apply strict scrutiny to a statute of repose when no fundamental right or suspect classification was involved).

55. Because courts often use language imprecisely, it may be unclear what test a court is applying. For example, builder's statutes of repose have been upheld under a rational basis test. *See, e.g.*, Cudahy Co. v. Ragnar Benson, Inc., 514 F. Supp. 1212 (D. Colo. 1981); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970); Regents of the Univ. of Cal. v. Hartford Accident & Indem. Co., 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978); Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982); Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Cheswold Volunteer Fire Dept. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 499 A.2d 178 (1985); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (N.M. Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977); Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972).

Builder's statutes of repose have been struck down under the rational basis test by other courts. *See, e.g.*, McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980); Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 194 Minn. 97, 260 N.W.2d 548 (1977); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

Products liability statutes of repose have been upheld under the rational basis test in Braswell v. Flintkote Mines, Ltd. 723 F.2d 527 (7th Cir. 1983), *cert. denied*, 467 U.S. 1231 (1984); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Pitts v. Unarco Indus., Inc., 712 F.2d 276 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983); Groth v. Sandoz, Inc., 601 F. Supp. 453 (D. Neb. 1984); Kline v. J.I. Case Co., 520 F. Supp. 564 (N.D. Ill. 1981); Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. Ct. App. 1983).

Products liability statutes of repose have been struck down under a rational basis in Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984).

56. One of the primary purposes behind the adoption of products liability statutes of repose is to increase the availability of liability insurance at affordable rates. *See supra* notes 1-2, 35 and accompanying text.

57. *See* Schweiker v. Wilson, 450 U.S. 1074 (1981); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Responsible Citizens in Opposition to the Flood Plan Ordinance v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983); Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), *cert. denied*, 406 U.S. 920 (1972); Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985).

of analysis[58] to statutes of repose because of the importance of the right to compensation for injuries.[59] This standard of review requires a nonarbitrary classification that bears a fair and substantial relation to the achievement of a reasonable legislative purpose.[60]

The *Tetterton* opinion indicates that the supreme court will apply the more lenient rational basis test to review any classification created by section 1-50(6). As the court stated: "The General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common-law rule, the statute supplants the common-law rule and becomes the public policy of the State in respect to that particular matter."[61] This deference to the legislative judgment is characteristic of the rational basis test and indicates that the court will uphold section 1-50(6) if challenged on equal protection grounds.[62]

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58. The middle tier approach allows greater judicial review of the legislative ends sought by the classification. For example, middle tier review should allow a court to review whether a legislature had reasonable grounds to believe that an insurance "crisis" existed in the products liability field in the mid-1970s, see *supra* notes 1-2 and accompanying text, and whether the statute of repose was substantially related to easing the crisis. Because this alleged crisis is the main justification for the passage of products liability statutes of repose, a court can invalidate the law if it concludes that the crisis never existed or no longer exists. *See* Heath v. Sears, Roebuck & Co., 123 N.H. 512, 526, 464 A.2d 288, 296 (1983).

Courts have struck down builder's statutes of repose under a middle tier equal protection analysis. *See, e.g.*, Henderson Clay Prod., Inc. v. Edgar Wood & Assoc., 122 N.H. 800, 451 A.2d 174 (1982).

The sole case in which a court applied a middle tier of scrutiny to a products liability statute of repose appears to be Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983); *see also* Dworkin, *supra* note 1, at 57-58 (arguing that a middle tier approach is appropriate for reviewing products liability statutes of repose).

59. Courts are in complete agreement that the right to compensation for injuries is not a fundamental right that would lead to strict scrutiny analysis. *See supra* note 54. For this reason, most courts conclude that the rational basis test is appropriate. *See, e.g.*, Wayne v. Tennessee Valley Auth., 730 F.2d 392, 404 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 908 (1985); Scalf v. Berkel, Inc., 448 N.E.2d 1201, 1203 (Ind. Ct. App. 1983); Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 352, 499 A.2d 178, 185 (1985). Those few courts that apply a middle tier of scrutiny generally reason that although the right to compensation is not a fundamental right, it is an important interest that should receive more protection than review for mere rationality. *See, e.g.*, Heath v. Sears, Roebuck & Co., 123 N.H. 512, 524-25, 464 A.2d 288, 295 (1983); Carson v. Maurer, 120 N.H. 925, 931-32, 424 A.2d 825, 830 (1980) (holding the right to recover for personal injuries to be "an important substantive right" requiring a middle tier equal protection approach).

60. *See, e.g.*, Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). The United States Supreme Court has generally limited the middle tier approach to classifications based on gender, illegitimacy, and occassionally, alienage. Plyler v. Doe, 457 U.S. 202 (1982). Lalli v. Lalli, 439 U.S. 259 (1979); Reed v. Reed, 404 U.S. 71 (1971). State courts, however, are free to extend the middle tier analysis to other classifications based on state constitutional guarantees of equal protection. *See, e.g.*, Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (extending the middle tier approach to review of statute limiting medical malpractice actions).

61. *Tetterton*, 314 N.C. at 59, 332 S.E.2d at 75 (quoting Lamb v. Wedgewood South Corp., 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983)).

62. The rational basis test is a minimal level of review under which most statutes are upheld. For example, some courts merely ask whether any "conceivable legitimate government interest" for a classification can be found. Pangburn v. Saad, 73 N.C. App. 336, 340, 326 S.E.2d 365, 368 (1985). Under this approach, so long as "the legislature could reasonably conceive to be true the facts on which the challenged legislative classifications are based," the statute will be upheld. Carson v. Maurer, 120 N.H. 925, 933, 424 A.2d 825, 831 (1980). In borderline cases the statute generally prevails. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 435, 302 S.E.2d 868, 877 (1983).

Some courts nevertheless have found that products liability statutes of repose do not meet the rational basis requirement. In Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984), for

The court cited with approval several cases in which courts have considered equal protection challenges to products liability statutes of repose under a rational basis test and rejected those challenges.[63] In addition, the court cited with strong approval its previous decision in *Lamb v. Wedgewood South Corp.*[64] The court in *Lamb* upheld the North Carolina builder's statute of repose[65] against an equal protection attack, after applying a rational basis test.[66]

There is one important area in which the court could be persuaded to apply a higher level of scrutiny than mere rationality. When injury from a product is a delayed manifestation disease,[67] the unfairness of section 1-50(6) is clear.[68] A plaintiff may be denied recovery simply because he or she did not become aware of an injury until more than six years from the date of the product's sale. Analo-

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example, the Rhode Island Supreme Court concluded that the statute arbitrarily singled out plaintiffs injured by manufactured products and created special legislation for manufacturers. *Id.* at 198-99. In Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982), the Alabama Supreme Court found a products liability statute of repose arbitrary for treating durable and nondurable goods in an identical manner. *Id.* at 1002-03. The court in *Tetterton* acknowledged the decisions in *Kennedy* and *Lankford*, but stated that it did not find the reasoning persuasive. *Tetterton*, 314 N.C. at 58, 332 S.E.2d at 75.

63. For example, the court cited with approval Scalf v. Berkel, 448 N.E.2d 1201 (Ind. Ct. App. 1983), in which the Indiana court used "a rational relationship test, . . . [and] concluded that the limitation period was reasonably related to the purpose of the statute." *Tetterton*, 314 N.C. at 57, 332 S.E.2d at 74.

64. 308 N.C. 419, 302 S.E.2d 868 (1983).

65. The statute provided that

> [n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. GEN. STAT. § 1-50(5) (1983). Analogous statutes have been passed in the majority of jurisdictions. *See generally* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH. U.L. REV. 361 (1969) (detailing the development, provisions, and constitutionality of builder's statutes of repose).

66. *Lamb*, 308 N.C. at 434-38, 302 S.E.2d at 877-79. Adjudication of the constitutionality of products liability statutes of repose is still in an early stage. Decisions on the constitutional validity of builder's statutes of repose are numerous, however, because these statutes generally predate products liability statutes of repose by at least 10 to 20 years. In addition, the constitutional attacks are similar for both types of statutes because they function in the same manner. Several courts and observers have therefore relied heavily on past constitutional decisions on builder's statutes of repose to judge attacks on products liability statutes of repose. In addition to *Tetterton*, see Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984); Diamond v. E.R. Squibb & Sons, 397 So. 2d 671 (Fla. 1981), *overruled on other grounds*, Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Davis v. Mobilift Equip. Co., 70 N.C. App. 621, 622, 320 S.E.2d 406, 407 (1984) (holding that both § 1-50(5) and § 1-50(6) "are statutes of repose, and no rational basis appears for treating them differently with respect to the issues presented"), *disc. rev. denied*, 313 N.C. 328, 329 S.E.2d 385 (1985); *Tetterton*, 67 N.C. App. at 631, 313 S.E.2d at 251 (Becton, J., concurring) (although Judge Becton believes § 1-50(6) is unconstitutional, he voted in favor of its constitutionality because of a state supreme court decision on the constitutionality of a builder's statute of repose); McGovern, *supra* note 1, at 582; Note, *supra* note 10, at 1050-54.

67. A common example of a delayed manifestation disease caused by a manufactured product is asbestosis, which may manifest itself decades after initial exposure. *See, e.g.*, Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985) (plaintiff's first exposure was in 1938, but asbestosis was not diagnosed until 1979).

68. The arguments against statutes of repose are so much more persuasive in this context that the court may also apply a heightened standard of review under other constitutional provisions such as the state constitutional guarantee of open access to courts. *See infra* note 106 and accompanying text.

gizing the situation to adoption of the discovery rule,[69] many courts have been willing to strike down products liability statutes of repose in delayed manifestation disease cases.[70] Although there is no direct North Carolina precedent on the subject,[71] *Tetterton* could have been decided differently had plaintiff's suit been barred due to failure to discover an injury within the six-year period.[72]

The second constitutional attack on section 1-50(6) in *Tetterton* was based on the "exclusive emoluments" clause of the state constitution,[73] which prevents individuals or classes from receiving special privileges from the state.[74] As with her equal protection claim, plaintiff argued that section 1-50(6) conferred a privilege on a class because it arbitrarily limited the liability of manufacturers but

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69. Under the common law a cause of action accrued at the time of injury. Application of this rule operated unjustly in many medical malpractice cases. Plaintiffs' claims were barred simply because they did not learn of their injuries until the statute of limitations period had passed. Courts and legislatures in most jurisdictions responded by adopting the discovery rule. The discovery rule modifies the common law and holds that a cause of action accrues at the time an injury is discovered or reasonably should have been discovered. *See* Dworkin, *supra* note 1, at 37-40.

70. In some products liability cases, courts have analogized the statute of repose barring plaintiffs who have not yet discovered their injury to the inequitable situation existing before adoption of the discovery rule. *Compare* Heath v. Sears, Roebuck & Co., 123 N.H. 512, 525, 464 A.2d 288, 295 (1983) (holding that "[t]he twelve year [product liability statute of repose] is unreasonable because the mere purchase [of some products] does not place the consumer on notice of a hidden defect injurious to his health or safety") *with* Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983) (upholding a products liability statute of repose despite the fact it may operate as a complete bar to recovery for plaintiffs who have an injury that is not yet manifested), *cert. denied*, 467 U.S. 1231 (1984).

71. In Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985), the North Carolina Supreme Court held that a plaintiff with a delayed manifestation disease was not barred by the statute of repose in § 1-15(b), the predecessor of § 1-52(16). *Id.* at 562, 336 S.E.2d at 73. Rather than rule on the constitutionality of § 1-15(b), however, the court held that the statute did not apply to claims of delayed manifestation diseases. It would be difficult for the court to apply this same analysis to § 1-50(6), which purports to apply to any action based on a products liability theory. *See supra* note 9; Note, *supra* note 7, at 422-23; *see also* Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) (upholding § 1-15(b) as constitutional when applied to a plaintiff with a delayed manifestation disease).

Should the court find § 1-50(6) constitutional as applied to plaintiffs with delayed manifestation diseases, legislative action to exempt these plaintiffs from operation of the statute would be warranted. *See* Note, *supra* note 7, at 415. A few states do exempt the claims of plaintiffs with delayed manifestation diseases from their products liability statute of repose. *See, e.g.*, IDAHO CODE § 6-1303(2)(b)(1) (Supp. 1985).

72. In light of the court's refusal to address the constitutional issue in Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985), *see supra* note 71, such a holding is probably unlikely despite the equitable appeal it would have. This possibility is suggested, however, by some commentators. Note, *supra* note 7, at 430; *see also* Dworkin, *supra* note 1, at 56 (suggesting that constitutional arguments against products liability statutes of repose are much stronger in cases of delayed manifestation disease).

73. "No person . . . is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service." N.C. CONST. art. I, § 32.

74. The constitutional standard of review under the "exclusive emoluments" clause is closely related to the rational basis equal protection standard. The statute in question will be upheld so long as the general assembly reasonably could have assumed that the law promotes the general welfare. *Lamb*, 308 N.C. at 439, 302 S.E.2d at 879; State v. Knight, 269 N.C. 100, 108, 152 S.E.2d 179, 184 (1967). The law is unconstitutional, however, if no reasonable aspect of the public welfare is promoted and the statute confers a special benefit on a particular class of persons. *See* State v. Harris, 216 N.C. 746, 753-55, 6 S.E.2d 854, 858-60 (1939) (statute excluding dry cleaners in several counties from licensing requirements held unconstitutional).

The court in *Tetterton* did not have to apply this standard because it found that no special benefit was conferred by § 1-50(6). The court, however, did indicate that it viewed the statute to be in the public interest. *Tetterton*, 314 N.C. at 53, 332 S.E.2d at 72.

not the liability of distributors.[75] The court held that because the statute applied equally to manufacturers and retailers of products,[76] it conferred no special privilege on manufacturers.[77]

Plaintiff in *Tetterton* also claimed that section 1-50(6) violated the "open courts" provision of the North Carolina Constitution.[78] Article I, section 18 of the state constitution provides that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."[79] Plaintiff alleged that section 1-50(6) barred her claim for her husband's death before the death occurred and thus denied her a remedy for an injury done.[80]

Statutes of repose have been challenged frequently under the "open courts" provisions of state constitutions.[81] Courts generally have taken one of three views when confronted with an "open courts" challenge. A majority of courts give very little weight to the constitutional guarantee of open access to courts.[82] These courts generally view the constitutional provision as a mandate to the courts rather than a limitation on the legislature.[83] To the extent that the guar-

75. *Tetterton*, 314 N.C. at 52-53, 332 S.E.2d at 72.

76. *Id.* at 50, 332 S.E.2d at 70-71; *see supra* note 44; text accompanying notes 43-44.

77. *Tetterton*, 314 N.C. at 49-52, 332 S.E.2d at 70-71.

78. *Id.* at 53, 332 S.E.2d at 72.

79. N.C. CONST. art. I, § 18.

80. *Tetterton*, 314 N.C. at 53, 332 S.E.2d at 72.

81. Thirty-seven states have some form of open access to state courts guarantee in their constitutions. Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 350 (Ala. 1980) (Shores, J., concurring).

Courts have upheld builder's statutes of repose under open access to courts attacks in the following cases: Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); *Lamb*, 308 N.C. 419, 302 S.E.2d 868; Joseph v. Burns, 260 Or. 493, 491 P.2d 203 (1971); and Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978).

Courts have struck down builder's statutes of repose as violating state constitutional guarantees of open access to courts in Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Kluger v. White, 281 So. 2d 1 (Fla. 1973); and Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1981).

Courts have upheld products liability statutes of repose under open access to courts attacks in Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981); and *Tetterton*, 314 N.C. 44, 332 S.E.2d 67.

Courts have struck down products liability statutes of repose as violating constitutional guarantees of open access to state courts in Ellison v. Northwest Eng'g Co., 521 F. Supp. 199 (S.D. Fla. 1981); Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Diamond v. E.R. Squibb & Sons, 397 So. 2d 671 (Fla. 1981), *overruled by*, Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984); Davgaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984); and Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

82. Predictably, all courts taking this limited view of the constitutional provision have held that the statute of repose is valid. *See infra* note 85.

83. *See* Harmon v. Angus R. Jessup Assoc., 619 S.W.2d 522, 524 (Tenn. 1981); Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978) (holding that the state constitutional guarantee of open access to courts is "a mandate to the judiciary and not . . . a limitation upon the legislature"). In effect, courts applying this low standard of review "have all but read those constitutional provisions

antee is held to limit legislative actions, it gives no more protection than does the constitutional provision for due process of law.[84] The legislature has complete discretion to modify or abolish common-law causes of action without providing an alternative remedy.[85] Only when the statute of repose infringes on vested rights[86] without providing an equivalent remedy have these courts held that the "open courts" guarantee may be violated.[87] For example, if a plaintiff is injured on May 28, and a statute of repose bars his or her action on May 30, a court might find a violation of the "open courts" provision even under this minimal test.[88]

Some courts apply an intermediate level of review, allowing the legislature great flexibility in modifying common-law remedies but requiring that modifica-

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out of their respective constitutions, at least insofar as they provide substantive, as opposed to procedural, protections." Berry v. Beech Aircraft Corp., 717 P.2d 670, 678 (Utah 1985).

84. Due process provides little protection for plaintiffs deprived of nonvested rights. *See infra* notes 112-15 and accompanying text.

85. The legislature generally has complete discretion to define what constitutes a recognized legal cause of action. Furthermore, the constitutional guarantee of open access assures access to the courts only to those plaintiffs who have a recognized cause of action. A plaintiff who cannot meet the requirements of the statute of repose does not have a recognized legal action and may be constitutionally denied a remedy for his or her injuries. Courts often cite the following passage from Silver v. Silver, 280 U.S. 117, 122 (1929): "The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible purpose." *See* Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982) (upholding legislature's complete discretion to define causes of action in order to respond to changing social circumstances); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981); *Lamb*, 308 N.C. 419, 302 S.E.2d 868; Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 281, 382 A.2d 715, 721 (1978) (stating that "[t]his Court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts").

86. A right generally vests only when an actionable injury occurs. *See* Walters v. Blackledge, 220 Miss. 485, 518, 71 So. 2d 433, 446 (1954) ("there is no vested right in any remedy for torts yet to happen, and except as to vested rights the legislature has full power to change or abolish existing common law remedies and methods of procedures"); Reeves v. Ille Elec. Co., 170 Mont. 104, 110, 551 P.2d 647, 651 (1976) ("no one has a vested right in any rule of the common law").

87. *See* Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Dunn v. Felt, 379 A.2d 1140 (Del. Super. Ct. 1977), *aff'd sub. nom.*, Dunn v. St. Francis Hosp., Inc., 401 A.2d 77 (Del. 1979); Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Loyal Order of Moose, Lodge 1785 v. Cavanass, 563 P.2d 143, 146 (Okla. 1977).

88. Courts that find a violation of the open courts guarantee when vested rights are infringed upon generally do so in dicta. In these cases, the statutes do not in fact alter vested rights. *See* cases cited *supra* note 87.

A statute of repose that affects vested rights functions procedurally rather than substantively. *See supra* notes 30-32 and accompanying text. Not all statutes of repose that procedurally infringe upon vested rights are unconstitutional. For example, a plaintiff who has two years after accrual in which to bring suit under a statute of repose has not been unconstitutionally deprived of a vested right. The proper standard of review in such a circumstance is the due process test of reasonableness rather than an open courts analysis. So long as plaintiffs have a reasonable time in which to enforce their vested rights, the statute of repose is constitutional. *See infra* notes 117-28 and accompanying text. The open courts guarantee does not appear to add to this protection. Courts' statements in dicta that the open courts guarantee may be violated if vested rights are infringed upon are thus nothing more than a recognition that due process limits apply when a statute of repose functions procedurally.

tions provide a meaningful opportunity for redress of injury.[89] The South Dakota Supreme Court in applying this standard of review concluded that the open access provision of the state constitution should not be merely "a faint echo to be skirted or ignored."[90] Rather, the court held that even if the statute of repose does not affect vested rights, it is unconstitutional if it arbitrarily extinguishes previously recognized legal rights.[91] Under this approach a statute of repose that functions as an absolute bar[92] to a plaintiff's recovery is invalid.[93]

The courts in Florida,[94] Alabama,[95] and Utah,[96] apply the highest standard

89. A leading case adopting this view is Davgaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984). The constitutional provision at issue in *Davgaard* was very similar to the North Carolina guarantee: "All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay." S.D. CONST. art. VI, § 20. The South Dakota Supreme Court found that South Dakota's six-year products liability statute of repose clearly violated this constitutional guarantee because it arbitrarily and completely extinguished the plaintiff's right to recovery for otherwise compensable injuries. *Davgaard*, 349 N.W.2d at 425-27.

90. Davgaard v. Baltic Coop. Bldg. Supply Assoc., 349 N.W.2d 419, 425 (S.D. 1984).

91. *Id.* at 424-25.

92. A statute of repose does not always function as an absolute substantive bar to recovery. Rather, when a cause of action accrues before the statutory period has passed, a statute of repose may function procedurally to limit the time in which a plaintiff may bring suit. *See supra* notes 30-32 and accompanying text. In this instance, courts generally uphold application of the statute as constitutional so long as the plaintiff is provided a reasonable time in which to sue. *See infra* notes 117-28 and accompanying text.

93. To these courts the objectionable characteristic of a products liability statute of repose is that it can function to bar some actions completely. *See* Kennedy v. Cumberland Eng'g Co., 471 A.2d 195, 198, 200 (R.I. 1984) ("The total denial of access to the courts for adjudication of a [products liability] claim even before it arises, however, most certainly 'flies in the face of the constitutional command' " of open access to courts, and "[i]t would be manifestly unjust and inconsistent with [the open access guarantee] to bar plaintiff's right to access to the courts absolutely."); Davgaard v. Baltic Coop. Bldg. Supply Assoc., 349 N.W.2d 419, 424-25 (S.D. 1984) (finding that a six-year products liability statute of repose "unconstitutionally locked the courtroom door before appellants had an opportunity to open it" and that the statute is "a locked deadbolt and shackle on our courtroom doors").

94. The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." FLA. CONST. art. I, § 21. Due to the Florida Supreme Court's recent decision in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985), however, the state of the law in Florida is unclear. In Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), the Florida Supreme Court ruled that the Florida builder's statute of repose violated the constitutional guarantee of open access to courts. The court applied the high standard of review discussed *infra* notes 97-99 and accompanying text. In Battillia v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980), *overruled by*, Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985), the court, citing *Overland*, also struck down the state's twelve-year products liability statute of repose. In *Pullum*, however, the court overruled *Battillia* with little analysis other than to state that the products liability statute of repose was reasonable and therefore did not violate the open courts guarantee. *Pullum*, 476 So. 2d at 659. The court in *Pullum*, however, purported not to reverse the *Overland* decision. *Id.* at 659-60. It is therefore unclear what standard the Florida Supreme Court would apply to a statute challenged under the state constitutional guarantee of open access. *Pullum* is a short decision that appears to adopt the minimum standard of reasonableness. At the same time, the *Pullum* decision upholds the *Overland* case that applied a stringent standard of review.

95. The Alabama Constitution provides "[t]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." ALA. CONST. art. I, § 13.

96. The Utah Constitution provides that

> [a]ll courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or

of review to statutes of repose under open access guarantees. Although courts in these states claim to presume the statute constitutional, they give the constitutional guarantee of open courts a great deal of weight.[97] Under this heightened scrutiny, a statute of repose unconstitutionally deprives plaintiffs of nonvested rights[98] unless there is "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."[99]

The court in *Tetterton* upheld section 1-50(6) under the open access guarantee of the North Carolina Constitution. Rather than analyzing its rejection of plaintiff's constitutional attack in *Tetterton*, the court simply cited its earlier *Lamb* decision, in which it had rejected an identical challenge to the six-year builder's statute of repose in North Carolina.[100] The court in *Lamb* reasoned:

> We are confident that this condition to the legal cognizability of a claim does not violate the constitutional guarantee that for every "injury done" there shall be a "remedy." The "remedy" constitutionally guaranteed "for an injury done" is qualified by the words "by due course of law." This means that the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not.[101]

The court in *Lamb* thus expressly adopted the majority view that the open access guarantee requires only minimal review of a statute of repose and that the general assembly has great flexibility to modify nonvested rights.[102]

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defending before any tribunal in this state, by himself or counsel any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

97. *See, e.g.*, Fireman's Fund Amer. Ins. Co. v. Coleman, 394 So. 2d 334, 350-51 (Ala. 1980) (Shores, J., concurring) (The constitutional guarantee of open access to courts "is among the most fundamental of the guarantees against governmental oppression embodied in our state constitution .... [I]t can generally be said to incorporate into our constitution a fundamental principle of fairness, a perhaps vaguely conceived but important notion of limitation on the power of government to infringe on individual rights, and to act arbitrarily."); Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985) (The open access to courts guarantee "is based on fairness and equality" and protects "basic individual rights.").

98. Even courts applying the minimum standard of review agree that a statute of repose cannot infringe upon vested rights without implicating the constitutional guarantee of open access. *See supra* notes 86-88 and accompanying text.

99. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). For other decisions applying this standard, see Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Fireman's Fund Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980); Diamond v. E.R. Squibb & Sons, 397 So. 2d 671 (Fla. 1981), *overruled by*, Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985).

100. *Tetterton*, 314 N.C. at 53, 332 S.E.2d at 72.

101. *Lamb*, 308 N.C. at 444, 302 S.E.2d at 882.

102. Before *Lamb* the North Carolina Court of Appeals had imposed a higher standard of review and invalidated § 1-50(6) as violating the North Carolina open courts guarantee. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982). The court of appeals in *Bolick* reasoned:

> [A]rticle I, section 18 guarantees to those who suffer injury to their persons, property, or reputation, the right to seek redress therefor in the courts of this state. Any law which attempts to deny that right runs afoul of this guarantee. G.S. 1-50(6), because it would absolutely abolish rights to seek redress for injuries, on its face violates article I, section 18.

*Id.* at 593, 284 S.E.2d at 191. The court in *Bolick* relied on Osborn v. Leach, 135 N.C. 628, 47 S.E.

The *Lamb* and *Tetterton* decisions may prove to be less restrictive than they first appear. Because the court in *Tetterton* found that section 1-50(6) imposed a minor limitation on the right to sue in products liability cases,[103] the court expressly refused to reach the issue whether the general assembly has complete discretion to modify or abolish common-law causes of action.[104] In *Lamb* the court also specifically refused "to decide whether the legislature could constitutionally abolish all tort claims against builders and designers arising out of improvements they built or designed" because the issue was not before the court.[105] Both *Lamb* and *Tetterton* are therefore carefully limited to upholding the general assembly's authority to establish reasonable statutes of repose as conditions precedent to the accrual of causes of action. These cases thus raise the possibility that any further limitation on common-law rights of action could violate the constitutional guarantee of open access to courts.[106]

The fourth and final constitutional challenge to section 1-50(6) in *Tetterton* was that the statute was unconstitutionally vague.[107] Plaintiff argued that the term "initial purchase for use or consumption," describing the date on which the

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811 (1904) to support its reasoning. The supreme court in *Osborn* upheld a law eliminating punitive damages in libel suits. The court made it clear in dicta that any limitation on actual compensatory damages would violate the constitutional guarantee of open access to courts. *Id.* at 639-40, 47 S.E. at 815. Although *Osborn* appears to impose an important limitation on legislative actions, the court in *Lamb* found this standard inapplicable because no right was totally abolished. *Lamb*, 308 N.C. at 443-44, 302 S.E.2d at 882. Rather, only actions accruing more than six years after the last act of the defendant were barred. In this circumstance, the court imposed the less stringent reasonableness test. *Id.*; *see also* Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984) (applying the permissive test from *Lamb* to uphold N.C. GEN. STAT. § 1-15(c) (1983), a four-year statute of repose for medical malpractice actions).

103. The court cited a study finding that "over 97 percent of product-related accidents occur within six years of the time the product was purchased." *Tetterton*, 314 N.C. at 54, 332 S.E.2d at 73 (quoting MODEL UNIFORM PRODUCTS LIABILITY ACT, § 110 analysis, *reprinted in* 44 Fed. Reg. 62,714, at 62,733 (1979)). The reliability of this statistic, however, has been seriously questioned. First, the quoted study is at best biased. As one observer has stated, "The results of this study cannot be overemphasized. [It was] [i]nitiated by the insurance industry and conducted by the Insurance Services Office, the ratemaking arm of the industry." Phillips, *supra* note 2, at 664 n.10. Second, the court's contention that an overwhelming majority of injuries related to manufactured goods occur within six years of sale is somewhat ironic because the injury in question occurred more than six years after sale. Third, if the conclusions of the study were accurate, the statute would serve no useful function. At the urging of the insurance industry, the general assembly adopted § 1-50(6) to curtail plaintiffs' awards in products liability suits. The statute does not achieve this purpose if, as the court concluded, it bars very few products liability actions.

104. The court observed that "the legislature might pass a statute of repose that had a time period so short that it would effectively abolish all potential claims." *Tetterton*, 314 N.C. at 54, 332 S.E.2d at 73 (quoting *Lamb*, 308 N.C. at 444 n.7, 302 S.E.2d at 882 n.7).

105. *Lamb*, 308 N.C. at 443-44, 302 S.E.2d at 882.

106. Previous decisions of the court, however, have implied that there is an absolute legislative right to abolish or modify existing common-law remedies. *See, e.g.*, Pinkham v. Unborn Children of Jather Pinkham, 227 N.C. 72, 78, 40 S.E.2d 690, 694 (1946) ("No person has a vested right in a continuance of the common or statute law.").

It is possible that the *Tetterton* court had in mind cases involving delayed manifestation diseases. In such cases constitutional attacks on statutes of repose are generally stronger than attacks in cases involving consumer goods. *See supra* notes 67-72 and accompanying text. Indeed, the court in *Tetterton* appeared to limit its analysis of the open courts provision to cases involving "durable goods." *Tetterton*, 314 N.C. at 54, 332 S.E.2d at 73. The court has thus left the door open to a finding that § 1-50(6) is unconstitutional as applied to plaintiffs with delayed manifestation diseases. *See supra* note 72 and accompanying text.

107. *Tetterton*, 314 N.C. at 54-56, 332 S.E.2d at 73-74.

six-year period began to run, could mean that the statutory period recommences each time a customer repurchases a product.[108] The court rejected this reading of the statute as implausible for two reasons. First, the statute clearly refers only to the "initial" purchase, which the court defined as the "first" purchase "for use or consumption."[109] Second, the court found that a contrary interpretation would be inconsistent with the intention of the general assembly that section 1-50(6) limit the liability of manufacturers.[110]

One major constitutional challenge conspicuously absent from the *Tetterton* case is a challenge based on state or federal guarantees of due process of law. Due process challenges to statutes of repose generally contend that the right to compensation for injuries is a property right that cannot be denied without a trial.[111] Although the *Tetterton* court did not address the validity of a due process attack, implicit in the court's reasoning is a rejection of such an argument.

Courts have generally upheld statutes of repose under a due process attack as valid exercises of legislative authority. Legislatures are generally held to have great discretion in defining the substantive elements of a cause of action.[112] A statute of repose merely imposes an additional substantive element that plaintiffs in a products liability action must prove in order to recover. So long as the statute of repose does not bar all claims from accruing, it is almost universally upheld against a due process challenge.[113] The due process standard that courts

108. *Id.* at 54-55, 332 S.E.2d at 73.

109. *Id.* at 56, 332 S.E.2d at 74.

110. *Id.* at 55-56, 332 S.E.2d at 73-74. Constitutional attacks on statutes of repose based on vagueness are rarely successful. *See, e.g.*, Taylor v. Karrer, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976) (holding that a statute of repose for medical malpractice actions is not unconstitutionally vague unless " 'it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement' ") (quoting Neeman v. Nebraska Natural Resources Comm'n, 191 Neb. 672, 217 N.W.2d 166 (1974)).

111. A unique due process argument was made in Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. Ct. App. 1983). Plaintiff challenged a products liability statute of repose in *Scalf* under the rule that due process is violated if a statute denies legal rights based on facts presumed to be true without allowing the party to prove the truth or falsity of the facts in question. Plaintiff asserted that the statute of repose created an irrebuttable presumption "that persons injured using machines or products of ten years of age or more are undeserving of compensation for their injuries." *Id.* at 1204. The court easily rejected plaintiff's argument by pointing out that the statute was not based on such a presumption but rather reflected a legislative policy decision to protect manufacturers from liability after a certain length of time. *Id.*

112. *See supra* note 85 and accompanying text.

113. *See, e.g.*, Mathis v. Eli Lilly & Co., 719 F.2d 134, 141 (6th Cir. 1983) (holding that there is no cause of action and no vested property right in tort claims "upon which to base a due process challenge until the injury actually occurs," and thus, an injury "which occurs after a specified limitation period, such as the discovery of cancer . . . does not give rise to due process protection"); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Pitts v. Unarco Indus., Inc., 712 F.2d 276, 279 (7th Cir.) (an objection to legislative modification of nonvested causes of action "is protected by the voting booth, not by the federal courts"), *cert. denied*, 464 U.S. 1003 (1983); Adair v. Koppers Co., 541 F. Supp. 1120 (N.D. Ohio 1982), *aff'd*, 741 F.2d 111 (6th Cir. 1984); Smith v. Allen-Bradley Co., 371 F. Supp. 698, 701 (W.D. Va. 1974) (finding that "the legislature, in its infinite wisdom may, within limits of rationality, determine what are actionable wrongs and the time limits within which lawsuits must be brought to redress such wrongs"); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 416-18 (Del. 1984) (upholding builder's statute of repose as a fair balance between an injured party's right to compensation and the need to limit liability); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1387 (La. 1978) ("the guarantee of due process does not forbid the creation of new causes of action or the abolition of old ones to attain permissible legislative objectives"); Klein v. Catalano, 386 Mass. 701, 707-13, 437 N.E.2d

apply is identical to the test that a majority of courts use in open access challenges.[114] The North Carolina Supreme Court thus would be likely to apply its analysis of the "open courts" attack in *Tetterton* and *Lamb* to reject any due process challenge to section 1-50(6).[115]

There is, however, one important instance in which a due process challenge to section 1-50(6) would have a substantial likelihood of success. Although statutes of repose generally function substantively, they may at times operate as a procedural bar to a vested cause of action.[116] This happens when a plaintiff's action accrues near the end of the statute of repose period. In such a situation, a plaintiff does not have the full statute of limitations period in which to file suit. Rather, a plaintiff will be procedurally barred from bringing suit once the statute of repose period has run.

When statutes of repose function in a procedural manner, a different due process analysis is justified. Courts in these cases generally judge the statute by the due process standard for procedural statutes of limitations.[117] Due process requires that procedural limits on the period in which a lawsuit must be brought be reasonable.[118] When a plaintiff has a reasonable time period in which to sue, courts have upheld the statute of repose even if it provides a shorter period than the applicable statute of limitations would otherwise provide.[119] If, however,

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514, 519-22 (1982); Reeves v. Ille Elec. Co., 170 Mont. 104, 113, 551 P.2d 647, 652 (1976) ("[t]he Constitution does not freeze common law rights in perpetuity"); Rosenberg v. Town of North Bergen, 61 N.J. 190, 199-200, 293 A.2d 662, 666-67 (1972).

114. *See supra* notes 82-88 and accompanying text.

115. The court in *Tetterton* cited with approval several cases that rejected due process challenges to statutes of repose. For example, the court cited Brown v. General Elec. Co., 733 F.2d 1085 (4th Cir.), *cert. denied*, 105 S. Ct. 189 (1984), which rejected a due process challenge to § 1-50(6). *Tetterton*, 314 N.C. at 57, 332 S.E.2d at 75.

116. *See supra* notes 30-32 and accompanying text.

117. *See* Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982); Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Flippen v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980); Terry v. New Mexico State Hwy. Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982).

Some courts have held that a statute is reasonable so long as it is reasonable as applied to the majority of a particular class. The fact the statute would deny some plaintiffs a reasonable time in which to bring suit would not violate due process under this standard. *See, e.g.*, Hargraves v. Brackett Stripping Mach. Co., 317 F. Supp. 676, 683 (E.D. Tenn. 1976) (A "statute of limitation must be judged [for due process purposes] in the light of the broad class of cases to which it applies and if it is reasonable with respect to the class, it will not be judged unreasonable merely because it is deemed to operate harshly in a particular or exceptional instance."). The North Carolina Supreme Court, however, has clearly rejected this due process standard. In Flippen v. Jarrell, 301 N.C. 108, 114-15, 270 S.E.2d 482, 487 (1980), for example, the court held that the issue for due process purposes is "whether the statute *as applied to plaintiff* afforded her a reasonable time within which to bring her action."

118. *See* McClosky & Co. v. Eckart, 164 F.2d 257 (5th Cir. 1947); Buckner v. GAF Corp., 495 F. Supp. 351 (E.D. Tenn. 1979); Hargraves v. Brackett Stripping Mach. Co., 317 F. Supp. 676 (E.D. Tenn. 1970); Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975); Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976); Lott v. Haley, 370 So. 2d 521 (La. 1979); O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980); Oole v. Oosting, 82 Mich. App. 291, 266 N.W.2d 795 (1978); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983); Flippen v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980); Blevins v. Northwest Carolina Util., Inc., 209 N.C. 683, 184 S.E. 517 (1936); Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919); Hite v. Town of West Columbia, 220 S.C. 59, 66 S.E.2d 427 (1951).

119. Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Diamond v. E.R. Squibb & Sons, 397 So. 2d 671 (Fla. 1981) (McDonald, J., concurring), *overruled on other grounds*, Pullum v. Cincinnati,

the plaintiff's cause of action accrues so close to the end of the statute of repose period that the "time afforded for bringing suit on existing causes of action is so short that the right to sue is 'practically denied,' "[120] courts have allowed the plaintiff the full statute of limitations period in which to file suit.

Reasonableness is a standard that must be applied on a case by case basis. A striking example of an unreasonable application of section 1-50(6) is the United States Court of Appeals for the Fourth Circuit's decision in *Brown v. General Electric Co.*[121] In *Brown* a restaurant fryer, which was originally purchased on December 13, 1974, caused a fire on December 12, 1980.[122] Under section 1-50(6), plaintiff in *Brown* had less than twenty-four hours in which to bring suit against the manufacturer of the fryer because the cause of action accrued more than five years and 364 days from the date of original sale. With little analysis the court rejected plaintiff's contention that section 1-50(6) unconstitutionally destroyed a vested right.[123]

A majority of courts have been more sympathetic to due process challenges when a statute of repose functions procedurally to bar claims. For example, in *Kennedy v. Cumberland Engineering Co.*[124] the Rhode Island Supreme Court held a products liability statute of repose unconstitutional as applied to a plaintiff who had only one year in which to bring suit. The court concluded that the statute was unreasonable because plaintiff did not know the product's initial date of purchase and thus had assumed the entire statute of limitations period was available to file suit.[125]

Other courts, however, have been less receptive to a plaintiff's due process attack.[126] Although the North Carolina Supreme Court has indicated it is not sympathetic to a plaintiff's claim of an unreasonable time in which to bring suit,[127] the court has ruled that thirty-nine days does not satisfy due process

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Inc., 476 So. 2d 657 (Fla. 1985); Purk v. Federal Press Co., 387 So. 2d 354 (Fla. 1980); Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978); MacRae v. Cessna Aircraft Co., 457 So. 2d 1093 (Fla. Dist. Ct. App. 1984).

120. Flippen v. Jarrell, 301 N.C. 108, 115, 270 S.E.2d 482, 487 (1980) (quoting Barnhardt v. Morrison, 178 N.C. 563, 568, 101 S.E. 218, 221 (1919)); *see also* Dunn v. St. Francis Hosp., 401 A.2d 77, 80 (Del. 1979) (The statute of limitations will be upheld unless it is "so short as to amount to a denial of the right itself.").

121. 733 F.2d 1085 (4th Cir.), *cert. denied*, 105 S. Ct. 189 (1984).

122. *Id.* at 1086.

123. *Id.*

124. 471 A.2d 195 (R.I. 1984).

125. *Id.* at 199-201. The only safe route for plaintiffs under the state's ten-year products liability statute of repose was to bring suit on the day of the injury, an alternative which the court rejected as unreasonable. *Id.*

126. *See, e.g.*, Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984) (six months reasonable); Pullum v. Cincinnati, Inc., 458 So. 2d 1136 (Fla. Dist. Ct. App. 1984) (18 months reasonable), *aff'd*, 476 So. 2d 657 (Fla. 1984); MacRae v. Cessna Aircraft Co., 457 So. 2d 1093 (Fla. Dist. Ct. App. 1984) (22 months reasonable). *But see* Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982) (three months unreasonable).

127. *See, e.g.*, Shearin v. Lloyd, 246 N.C. 363, 370-71, 98 S.E.2d 508, 514 (1957), in which the court held:

> Statutes of limitation are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.

requirements.[128]

Based on the state supreme court's unequivocal refusal to find section 1-50(6) unconstitutional in *Tetterton* and the statute's potential for unfairness in many cases, the North Carolina General Assembly should amend section 1-50(6).[129] A much fairer approach, which legislatures have enacted in two states,[130] focuses on the useful life of the product in determining the time period in which a plaintiff must bring suit. If an injury occurs after the product's useful life, the statute denies recovery.[131] Further, the statute establishes a presumption that the useful life of a product has expired a certain number of years after sale.[132] This presumption serves the same purpose as a statute of repose, but is less arbitrary because it can be overcome by clear and convincing evidence.[133] The proposed approach deals directly with a main problem associated with products liability statutes of repose—distinguishing between manufacturers of durable goods and manufacturers of nondurable goods.[134] Plaintiffs are not

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> The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: "Hard cases must not make bad law."

*Id.* (citations omitted).

128. Flippen v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980). The court strongly implied that it would consider an eight month period to be sufficient. In dicta the court also indicated that it would consider a period of five or six months to be unreasonable. *Id.* at 114, 270 S.E.2d at 486; *see also* Martin v. Smith, 534 F. Supp. 804 (W.D.N.C. 1982) (six months unreasonable under § 1-50(6)).

129. Even without any legislative reform, however, plaintiffs' attorneys may still exercise several options for limiting the statute's severity. Plaintiffs with delayed manifestation diseases caused by a defective product may still successfully challenge the constitutionality of § 1-50(6) as applied to them. *See supra* notes 68-72 and accompanying text. Plaintiffs who are given an unreasonable amount of time in which to bring suit may also successfully challenge the constitutionality of § 1-50(6). *See supra* notes 117-28 and accompanying text. In addition, a court could read a wide variety of exceptions and limitations into § 1-50(6). For a discussion of several possibilities, see Blanchard & Abrams, *supra* note 3, at 201-02; Phillips, *supra* note 2, at 666-72.

130. IDAHO CODE § 6-1303 (Supp. 1985); WASH. REV. CODE ANN. § 7.72.060(2) (Supp. 1986).

131. There is one exception, however. The manufacturers will be liable beyond the useful life of the product only if they have given an express warranty for a longer period. IDAHO CODE § 6-1303(1)(b) (Supp. 1985).

132. In Idaho the presumption begins ten years after delivery of the product. IDAHO CODE § 6-1303(2)(a) (Supp. 1985). In Washington the presumption begins twelve years after delivery. WASH. REV. CODE ANN. § 7.72.060(2) (Supp. 1986).

133. IDAHO CODE § 6-1303(2)(b) (Supp. 1985). In Washington the presumption may be overcome by a preponderance of the evidence. WASH. REV. CODE ANN. § 7.72.060(2) (Supp. 1986).

134. *See supra* note 46. The limitation of § 1-50(6) is harsh in that it arbitrarily abolishes the claims of certain plaintiffs without regard to the facts of the particular case. Thus, manufacturers of airplanes, who can expect their products to continue in use for a long period, will be immune from a products liability suit in North Carolina after only six years. Manufacturers of hairdryers, on the other hand, who do not share the same expectation of long-term use of their products, get little or no protection from the statute during the product's useful life. A plaintiff in all likelihood still has a strong claim against the airplane manufacturer after six years but not the hairdryer manufacturer; yet the plaintiff's claim against both is barred. The problem was clearly set forth by the Utah Supreme Court in Berry v. Beech Aircraft Corp., 717 P.2d 670, 681 (Utah 1985), when it observed:

> The six-year and ten-year periods in the [Utah Products Liability] Act are arbitrary because they apply to all kinds of products, irrespective of their useful life. The statute does not even purport to approximate an average expected life of the products covered, nor is it

barred from pursuing meritorious claims, while manufacturers are guaranteed that they will not be liable for use of their products indefinitely.

*Tetterton* represents a strong rejection of most constitutional attacks on North Carolina's six-year products liability statute of repose. After *Tetterton* constitutional challenges to section 1-50(6) have a reasonable likelihood of success in only two instances. First, plaintiffs whose injuries manifest themselves long after they are actually inflicted may have a constitutional right to a legal remedy notwithstanding the provisions of section 1-50(6). Second, plaintiffs who are given an unreasonably short time in which to bring suit for vested causes of action can probably successfully attack section 1-50(6) as applied to them. In light of the *Tetterton* decision and the unfairness of the statute in practice, however, the general assembly should amend section 1-50(6) to strike a more just balance between the rights of manufacturers and the rights of those injured by their products.

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based on products that have presented particular safety difficulties. It applies alike to toasters, automobiles, road graders, and prescription drugs.

# *State v. Cofield:* Petit Deliberation of Grand Jury Discrimination

The fifth amendment to the United States Constitution 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."[1] Since 1880, in an unbroken line of cases, the United States Supreme Court has held that discrimination in the selection of grand jury members constitutes a violation of the equal protection clause.[2] When a particular race or class has been arbitrarily excluded from a

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1. U.S. CONST. amend. V. The fifth amendment does not apply in certain military cases. *Id.* "Grand jury" is defined as:

> Body of citizens, the number of whom varies from state to state, whose duties consist in determining whether probable cause exists that a crime has been committed and whether an indictment (true bill) should be returned against one for such a crime. If the grand jury determines that probable cause does not exist, it returns a "no bill." It is an accusatory body and its function does not involve a determination of guilt.

BLACK'S LAW DICTIONARY 768 (5th ed. 1979).

The origin of the grand jury can be traced to the early history of England. Initially, it was instituted to assist the Crown in investigating crimes, but later came to be valued as an institution that protected the King's subjects against the oppression of unfounded prosecutions by the Crown. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 8.2, at 347-49 (1985). The American colonies adopted the grand jury as a part of the common law. They held its protection against unfounded accusations in high esteem, in part because grand juries had refused to indict various persons opposed to Royalist power. *Id.*

When the Bill of Rights was added to the federal constitution, a grand jury screening provision was placed in the fifth amendment without opposition. At that time almost all of the state constitutions also required that felony prosecutions be brought by indictment. In 1859 Michigan became the first state to authorize prosecutors to bring felony prosecutions by information as well as by indictment. *Id.* The difference was that a competent public officer, rather than a grand jury, could present a sworn, written accusation to a magistrate to bring a person to trial. In 1884 the Supreme Court upheld the constitutionality of this alternative method of initiating prosecutions in *Hurtado v. California*, 110 U.S. 516 (1884). The Court held that the due process clause, as applied to the states through the fourteenth amendment, does not require a state to adopt the institution and procedure of a grand jury. *Id.* at 538. As a result, the number of states allowing felony prosecutions to be brought by information as well as by indictment has grown steadily over the years. Today only nineteen states still require prosecution by indictment for all felonies. England has since abolished the grand jury altogether. W. LAFAVE & J. ISRAEL, *supra*, § 8.2, at 347-49.

The North Carolina Constitution provides that:

> Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. CONST. art. I, § 22.

2. *See* Vasquez v. Hillery, 106 S. Ct. 617 (1986); Rose v. Mitchell, 445 U.S. 545 (1979); Alexander v. Louisiana, 405 U.S. 625 (1972); Arnold v. North Carolina, 376 U.S. 773 (1964); Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Bush v. Kennedy, 107 U.S. 110 (1883); Neal v. Delaware, 103 U.S. 370 (1881); Virginia v. Rives, 100 U.S. 313 (1880).

Although the Supreme Court has held that the Constitution requires that members of a particular race or class who are qualified for jury service shall not be arbitrarily excluded therefrom, it has also emphasized that a particular defendant is not constitutionally entitled to have a jury composed of some members, or even a single member, of his or her race or class. *See infra* notes 29, 101. The Supreme Court, however, has extended the constitutional right to challenge systematic exclusion of any racial group from grand or petit juries to all criminal defendants regardless of their membership in the excluded race. *See infra* note 47.

grand jury in a criminal prosecution, neither the resulting indictment nor the conviction can stand, irrespective of the accused's guilt or evidence of actual prejudice.[3] In recent years criminal defendants have sought reversal of their convictions and dismissal of indictments against them on the ground that discrimination in the selection of grand jury foremen violated their fundamental rights of due process under the fifth amendment and equal protection under the fourteenth amendment.[4] In *State v. Cofield*[5] the North Carolina Court of Appeals refused to extend constitutional protection to this area. In a case of first impression, the court held that because there was no binding precedent on this issue, an otherwise valid conviction would not be reversed due to evidence of discrimination in the selection of a grand jury foreman.[6]

This Note examines the development of constitutional protections against race and class discrimination in the selection of jurors and the policy considerations associated with extending these principles to foreman selection procedures. In addition, this Note analyzes the court of appeals' holding in *Cofield* and concludes that the decision will have a detrimental impact on individual rights as well as on the fundamental values of our judicial and political systems.

A Northampton County Grand Jury indicted Ernest Richard Cofield on charges of first degree rape and felonious breaking and entering.[7] At trial the State introduced testimony of the victim that on the morning of June 25, 1984, she heard a knock at her front door. When she answered, a man wearing a blue work uniform asked for water for his logging truck parked in front of her house.[8] The victim closed the door, retrieved jugs from her kitchen and took them to an enclosed back porch to fill them. After she filled the jugs, the man entered the porch and asked for a cigarette. The victim returned to the kitchen to find one and handed the man an open pack as he walked up to the kitchen door.[9] When she turned to close the door, the man grabbed her, dragged her into a bedroom, and raped her. The victim identified her assailant as the defendant, Ernest Cofield, a truck driver for a local logging company.[10]

The trial jury found defendant guilty of second degree rape and felonious breaking and entering. The superior court judge imposed consecutive sentences of thirty years for the rape conviction and three years for the breaking and entering conviction.[11] Cofield appealed, alleging that the trial court erred in denying his motion to quash the indictment because discrimination against blacks in se-

3. *See* cases cited *supra* note 2.

4. *See* Hobby v. United States, 468 U.S. 339 (1984); Rose v. Mitchell, 445 U.S. 545 (1979); United States v. Cross, 708 F.2d 631 (11th Cir. 1983), *vacated*, 468 U.S. 1212 (1984); United States v. Aimone, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, Dentico v. United States, 468 U.S. 1217 (1984); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982); United States v. Coletta, 682 F.2d 820 (9th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983); Guice v. Fortenberry, 642 F.2d 98 (5th Cir. 1981).

5. 77 N.C. App. 699, 336 S.E.2d 439 (1985).

6. *Id.* at 702, 336 S.E.2d at 441.

7. *Id.* at 700, 336 S.E.2d at 440.

8. *Id.*

9. *Id.*

10. *Id.* at 700-01, 336 S.E.2d at 440.

11. *Id.* at 701, 336 S.E.2d at 440.

lection of grand jury foremen in Northampton County denied him his due process and equal protection rights under the North Carolina and United States Constitutions.[12]

The North Carolina Court of Appeals determined that there was insufficient evidence to reverse the conviction. The court noted that there is a presumption under state law that public officials have carried out their responsibilities in an impartial and equitable manner.[13] To rebut this presumption in the context of grand jury foreman selection, a defendant must introduce evidence covering a significant period of time on the total number of individuals serving as foremen and the number of members of the allegedly excluded class chosen as foremen. In addition, a defendant must establish the relative size of that class compared with the total population in the district and demonstrate a "sufficiently large disparity" between the two.[14]

In *Cofield* there was unrebutted testimony that sixty-one percent of Northampton County's population was black. The Northampton Superior Court Clerk testified that in the past eighteen years only one black person had served as grand jury foreman and that was for a one year period in 1979.[15] Nevertheless, the court determined that because there was no evidence on the total number of individuals selected as foremen over the relevant time period, it was impossible to perform the statistical calculations necessary to make out a prima facie case of racial discrimination.[16] The court concluded by saying, "Even if a violation of the Fourteenth Amendment could be found in the selection of grand jury foremen, reversal of an otherwise valid conviction is not mandated by any precedent binding on this Court."[17]

Judge Becton strongly dissented from the majority's resolution of the issue because he felt Cofield had presented a prima facie case of discrimination in the context of grand jury foreman selection.[18] To establish a prima facie case, Becton observed, the defendant must show that "the procedure employed in the selection of grand jury foremen is susceptible to abuse or is not racially neutral and results in substantial underrepresentation of his race or of the identifiable group to which he belongs. . . . The burden then shifts to the State to rebut the *prima facie* case."[19] Based on uncontradicted evidence that during the past

12. *Id.*

13. *Id.* (citing State v. Wilson, 262 N.C. 419, 423, 137 S.E.2d 109, 113 (1964)). The court conceded that the fourteenth amendment prohibits purposeful racial discrimination in the selection of grand jury foremen. The court held, however, that defendant had failed to present sufficient evidence to make out a prima facie case of purposeful discrimination so as to require a reversal of his conviction. *Id.* at 701, 336 S.E.2d at 440.

14. *Id.* at 701-02, 336 S.E.2d at 440 (citing Rose v. Mitchell, 443 U.S. 545, 571 (1979)).

15. *Id.* at 702, 336 S.E.2d at 440.

16. *Id.* at 702, 336 S.E.2d at 441.

17. *Id.* The court relied on a statement by the United States Supreme Court that " '[s]o long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foremen will distort the overall composition of the array or otherwise taint the operation of the judicial process.' " *Id.* (quoting Hobby v. United States, 468 U.S. 339, 348 (1984)).

18. *Id.* at 705, 336 S.E.2d at 442 (Becton, J., dissenting).

19. *Id.* at 706, 336 S.E.2d at 443 (Becton, J., dissenting) (citing Rose v. Mitchell, 443 U.S. 545, 565 (1979) and Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

eighteen years only one black had served as grand jury foreman in Northampton County, where sixty-one percent of the population was black, the dissent reasoned that the disparity in representation was sufficiently large to raise a presumption of discrimination in foreman selection procedures. Finding that the State had failed to rebut this presumption, the dissent would have quashed the indictment.[20]

The United States Supreme Court first addressed discrimination in the selection of jury members in a series of four cases in the early 1880s. In *Strauder v. West Virginia*[21] a black defendant convicted of murder challenged a state statute expressly excluding blacks from jury service. The Court held that the statute violated the equal protection clause of the fourteenth amendment.[22] The Court noted, "The very idea of a jury is a body of men composed of the peers and equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, [and] persons having the same legal status in society as that which he holds."[23] By denying blacks the right to participate in the administration of law, the statute branded them as inferior and stimulated racial prejudice.[24] Therefore, the conviction was reversed and the case remanded to the federal courts for a new trial free from racial taint.[25]

*Virginia v. Rives*[26] also involved a black defendant indicted for murder by a grand jury selected from a venire composed "entirely of the white race."[27] Unlike the situation in *Strauder*, the exclusion of blacks in *Rives* was not pursuant to state statute. Therefore, removal to the federal court system was not proper.[28] The Court held that "a right to which every colored man is entitled,

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20. *Cofield*, 77 N.C. App. at 706-07, 336 S.E.2d at 443 (Becton, J., dissenting). Judge Becton rejected the notion that the appointment of a black foreman in 1979 for a one year period " 'totally obliterated any vestage of racial stigma which could conceivably be said to have existed prior to 1979 with respect to the selection of grand jury foremen.' " *Id.* at 707, 336 S.E.2d at 443 (quoting Brief for the State at 3, *Cofield*).

21. 100 U.S. 303 (1880).

22. *Id.* at 310. Section 1 of the fourteenth amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Discrimination on the basis of race was the primary evil at which the amendments adopted after the Civil War, including the fourteenth amendment, were aimed. The equal protection clause was central to the fourteenth amendment's prohibition of discriminatory action by a state. The clause banned most types of purposeful discrimination by a state on the basis of race in an attempt to lift the burdens placed on blacks by society. *See Strauder*, 100 U.S. at 306-08.

23. *Strauder*, 100 U.S. at 308.

24. *Id.*

25. *Id.* at 312.

26. 100 U.S. 313 (1880).

27. *Id.* at 314.

28. *Id.* at 320-21. At the time, removal from state to federal court was proper when a "civil suit or prosecution [was] commenced in any State court, for any cause whatsoever, against any person who [was] denied or [could not] enforce in the judicial tribunals of the state, . . . any right secured to him by any law providing for the equal civil rights of citizens of the United States." *Id.* at 317. The Court commented that when a state statute denied one's civil rights, such a case was

[is] that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color."[29] The appropriate remedy, according to the Court, would be for the Virginia courts to "correct the wrong" and "quash the indictment."[30]

In *Ex parte Virginia*[31] a state judge refused to select blacks to serve as grand and petit jurors. He was indicted under the Civil Rights Act of 1875 and filed suit for habeas corpus.[32] In denying the writ, the United States Supreme Court emphasized that one of the purposes of the fourteenth amendment was to elevate blacks "from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all persons within the jurisdiction of the States. [It] was intended to take away all possibility of oppression by law because of race or color."[33] The Court noted that one of these civil rights was the right of criminal defendants to an impartial jury selected in a racially nondiscriminatory fashion and that section five of the fourteenth amendment empowers Congress to enforce this right by means of criminal sanctions.[34]

Finally, in *Neal v. Delaware*[35] a black defendant indicted for rape moved to quash his indictment on the ground that blacks had been excluded from the pool of potential grand jurors because of race. The evidence indicated that no black citizens had ever been chosen to serve as jurors in Delaware, even though the black population was over 26,000 in 1880, out of a total population of less than 150,000.[36] Justice Harlan, speaking for the Court, observed that this was a prima facie denial "of that equality of protection which has been secured by the Constitution."[37] In addition, Harlan criticized the judgment of state officials

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clearly removable. Yet when an officer of the state, in violation of local law, denied a defendant a right afforded by statute, then the state courts were the appropriate forums to address the wrong. *Id.* at 321-22.

29. *Id.* at 322-23. The Court, however, qualified this right: "A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment." *Id.*

30. *Id.* at 322.

31. 100 U.S. 339 (1880).

32. *Id.* at 342. Section 4 of the Civil Rights Act of 1875 provided:

> [N]o citizen, possessing all other qualifications which are or may be prescribed by law should be disqualified for service as grand or petit juror in any Court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the case aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000.

Act of March 1, 1875, ch. 114, § 4, 18 Stat. 335, *repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862.

33. *Ex Parte* Virginia, 100 U.S. at 344-45.

34. *Id.* at 345. *Ex parte* Virginia is a rare example of an attempt to remedy discriminatory jury selection procedures through criminal sanctions. Although the Civil Rights Act of 1875 authorizes the federal government to bring criminal actions against state officials responsible for discrimination, the almost universal remedy is that set forth in Virginia v. Rives, 100 U.S. 313 (1880)—to quash the indictment and begin anew. *See supra* notes 26-30 and accompanying text.

35. 103 U.S. 370 (1881).

36. *Id.* at 397.

37. *Id.*

that blacks were "utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries" as a "violent presumption" which could not stand.[38] Thus, the Court granted the motion to quash the indictment, concluding that otherwise "the constitutional prohibition has no meaning."[39]

These early cases set the precedent for a century of subsequent litigation. In an unbroken line of cases since 1880, the Supreme Court has held that under the equal protection clause of the fourteenth amendment, criminal defendants are entitled to grand and petit juries selected in a racially nondiscriminatory manner.[40] When discrimination is sufficiently proven, the Court has consistently required that the indictment be quashed and the conviction be set aside.[41]

The North Carolina Supreme Court has affirmed these same core equal protection principles as a matter of state constitutional law on several occasions. In *State v. Wilson*[42] the court quashed the indictment of a black defendant convicted of rape based on evidence that one-fourth of the population of Cleveland County was black and that only two or three blacks had served on the county's grand juries within the last seven years.[43] The court noted, "A valid indictment returned by a legally constituted grand jury is an essential of jurisdiction."[44] Evidence of substantial underrepresentation of blacks on county grand juries over a significant period of time constitutes a prima facie case of purposeful discrimination on the basis of race. The burden then shifts to the state to rebut that case by "competent evidence" other than mere denials of intentional discrimination.[45] If the state fails to overcome defendant's prima facie showing, "the bill of indictment must be quashed."[46]

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38. *Id.*

39. *Id.* at 397 (quoting *Ex parte* Virginia, 100 U.S. 339, 347 (1880)).

40. *See* cases cited *supra* note 2. For additional information on constitutional challenges to discrimination in the selection of jurors, see W. LAFAVE & J. ISRAEL, *supra* note 1, § 15.3, at 623-30; Diamond, *Federal Remedies for Racial Discrimination in Grand Juror Selection*, 16 COLUM. J.L. & SOC. PROBS. 85 (1980); Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process, and Equal Protection*, 74 YALE L.J. 919 (1965); Annot., 33 L.E.2d 783 (1972). For a discussion of racial prejudice's influence on the determination of guilt and a proposal that social science data serve as proof of purposeful discrimination under equal protection principles, see Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

41. *See* cases cited *supra* note 2.

42. 262 N.C. 419, 137 S.E.2d 109 (1964); *see also* State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965) (prima facie case of systematic exclusion established by showing the population ratio and that only a token number of blacks had served on the grand jury; if unrebutted, indictment quashed and judgment vacated); State v. Perry, 250 N.C. 119, 108 S.E.2d 447 (1959) (indictment returned by grand jury from which members of an identifiable group have been purposefully rejected violates equal protection clause of fourteenth amendment); Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953) (arbitrary exclusion of citizens from service on grand juries on the basis of race constitutionally forbidden).

The North Carolina Supreme Court actually invalidated intentional racial discrimination in the selection of grand jury members prior to the Supreme Court's decision in *Strauder*. In Capehart v. Stewart, 80 N.C. 90 (1879), the court held that a judge could not direct the sheriff to summon members of a specified race for jury service. The court stated, "The law knows no distinction among the people of the state in their civil and political rights and corresponding obligations and none such should be recognized by those who are charged with its administration." *Id.* at 102.

43. *Wilson*, 262 N.C. at 422, 137 S.E.2d at 113.

44. *Id.* at 421, 137 S.E.2d at 112.

45. *Id.* at 421-22, 137 S.E.2d at 112.

46. *Id.* at 425, 137 S.E.2d at 114.

In a series of cases, the United States Supreme Court has expanded both the classes of individuals[47] that can challenge systematic discrimination in the selection of juries, and the procedures[48] and constitutional doctrines[49] for doing so.

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47. In Peters v. Kiff, 407 U.S. 493 (1972), the Court extended the constitutional right to challenge discriminatory jury selection procedures to all criminal defendants regardless of their membership in the excluded class or any evidence of actual prejudice. Peters, convicted of burglary in the state courts of Georgia, filed a habeas corpus petition in the federal courts alleging that blacks had been systematically excluded from the grand jury that had indicted him. The court of appeals affirmed the denial of the petition because Peters was not black. *Id.* at 494. The Supreme Court reversed, holding that "*whatever his race*, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of *any race*, and thereby denies due process of law." *Id.* at 504 (emphasis added).

Although the plurality opinion rested its decision on the fifth amendment right to due process, it also implicated the sixth amendment's guarantee of an impartial jury:

> [W]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Id.* at 503-04. Later cases explored the sixth amendment's guarantee of an impartial jury. *See infra* note 49.

48. *Strauder* and the other early cases of discriminatory jury selection procedures involved absolute exclusion of an identifiable group. Later Supreme Court cases established the principle that substantial underrepresentation of such a group constitutes a constitutional violation as well, if it results from purposeful discrimination. *See* Turner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Swain v. Alabama, 380 U.S. 202 (1965); Johnson, *supra* note 40, at 1652-53.

In 1977 the Court articulated the appropriate criteria for establishing a prima facie case of discrimination:

> [I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in a substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. . . . Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the state to rebut that case.

Castaneda v. Partida, 430 U.S. 482, 494-95 (1977).

In *Castaneda* a Texas prisoner filed a habeas corpus petition alleging a denial of due process and equal protection because of gross underrepresentation of Mexican-Americans on past grand juries. *Id.* at 490. The evidence indicated that the population of the county was 79.1% Mexican-American, but that only 39% of the persons summoned for grand jury service over an eleven-year period were Mexican-Americans. *Id.* at 495-96. When the state failed to rebut the presumption of purposeful discrimination with competent evidence, the Supreme Court affirmed the court of appeals, holding that such a disparity constituted a denial of equal protection in the grand jury selection process. *Id.* at 501.

49. In Taylor v. Louisiana, 419 U.S. 522 (1974), the Supreme Court examined the sixth amendment right to an impartial jury as a means of challenging the process used to impanel grand and petit juries. Taylor, a male defendant indicted for kidnapping, moved to quash the venire because of the systematic exclusion of women. His motion was denied, and he appealed, challenging a state law that excluded women from jury service unless they filed a written declaration of a desire to be called. *Id.* at 523-25. The Court held that the sixth amendment requires that a jury be selected from a "cross-section of the community," *id.* at 529-30, and that the systematic exclusion of women violated this requirement, *id.* at 530-31. The Court declared that excluding large distinctive groups from the jury pool frustrates the purpose of the jury as a check against the exercise of arbitrary state and

Recently, criminal defendants, instead of challenging the entire composition of the grand jury, have sought to quash their indictments on the ground that racial discrimination in the selection of grand jury *foremen* violated their equal protection and due process rights.[50] The Supreme Court has addressed this issue on two occasions.

In *Rose v. Mitchell*[51] two black defendants convicted of murder alleged that the foreman of the grand jury that had indicted them had been chosen in a racially discriminatory fashion. Reviewing the case in a habeas corpus proceeding, the Supreme Court "[assumed] without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire."[52]

The Court explicitly addressed the question whether its unbroken line of case law reversing convictions for discrimination in the selection of grand jury members should be reconsidered in favor of a harmless error standard.[53] Justices Stewart and Rehnquist, in a concurring opinion, argued that discrimination in the selection of the grand jury had no effect on the fairness of a later trial or the guilt or innocence of the defendant.[54] They maintained that any harm to the defendant could be adequately remedied by civil actions, pretrial remedies, or prosecutions against the discriminating government officials.[55] The majority, however, rejected this approach, emphasizing that the injury caused by the discrimination is not only to the defendant but also to the courts, the jury system,

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judicial power, and erodes "public confidence in the fairness of the criminal justice system." *Id.* at 530.

In Duren v. Missouri, 439 U.S. 357 (1979), the Court again upheld a male defendant's right to contest a state law excluding a disproportionate number of women from jury duty. The Court outlined the elements necessary to establish a prima facie violation of the fair cross-section requirement of the sixth amendment. A defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

*Id.* at 364. The burden then shifts to the state to demonstrate "a significant state interest." *Id.* at 367. Thus, " 'the right to a proper jury cannot be overcome on purely rational grounds.' " *Id.* at 367 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

Cofield, however, did not raise a sixth amendment challenge to the selection of his grand jury foreman. He relied solely on the fifth amendment's guarantee of due process and the fourteenth amendment's right to equal protection. *See supra* text accompanying note 12.

50. *See* cases cited *supra* note 4.

51. 443 U.S. 545 (1979).

52. *Id.* at 551 n.4. The Court did not have to decide the issue because it held that defendants had failed to make out a prima facie case of purposeful discrimination in the selection of the foreman. *Id.* at 574.

53. *Id.* at 550-51.

54. *Id.* at 575-76 (Stewart and Rehnquist, J.J., concurring). This concurrence stated that " 'deprivations of constitutional rights that occur before trial are no bar to conviction unless there has been an impact upon the trial itself. A conviction after trial, like a guilty plea, represents a break in the chain of events which has preceded it in the criminal process.' " *Id.* at 576 (Stewart and Rehnquist, J.J., concurring) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

55. *Id.* at 578 (Stewart and Rehnquist, J.J., concurring).

and society as a whole.[56] "[Although] alternative remedies remain to vindicate the rights of those members of the class denied the chance to serve on grand juries, the fact is that permitting challenges to unconstitutional state action by defendants has been, and is, the main avenue by which Fourteenth Amendment rights are vindicated in this context."[57] The Court reaffirmed its position that discrimination in choosing grand jury members requires reversal of an otherwise valid conviction.[58] Nevertheless, the Court refused to reverse defendants' convictions in this case because they had failed to prove underrepresentation sufficient to establish a prima facie case.[59]

More recently, in *Hobby v. United States*,[60] the Supreme Court again considered discriminatory foreman selection procedures, but on a different constitutional theory. Hobby, a white male indicted and convicted on federal fraud charges, argued that discrimination in the selection of the federal grand jury foreman, resulting in an underrepresentation of blacks and women in that position, violated the due process clause and required both dismissal of the indictment against him and reversal of his conviction.[61] The Court agreed that the fifth amendment prohibits purposeful discrimination against blacks or women in designating a federal grand jury foreman, assumed that discrimination occurred in this particular selection process, and proceeded to consider the appropriate remedy.[62] The Court reasoned that, federal grand jury foremen perform essentially clerical functions and that therefore, the role of the foreman is not constitutionally significant.[63] "Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect

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56. *Id.* at 554-56. The Court noted,

> Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.... For this same reason, the Court also has reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage.

*Id.* at 556.

57. *Id.* at 558.

58. *Id.* at 559.

59. *Id.* at 574. The evidence of discriminatory foreman selection procedures consisted of the testimony of three former foremen. The Court found that the evidence did not cover a significant time period. *Id.* at 570. Furthermore, there was no affirmative testimony of a total exclusion of blacks from the position during that time. *Id.* at 570-71. Finally, according to the Court, there was no evidence on the total number of foremen appointed in the county during the relevant time period. Without such evidence, the Court concluded, it was "difficult to say that the number of Negroes appointed foreman, even if zero, is statistically so significant as to make out a case of discrimination under the rule of 'exclusion.'" *Id.* at 571.

60. 468 U.S. 339 (1984).

61. *Id.* at 340-41. For additional sources evaluating *Rose*, see Note, *Constitutional Challenges to Grand Jury Foreperson-Selection Procedures*, 17 GA. L. REV. 153 (1982); Note, Rose v. Mitchell: *Grand Jury Discrimination—Rebalancing the Scales of Justice*, 7 OHIO N.U.L. REV. 304 (1980).

62. *Hobby*, 468 U.S. at 342-43.

63. *Id.* at 344-45. In the federal system the court selects a foreman from among the members of the grand jury after they have been impaneled. The foreman is responsible for administering oaths, keeping a record of the jurors' votes, and reporting indictments to the Court. *Id.* at 344 (citing FED. R. CRIM. P. 6(c)).

upon the defendant's due process right to fundamental fairness."[64]

In addition, the Court rejected Hobby's argument that *Rose* supported reversal of his conviction on equal protection grounds. The Court focused solely on the due process question presented and carefully distinguished the different concerns raised under the equal protection clause and its decision in *Rose*.[65] Acknowledging that the equal protection clause offers relief for discrimination in the context of grand and petit juries, the Court emphasized that defendant had challenged the underrepresentation of blacks and women in the foreman position only under principles of due process. "[D]iscrimination in the selection of federal grand jury foremen cannot be said to have a significant impact upon the due process interests of criminal defendants."[66] Therefore, the Court refused to reverse Hobby's conviction or dismiss his indictment.[67]

*State v. Cofield*[68] presented the first opportunity for a North Carolina court

64. *Id.* at 345.

65. *Id.* at 347. *See infra* notes 85-87 and accompanying text.

66. *Hobby*, 468 U.S. at 347. The Court also distinguished *Rose* on its facts. In Tennessee the judge appointed the foreman from the general population as the thirteenth member of the jury, with the same powers as the twelve properly selected jurors. By contrast, the foreman in *Hobby* was selected under the federal system from within the properly constituted grand jury. *Id.* In addition, the grand jury foreman in Tennessee had "virtual veto power over the indictment process" and thereby played a substantially greater role than the clerical and ministerial functions of a federal grand jury foreman. *Id.* at 348.

Although the *Hobby* decision might appear to limit *Rose* to its particular facts, the Supreme Court did not repudiate any of the subsequent courts of appeals' cases holding that discrimination in the selection of grand jury foremen *does* violate the equal protection clause. *See* United States v. Sneed, 729 F.2d 1333, 1335 (11th Cir. 1984) (selection of grand jury foreman protected under equal protection clause); Guice v. Fortenberry, 722 F.2d 276, 281 (5th Cir. 1984) (systematic exclusion of blacks as grand jury foremen found when judge failed to appoint blacks as grand jury foremen in 31 grand juries over 15 years and when he used no objective criteria to select foremen), *reh'g denied*, 726 F.2d 752 (5th Cir. 1984); United States v. Perez-Hernandez, 672 F.2d 1380, 1385-86 (11th Cir. 1982) (per curiam) ("fair cross-section" protection of sixth amendment not basis for challenging selection of grand jury foreman, but equal protection clause does provide such a basis).

67. *Hobby*, 468 U.S. at 350. Justice Marshall, joined by Justices Brennan and Stevens, vigorously dissented from the majority opinion. First, Marshall noted that deliberate exclusion of blacks in the selection of a grand jury foreman perpetuates racial prejudices and "vicious stereotypes that our society has been struggling to erase" and also diminishes public confidence in the integrity of the judicial process. *Id.* at 352-54 (Marshall, J., dissenting). Second, Marshall maintained that the majority underestimated the significance of the foreman. The foreman takes the votes, signs the official documents, administers the oaths, excuses members in emergency situations, and responds for the others in open court. Further, trial judges usually devote considerable time to the selection process in an effort to appoint capable persons. *Id.* at 356-57 (Marshall, J., dissenting). Last, Marshall emphasized that the majority offered no viable alternative to the traditional remedy of dismissing the indictment and reversing the conviction for judicial discrimination in the grand jury selection process. *Id.* at 359-60 (Marshall, J., dissenting).

68. 77 N.C. App. 699, 336 S.E.2d 439 (1985). The court of appeals considered this issue again in State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985). In *Gary* defendant was indicted for and convicted of conspiracy to sell and deliver cocaine, possession of cocaine with intent to sell and deliver, and maintaining a business for the use and sale of controlled substances. On appeal he argued that the trial court erred in refusing to dismiss his indictment, because discrimination against blacks in the selection of a grand jury foreman abridged his equal protection rights. *Id.* at 30-31, 337 S.E.2d at 72.

The court of appeals reviewed the applicable case law from *Rose* and *Hobby*, and suggested that *Rose* was limited to its facts. *Id.* at 31-32, 337 S.E.2d at 72-73. Moreover, the court analogized to *Hobby* and reasoned that in North Carolina the foreman performs essentially inconsequential, ministerial functions such as presiding over hearings and administering oaths, releasing jurors, requesting that the grand jury be allowed to interview further witnesses, and returning the bill of indictment. "[A]lthough the foreman by statute must indicate which witness(es) were sworn and examined, G.S.

to evaluate a challenge of racial discrimination in the selection of a grand jury foreman. Relying on *Rose*, the court of appeals acknowledged that purposeful discrimination against blacks in choosing a grand jury foreman is prohibited by the fourteenth amendment.[69] In considering whether sufficient evidence of discrimination existed to merit a reversal of the conviction, the court noted that there is a presumption that public officials have carried out their duties in an impartial and nondiscriminatory fashion.[70] To rebut this presumption in the context of grand jury foreman selection, the defendant bears the burden of proof to introduce evidence of the number of individuals who have served as foremen over a significant time period, the number of foremen chosen from a distinct class, the relative size of that class in terms of the total population of the district, and a "sufficiently large disparity" between the two.[71]

Although uncontradicted testimonial evidence established that sixty-one percent of the county's population was black and that only one black person had served as grand jury foreman in the eighteen years prior to defendant's indictment, the majority denied that Cofield had established a sufficient presumption of underrepresentation.[72] The court reasoned, " 'Inasmuch as there is no evidence in the record of the number of foremen appointed, it is not possible to perform the calculations and comparisons needed to permit a court to conclude that a statistical case of discrimination has been made out and proof under the 'rule of exclusion' fails.' "[73] In addition, the court stated that even if there were sufficient proof of discrimination in the selection of grand jury foremen so as to abridge a defendant's fourteenth amendment rights, there was no binding precedent for reversing an otherwise valid conviction.[74]

The *Cofield* case requires analysis on two levels. First, it demands a deliberation on the facts to determine if the defendant established a prima facie case of racial discrimination in the selection of a grand jury foreman. Second, it necessitates a resolution of the question whether such conduct violates a constitutional right, and if so, a determination of the appropriate remedy. The court of appeals' opinion is misguided and mysterious on both accounts.

To establish a prima facie case of discrimination in the selection of grand jury foremen, a defendant must show that "the procedure employed resulted in a substantial underrepresentation of his race or of the identifiable group to which

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15-623(c), and must sign the indictment, G.S. 15-644(a)(5), the absence of these endorsements will not render an otherwise valid indictment fatally defective." *Id.* at 33, 337 S.E.2d at 73. Thus, the court concluded that there was no prejudice to defendant's equal protection rights: "The role of the foreman of a North Carolina grand jury is not 'so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.' " *Id.* at 34, 337 S.E.2d at 74 (quoting *Hobby*, 468 U.S. at 345). Defendant's motion was dismissed. *Gary*, 78 N.C. App. at 34, 337 S.E.2d at 74.

69. *Cofield*, 77 N.C. App. at 701, 336 S.E.2d at 440.

70. *Id.* (citing State v. Wilson, 262 N.C. 419, 423, 137 S.E.2d 109, 113 (1964)).

71. *Id.* at 701-02, 336 S.E.2d at 440 (citing Rose v. Mitchell, 443 U.S. 545, 571 (1979)).

72. *Id.* at 702, 336 S.E.2d at 440-41.

73. *Id.* at 702, 336 S.E.2d at 441 (quoting Rose v. Mitchell, 443 U.S. 545, 571-72 (1979)).

74. *Cofield*, 77 N.C. App. at 702, 336 S.E.2d at 441.

he belongs."[75] To do this, a defendant must introduce evidence to demonstrate (1) that a recognizable, distinct group was targeted for unequal treatment under the laws, (2) that a significant disparity exists between the proportion of the group serving as foremen and the proportion of that group in the general population over an extended period of time, and (3) that the selection procedure is "susceptible of abuse" or otherwise "not racially neutral."[76]

The court conceded that the first and third of these elements were established. Cofield, as a black American, was clearly a member of an identifiable class susceptible of being singled out for unequal treatment under the law.[77] In addition, the selection procedure for foremen in Northampton County was subject to misuse. The evidence indicated that the superior court judge appointed one of the grand jurors as foreman without any statutory or judicial guidelines. " 'The Judge usually confers with whoever he wants to' when making his selection . . . , and apparently does so in a casual and off-the-record fashion. . . . It is a system devoid of checks, balances or requirements of any kind. Such a system is susceptible of abuse."[78]

The court's failure to recognize discrimination in *Cofield* was based on its interpretation of the second element of the prima facie case—underrepresentation of the class discriminated against as compared with the proportion of the total population. The court analogized to *Rose* and suggested that there was no evidence on the number of persons who had served as grand jury foremen in the county during the prior eighteen years.[79] The defendant's brief, however, clearly stated, "During that same period, the [trial] court was presented with the opportunity to appoint some *36 foreman* [sic]. While 61% of the county's population was black, a black member of the community held the position of foreman for only 5.6% of the time."[80] By contrast, in *Rose* there was no indication of the total number of foremen appointed by a county judge during the relevant time period.[81] It is difficult to believe that, absent racially discriminatory motivation, only one black person was qualified to serve as grand jury foreman in thirty-six selections, from 324 grand jurors chosen over an eighteen year period, of whom a substantial number were black.[82] Thus, the majority's resolution of the factual issues in *Cofield* appears flawed.

The second tier of the court's opinion considered the legal and policy issues associated with extending the constitutional right to challenge jury selection pro-

75. Castaneda v. Partida, 430 U.S. 482, 494 (1977); *see supra* note 48.

76. Castaneda v. Partida, 430 U.S. 482, 494-95 (1977).

77. *See Rose*, 443 U.S. at 565; Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).

78. Defendant-Appellant's Brief at 5 (quoting trial court testimony), *Cofield*.

79. *Cofield*, 77 N.C. App. at 702, 336 S.E.2d at 440-41.

80. Defendant-Appellant's Brief at 5-6 (emphasis added), *Cofield*.

81. *Rose*, 443 U.S. at 571-72.

82. The Clerk of Superior Court testified that 18 individuals were selected to serve as grand jurors each year. Trial Court Transcript at 8, *Cofield*. Eighteen grand jurors a year for a period of 18 years constitutes a total of 324 jurors. Because Northhampton County selected a panel of 9 grand jurors every 6 months, there was an opportunity to select 36 foremen. Although the 60% black general population did not necessarily reflect the percentage of blacks eligible to serve as jurors, the County Clerk testified that over the past 18 years, the composition of the venire reflected the percentage of blacks in the total population. *Id.* at 8-9.

cedures to the designation of foremen. The court initially admitted that the fourteenth amendment prohibits racial discrimination in the selection of grand jury foremen, yet it concluded that "[e]ven if a violation of the Fourteenth Amendment could be found," there was no precedent for reversing an otherwise proper conviction.[83] The majority relied on *Hobby* to support this proposition. As the dissent correctly pointed out, however, these cases can be easily distinguished. In *Cofield* defendant challenged the foreman selection procedures on both due process and equal protection grounds,[84] whereas in *Hobby* the Court focused solely on the due process question.[85] Nothing in the *Hobby* decision purported to overrule the Supreme Court's analysis in *Rose*, which assumed without deciding that racial discrimination in choosing a state grand jury foreman violates the equal protection clause and merits a reversal of the conviction.[86] The Court in *Hobby* merely sought to distinguish *Rose*, not to repudiate the principles therein:

> *Rose* involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class allegedly excluded from service as grand jury foremen, the *Rose* defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries.[87]

Thus, *Hobby* in no way affects the equal protection concerns raised in *Cofield*.

The court of appeals' analysis also fails to address whether the role of the foreman is constitutionally significant. The court implied that the foreman was unimportant by relying on the statement in *Hobby* that " '[s]o long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.' "[88] Even if the court in *Cofield* had expressly stated, as did the Supreme Court in *Hobby*, that the role of a grand jury foreman is "essentially clerical in nature" and thereby inconsequential,[89] there are serious inconsistencies in this reasoning.

The foreman is the chairperson, or presiding officer, responsible for the entire conduct of the grand jury investigation. The foreman excuses other members in emergency situations, administers the oaths, takes the votes, signs the indictments, and communicates the desire of the grand jury to hear additional witnesses.[90] In short, the foreman initiates and guides the critical deliberations. Thus, the very designation by the judge that one individual will serve as foreman differentiates that person from the other members of the grand jury in an impor-

83. *Cofield*, 77 N.C. App. at 702, 336 S.E.2d at 441.
84. *Id.* at 701, 336 S.E.2d at 440.
85. *Hobby*, 468 U.S. at 347.
86. *Rose*, 443 U.S. at 551-52 n.4.
87. *Hobby*, 468 U.S. at 347.
88. *Cofield*, 77 N.C. App. at 702, 336 S.E.2d at 441 (quoting *Hobby*, 468 U.S. at 348).
89. *Hobby*, 468 U.S. at 348.
90. *See* N.C. GEN. STAT. §§ 15A-622(d), -623(b), -623(c), -626(b), -628(c) (1983).

tant manner. Although "[a] foreman has only one vote on the grand jury, . . . the selection by the district judge might appear to the other grand jurors as a sign of judicial favor which could endow the foreman with enhanced persuasive influence over his or her peers."[91]

In addition, if the responsibilities of a foreman are essentially ministerial in nature, then presumably a grand juror with clerical skills would be best suited for the position. Yet trial judges look far beyond this experience in the selection process. District judges have testified that they typically allocate considerable time and attention to the selection of a grand jury foreman, choosing individuals with "good management skills, strong occupational experience, the ability to preside, good educational background, and *personal leadership qualities.*"[92] One judge has declared that the foreman should possess sufficient intellectual independence to prevent being easily led by the prosecutor.[93] If the post was truly only clerical in nature, there would be little need to devote so much time and effort to finding a foreman with these requisite qualities.

Finally, even if the foreman's role is inconsequential, that fact alone does not render it devoid of constitutional significance. There is a great deal of current debate whether the role of the grand jury itself is insignificant.[94] The 1973 North Carolina Criminal Code Commission even indicated that "a clear majority of the commission [believes] that the grand jury as presently constituted serves little in the way of a truly functional purpose in the administration of criminal justice . . . ."[95] Nevertheless, for over a century the United States and North Carolina Supreme Courts have held that systematic exclusion of identifiable groups in the selection of grand jurors constitutes a violation of the equal protection clause.[96] Refusing to inquire into a judge's process for selecting foremen leaves the court in the anomalous position of scrutinizing grand juror selections for equal protection violations while looking the other way when similar challenges are raised against foreman selection procedures.

One of the policy issues that the court of appeals failed to assess in *Cofield* is the prejudice to both the defendant and the criminal justice system that emanates from discrimination in the selection of grand jury foremen. In a subsequent North Carolina decision, *State v. Gary*,[97] the court of appeals concluded that given the ministerial nature of the position, discrimination in the selection of a foreman has no "prejudicial impact" on a defendant's constitutional

91. United States v. Cross, 708 F.2d 631, 637 (11th Cir. 1983).

92. *Id.* at 636 (emphasis added) (summarizing testimony of federal district court judges). Although federal district court judges consider these factors, the role of both the federal and North Carolina grand jury foreman is essentially the same. *See supra* notes 63, 90 and accompanying text. Thus, North Carolina trial judges are likely to consider similar factors in selecting foremen.

93. United States v. Holman, 510 F. Supp. 1175, 1180 (N.D. Fla. 1981).

94. *See* W. LAFAVE & J. ISRAEL, *supra* note 1, § 15.2(a), at 618-20. Many critics argue that the grand jury is a mere "rubber stamp" for the prosecutor, approving practically all indictments brought before it by the government. *Id.*

95. N.C. GEN. STAT. ch. 15A, art. 31 official commentary (1983).

96. *See supra* notes 2 & 42 and accompanying text.

97. 78 N.C. App. 29, 337 S.E.2d 70 (1985). For a discussion of the facts of *Gary*, see *supra* note 68.

rights.[98] The court's logic, however, is unpersuasive.

Discrimination in the selection of grand jury foremen inflicts a very real injury on criminal defendants. As early as 1880 the Supreme Court in *Strauder* noted,

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects qualified, is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[99]

A defendant is entitled to have his or her case considered by a grand jury from which no segment of the community has been improperly excluded.[100] Although Cofield did not have an affirmative right to a black foreman on his grand jury, he did have a legal right to at least the possibility of having a black foreman.[101] If purposeful discrimination entered into the selection process, that possibility was nullified.

Not only is there prejudice to individual defendants, but "[i]llegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well."[102] Public confidence in the integrity of the judicial system, the law as an institution, and the concepts of democracy and representative government diminishes whenever invidious prejudice seeps into the administration of justice.[103] The distinction between the incidental role of the foreman as compared with the grand jury as a whole is immaterial.

The principal evil lies in unlimited judicial discretion. "A judge is supposed

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98. *Id.* at 34, 337 S.E.2d at 74.

99. *Strauder*, 100 U.S. at 308.

100. *See* Peters v. Kiff, 407 U.S. 493, 504 (1972); *see also supra* note 47 (discussing *Peters*).

101. The United States and North Carolina Supreme Courts have stated that a criminal defendant has no constitutional right to be indicted or tried by any particular jury, or by a jury composed in part of members of the defendant's race or class. *See* Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Virginia v. Rives, 100 U.S. 313, 323 (1880); State v. Perry, 250 N.C. 119, 130, 108 S.E.2d 447, 455, *cert. denied*, 361 U.S. 833 (1959).

102. Peters v. Kiff, 407 U.S. 493, 502-03 (1972).

103. *Rose*, 443 U.S. at 555-56. The Court summarized the harm to society resulting from purposeful discrimination in the jury selection process:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." . . . The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

*Id.* (citations omitted).

to be the very embodiment of evenhanded justice."[104] However, if the judge systematically excludes identifiable groups from the administration of the law, it matters very little whether the impropriety occurred at the grand jury or foreman level. The injury is to the judicial process itself. Although there may be no demonstrable harm to the defendant in selecting a foreman in a discriminatory fashion, the improper judicial decisionmaking may extend into other areas of the judicial proceeding.[105]

Finally, the majority opinion in *Cofield* did not consider the public policy concerns of formulating an appropriate remedy to vindicate defendants' rights and to discourage prejudicial foreman selection procedures. For over one hundred years the traditional remedy for discrimination in the selection of grand jurors has been to reverse the conviction and quash the indictment irrespective of the accused's guilt or innocence.[106] Although such a remedy exacts a heavy social cost, the Supreme Court has reexamined and reaffirmed its commitment to this approach on two occasions in recent years.

In *Rose* the Court determined that the cost to the state of reindicting and retrying a defendant was "outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice."[107] The Court observed that dismissal of an indictment is far less egregious than remedies resorted to in other situations where constitutional rights have been violated. In the case of an illegal search or a coerced confession, the evidence unconstitutionally obtained is suppressed altogether.[108] Dismissing an indictment, however, does not render a defendant immune from subsequent reindictment and reprosecution. In the ensuing prosecution, the government remains free to use the proof it initially introduced to obtain the conviction.[109] Finally, the Court recognized that even though alternative remedies exist, they are ineffectual in discouraging purposeful discrimination in the grand jury context.[110]

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104. *Hobby*, 468 U.S. at 353 (Marshall, J., dissenting).

105. *Id.* (Marshall, J., dissenting). Justice Marshall detailed the potential for prejudicial error:

> [I]t is unlikely that a judge who engages in racist and sexist appointment practices will confine his prejudicial attitudes and actions to the area of foreman selection. More likely is that the presence of unconstitutional discrimination in that area is but a portion of a widespread region of tainted decisionmaking.
>
> Furthermore, by allocating authority within the grand jury venire on the basis of race and sex, the judge who assumably discriminated against Negroes and women helped to perpetuate well-known and vicious stereotypes that our society has been struggling to erase. To denigrate the significance of the judge's violation by characterizing its effect as "minimal and incidental" exposes the judiciary to justified charges of hypocrisy.

*Id.* at 352-54 (Marshall, J., dissenting).

106. *See supra* notes 2-3, 42-43 and accompanying text.

107. *Rose*, 443 U.S. at 558.

108. *See id.* at 557-58.

109. *Id.*

110. *Id.* The Court noted that 18 U.S.C. § 243 (1982) makes it a federal crime to exclude citizens from service on grand and petit juries on account of race. It recognized, however, that prosecutions under this statute "have been rare and they are not under the control of the class members and the courts." *Id.* at 558. Furthermore, the Court emphasized that "[c]ivil actions, expensive to maintain and lengthy, have not often been used." *Id.*

Similarly, in *Vasquez v. Hillery*[111] the Court reasoned that dismissal of an indictment is not "disproportionate to the evil that it seeks to deter."[112] In 1962 a California grand jury indicted Hillery for first-degree murder, and subsequently he was convicted. After unsuccessfully pursuing appeals and collateral relief in the state courts for the next sixteen years, Hillery filed a habeas corpus petition in the federal courts.[113] On certiorari the Supreme Court confronted the practical realities of retrying a defendant over a quarter of a century after his alleged crime was committed. In such a situation many key witnesses may have died or moved away, and evidence may have deteriorated or been lost. Nevertheless, the Court determined that overturning the conviction was "the only effective remedy for this violation . . . . If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it."[114] Thus, given the seriousness and similarity of the discrimination, quashing the indictment is an appropriate means for discouraging purposeful discrimination in the selection of grand jury foremen.

In a case of first impression, the North Carolina Court of Appeals chose to deny relief for a claim of racial discrimination in the selection of grand jury foremen. The court, however, has misperceived the nature of the constitutional violation. That purposeful discrimination occurs in the selection of a foreman as opposed to a grand juror makes little difference. The injury is to the judicial process itself. The result undermines the public's confidence in the integrity of the judicial system, denies criminal defendants the right to fair and representative treatment in the jury room, and perpetuates racial and other forms of discrimination in the administration of the law. To ensure every criminal defendant the right to a trial free from the taint of racial prejudice, the North Carolina Supreme Court should reverse the court of appeals and extend the constitutional right to challenge discriminatory jury selection procedures to the context of grand jury foremen.

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111. 106 S. Ct. 617 (1986).
112. *Id.* at 623.
113. *Id.* at 619-20.
114. *Id.* at 623.

# *In re Truesdell*: North Carolina Adopts Two New and Conflicting Standards for Sterilization of Mentally Retarded Persons

Sterilizing mentally retarded people as a means of race purification came into vogue in the United States at the end of the nineteenth century.[1] In the first half of the twentieth century, the practice gained widespread popularity, and a majority of states passed statutes allowing compulsory sterilization of the mentally retarded.[2] In recent years, the development of scientific evidence discrediting sterilization as a means of race purification and an expanded view of the rights of mentally retarded people have led most of these states to repeal their sterilization statutes.[3] Among the few compulsory sterilization statutes still in existence is North Carolina General Statutes section 35, article 7,[4] which empowers North Carolina courts to authorize the sterilization of mentally retarded persons on the basis of certain compelling state interests.[5]

The application of this statute was challenged most recently in *In re Truesdell*.[6] In *Truesdell* the North Carolina Supreme Court upheld the court of appeals' application of an additional standard designed to protect the procreative rights of the mentally retarded. The new standard requires proof that sexual activity without the use of contraception is likely before sterilization can be authorized.[7] The court also held, for the first time, that when a court reviews a sterilization petition, some consideration of the best interests of the retarded person is constitutionally required.[8]

This Note examines the reasoning that underlies the new standard and the practical difficulties which may result from a strict construction of that standard. The Note identifies unanswered questions about the application of North Carolina's standards and analyzes the conflict that exists between the best interest analysis the supreme court described in *Truesdell* and the state's interests analysis required by the sterilization statute. The Note concludes that the legislature should reconsider involuntary sterilization in light of current understanding of the scientific and constitutional issues involved and rewrite the statute so that sterilization decisions are based solely on the interests of the retarded person.

In 1977 the Mecklenburg County Department of Social Services (DSS) instituted an action seeking sterilization of Sophia Renee Truesdell pursuant to

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1. *See infra* notes 43-54 and accompanying text.
2. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 594 (1966).
3. *See infra* notes 54-58 and accompanying text.
4. N.C. GEN. STAT. §§ 35-36 to -50 (1984).
5. *See infra* notes 80-81 and accompanying text.
6. 313 N.C. 421, 329 S.E.2d 630 (1985), *aff'g* 63 N.C. App. 258, 304 S.E.2d 793 (1983).
7. *Id.* at 429, 329 S.E.2d at 635.
8. *Id.* at 430, 329 S.E.2d at 635-36.

North Carolina's sterilization statute.[9] Truesdell, a severely retarded woman with a mental age of three to five years and an I.Q. of approximately 30, was eighteen years old at the time of trial.[10] Truesdell's deficiencies rendered her unable to provide for her own basic needs, such as shopping, cooking, and personal hygiene. As a result, she was unable to survive without significant assistance from others. Her condition was not likely to improve materially over time.[11] Truesdell was constantly under the supervision of others,[12] and she had displayed no significant sexual behavior at any time prior to the trial.[13]

DSS petitioned for Truesdell's sterilization pursuant to the sterilization statute[14] on the grounds that "because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the respondent would probably be unable to care for a child or children."[15] DSS alleged that it brought the action pursuant to its duty under North Carolina General Statutes section 35-39[16] because "sterilization would be in the public good and in the best interests of the mental, moral, and physical improvement of the respondent."[17] The trial court found as a matter of law that Truesdell was a mentally retarded person subject to the sterilization statute, that she suffered from a mental disease not likely to improve materially which rendered her unable to care for children, and that sterilization would be in her best interests.[18] Nevertheless, the trial court concluded that the decision of the Federal District Court for the Middle District of North Carolina in *North Carolina Association for Retarded Children v. North Carolina*[19] precluded it from allowing sterilization absent a showing that respondent was likely to engage in sexual activity without the use of contraception.[20] The court held that the evidence was insufficient to show that Trues-

9. N.C. GEN. STAT. §§ 35-36 to -50 (1984).

10. *Truesdell*, 313 N.C. at 423, 329 S.E.2d at 631.

11. *In re* Truesdell, 63 N.C. App. 258, 260, 304 S.E.2d 793, 795 (1983), *aff'd*, 313 N.C. 421, 329 S.E.2d 630 (1985).

12. *Id.* at 260-61, 304 S.E.2d at 795. Truesdell suffered from "a severe impairment of adaptive behavior including basic social skills" and some degree of psycho-motor impairment which caused her to walk with an unsteady gait. *Id.* The court presumed that she was fertile on the grounds that she experienced regular menstruation. *Id.*

13. *Id.* at 261, 304 S.E.2d at 796. Truesdell's foster parent testified that she had seen her daughter rub her genital area on some occasions in the past, but that she had gotten her to stop most of this behavior. Truesdell's instructors reported that she was withdrawn and shy and had never initiated any physical contact with any members of the opposite sex. *Id.* Another client at the Center for Human Development which she attended viewed her as his girlfriend and had sometimes put his arm around her, but he was described as being totally unaware of sexuality or the significance of the act. *Id.* at 284, 304 S.E.2d at 809.

14. N.C. GEN. STAT. § 35-43 (1984).

15. *Truesdell*, 313 N.C. at 422, 329 S.E.2d at 631.

16. N.C. GEN. STAT. § 35-39 (1984). The statute imposes a duty on the director of social services to petition for sterilization whenever any of a list of circumstances exist. *See infra* note 70 and accompanying text.

17. *Truesdell*, 313 N.C. at 422, 329 S.E.2d at 631.

18. *Truesdell*, 63 N.C. App. at 263, 304 S.E.2d at 797.

19. 420 F. Supp. 451 (M.D.N.C. 1976) (upholding the constitutionality of the North Carolina sterilization statute, N.C. GEN. STAT. §§ 35-36 to -50 (1984), and construing the statute to require that petitioner show a likelihood respondent will engage in sexual activity without using contraception).

20. *Truesdell*, 63 N.C. App. at 263, 304 S.E.2d at 797.

dell was likely to engage in sexual activity[21] and declined to authorize sterilization.[22]

The North Carolina Court of Appeals affirmed the trial court's decision.[23] The court of appeals agreed with the trial court's application of the standard set forth in *North Carolina Association for Retarded Children*,[24] which construed section 35-43 to require that the petitioner show "by clear, strong and convincing evidence" that:

> [t]here is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation; AND
>
> [t]he respondent is unable or unwilling to control procreation by alternative birth control or contraceptive methods, including, but not limited to, supervision, education, and training . . . .[25]

The court of appeals was persuaded by the reasoning of the federal district court that "it must have been the sense of the legislature to require only that which is necessary."[26] The court reasoned that sexual activity and contraceptive irresponsibility must be demonstrated before sterilization could be required because no likelihood exists that a person will become a parent, fit or unfit, unless that person is sexually active.[27]

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21. *Id.* at 263, 304 S.E.2d at 796.

22. *Id.* at 263, 304 S.E.2d at 797.

23. The court of appeals affirmed the trial court's holding, but remanded the case for entry of findings of fact consistent with its opinion concerning best interests, and inability to use other forms of birth control. *Id.* at 292, 304 S.E.2d at 813.

24. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456.

25. *Truesdell*, 63 N.C. App. at 279, 304 S.E.2d at 806. The court noted that the petitioner must also show:

> (1) That the respondent is a mentally ill or retarded person subject to the sterilization statutes (Art. 7, *supra*);
>
> a. has a physical, mental or nervous disease or deficiency,
>
> b. the disease or deficiency is not likely to materially improve, and
>
> c. the respondent is likely to procreate a genetically defective child, or
>
> d. would probably be unable to care for a child or children; AND
>
> (2) The respondent is physically capable of procreation. Where, however, the respondent has reached sexual maturity, the court may presume fertility, absent medical evidence to the contrary; AND. . .
>
> (5) That the proposed method of sterilization entails the least invasion of the body of the respondent. In other words, the proposed surgical intervention is the least intrusive and least burdensome method for sterilization of the respondent.

*Id.* The court also held that a court must consider and make findings relative to the possibility that a female respondent will experience trauma or psychological damage if she becomes pregnant and gives birth and the possibility that the respondent, male or female, will suffer psychological damage from the sterilization operation. *Id.*

26. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 457.

27. *Truesdell*, 63 N.C. App. at 278, 304 S.E.2d at 805. The court noted that in formulating standards, it had relied on standards set forth in jurisdictions where courts have been called upon to authorize sterilization in the absence of statutory guidelines. *See* Wyatt v. Anderholt, 368 F. Supp. 1383 (M.D. Ala. 1974); *In re* A. W., 637 P.2d 366 (Colo. 1981) (en banc); Wentzel v. Montgomery General Hosp. Inc., 293 Md. 685, 447 A.2d 1244 (1982), *cert. denied*, 495 U.S. 1147 (1983); *In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Guardianship of Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc); *In re* Guardianship of Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981). The court stated that in these cases a determination that sexual activity was likely was required as a condition for sterilization. *Truesdell*, 63 N.C.

The court of appeals viewed the decision of the federal district court, which required a likelihood of sexual activity that could lead to impregnation, as having been "reached to avoid an infirmity under the federal constitution."[28] Similarly, the court considered the standards it created in *Truesdell* to be constitutionally mandated.[29]

The court also addressed the trial court's finding that sterilization served Truesdell's best interests. The court stated that any finding that sterilization is in the best interests of the respondent *necessarily* would include a finding that the respondent is sexually active and that no less drastic means of contraception would be effective.[30] Because the evidence presented was insufficient to show that Truesdell was likely to be sexually active, the court of appeals ruled that sterilization was not in her best interests.[31] Truesdell's best interests were not, however, the controlling factor in the court of appeals' decision. Despite its reliance on the standards created by other jurisdictions,[32] the court found it "doubtful whether compulsory sterilization could be ordered on the basis of undefined 'best interests' in view of the fundamental interest at stake," and grounded its decision on its interpretation of the statute.[33]

The North Carolina Supreme Court affirmed the court of appeals' deci-

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App. at 280-281, 304 S.E.2d at 807. The court's analysis of the cases was, however, somewhat exaggerated. *See infra* note 115.

28. *Truesdell*, 63 N.C. App. at 276, 304 S.E.2d at 804. The constitutionality of sterilization performed under the North Carolina sterilization statute rests on the state's compelling interest in preventing the procreation of children by a person who probably would be unable to care for children, or of children who probably would have serious diseases or deficiencies. *In re* Moore, 289 N.C. 95, 102-03, 221 S.E.2d 307, 312 (1976). For further discussion of the constitutional justification for the statute as expressed in *Moore*, see *infra* notes 73-81 and accompanying text.

29. *Truesdell*, 63 N.C. App. at 290, 304 S.E.2d at 812. The *Truesdell* court found that for the state to have a compelling interest in sterilization, the threat to its interests represented by the person "against whom the State seeks to act" must be an immediate one. The required immediate threat does not exist when the respondent is not likely to engage in sexual activity without the use of contraception. *Id.* at 277, 304 S.E.2d at 805.

30. The court of appeals stated:

> "Moreover, for purposes of instituting sterilization proceedings under G.S. 35-39, a determination that a proposed sterilization is in the respondent's best interests must include a determination that the respondent is sexually active *and* that no temporary measure for birth control or contraception will adequately meet the respondent's needs, in addition to the statutory grounds regarding defective offspring and parental unfitness."

*Id.* at 289, 304 S.E.2d at 812.

31. *Id.* at 291, 304 S.E.2d at 809.

32. *See supra* note 27.

33. *Truesdell*, 63 N.C. App. at 289, 304 S.E.2d at 812. The court based its opinion on its observation that, although § 35-39 lists a determination that sterilization is in the retarded person's best interests among the situations giving rise to DSS's duty to petition for sterilization, *see infra* note 70, § 35-43, which sets out the specific findings a court must make before authorizing sterilization, makes no reference at all to the interests of the person to be sterilized.

> If the judge of the district court shall find from the evidence that the person alleged to be subject to this section is subject to it and that because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child or children, or because the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies, he shall enter an order and judgment authorizing . . . the operation.

N.C. GEN. STAT. § 35-43 (1984).

sion[34] and held that a petitioner seeking sterilization must meet certain standards beyond those specifically required by the statute.[35] Like the court of appeals, the supreme court found the reasoning in *North Carolina Association for Retarded Children* persuasive and specifically approved the requirement of clear, strong, and convincing evidence that a substantial likelihood exists that the respondent will engage in sexual activity likely to cause impregnation before sterilization may be authorized.[36]

The supreme court also addressed the need for courts to consider the best interests of mentally retarded individuals when ruling on petitions for sterilization. The court stated that it "[agreed] with the court of appeals that . . . some minimal 'best interests' standards are constitutionally required."[37] The court pointed out, however, that unlike the courts of jurisdictions which have no statute authorizing sterilization, upon which the court of appeals relied in formulating "best interests" standards, North Carolina courts are constrained to interpret an existing statute.[38] "Nevertheless," the court stated, it was "persuaded and influenced by the standards promulgated by the states in other jurisdictions"[39] and upheld the standards created by the court of appeals.[40] In dicta, the court expanded the court of appeals' standards by stating that they are not to serve as an exclusive list and that a trial judge may exercise his or her discretion to consider other factors which he or she finds reflective of the respondent's best interests.[41] The court held that because insufficient evidence existed to prove that Truesdell was in imminent danger for her life, or that her health would be severely jeopardized unless sterilization was performed immediately, sterilization was impermissible.[42]

The use of selective breeding to improve the human race has been advocated since at least the time of Plato's *Republic*.[43] In the late 19th century, inspired by the popular theory of social Darwinism and the rediscovery of Men-

34. *Truesdell*, 313 N.C. at 432, 329 S.E.2d at 636. The court modified in part, disapproving of the court of appeals' mischaracterization of § 35-43 as authorizing sterilization if " 'the respondent is likely to procreate a genetically defective child.' " *Id.* at 432 n.2, 329 S.E.2d at 636 n.2 (quoting *Truesdell*, 63 N.C. App. at 279, 304 S.E.2d at 806).

35. *Id.* at 430, 329 S.E.2d at 635-36.

36. *Id.* at 429, 329 S.E.2d at 635.

37. *Id.*

38. *Id.*

39. *Id.* at 430, 329 S.E.2d at 635. For a list of the cases the court identified as sources of these standards, see *supra* note 27.

40. *Truesdell*, 313 N.C. at 430, 329 S.E.2d at 635-36. In addition to the cases whose standards the court of appeals claimed its standards are substantially identical to, *see* cases cited *supra* note 27, the court cited Ruby v. Massey, 452 F. Supp. 361 (D. Conn 1978); *In re* C.D.M., 627 P.2d 607 (Alaska 1981); *In re* Penny N., 120 N.H. 269, 414 A.2d 541 (1980); Cook v. State, 9 Or. App. 224, 495 P.2d 768 (1972).

41. *Truesdell*, 313 N.C. at 430-31, 329 S.E.2d at 636. The court stated that examples of factors "which can be relied upon by the trial judge when making specific findings of fact regarding the respondent's best interests" can be found in the cases upon which it and the court of appeals relied. *Id.* For a list of these cases, see *supra* notes 27 & 40.

42. *Truesdell*, 313 N.C. at 431, 329 S.E.2d at 636.

43. R. MACKLIN & W. GAYLIN, MENTAL RETARDATION AND STERILIZATION 63 (1981); Vukovich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189, 189 (1971).

delian genetics, a eugenics movement began to develop in the United States.[44] The term "eugenics" is derived from a Greek word meaning "well born."[45] Sir Francis Galton, who coined the term, defined eugenics as " 'the study of agencies under social control that may improve or impair future generations . . . either physically or mentally.' "[46] The eugenics movement was based upon the idea that defects such as mental retardation, mental illness, and epilepsy, are genetically inherited. Its followers sought to prevent such genetically "inferior" persons from reproducing.[47] Originally, castration was the only method available for sterilization. The development in the 1890s of safe methods of sterilization that did not destroy sexual desire or ability added impetus to the eugenics movement.[48]

The first sterilization statute to take effect in the United States was enacted by Indiana in 1907.[49] By the end of the 1920s, the eugenics movement had reached its peak. In 1921 approximately 3,900 sterilizations had been performed under existing sterilization statutes.[50] By 1930, 28 states had passed involuntary sterilization statutes[51] and 20,000 sterilizations were performed by 1935.[52]

The greatest victory for the eugenics movement occurred in *Buck v. Bell*,[53] a landmark case in which the United States Supreme Court, upholding the application of Virginia's sterilization statute, made the famous statement, "three generations of imbeciles are enough."[54] This decision has been severely criticized

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44. *See* Ferster, *supra* note 2, at 591-92; Sherlock & Sherlock, *Sterilizing the Mentally Retarded: Constitutional, Statutory, and Policy Alternatives*, 60 N.C.L. REV. 943, 945 (1982); Comment, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions*, 9 FLA. ST. U.L. REV. 599, 602-06 (1981). For a discussion of the development of eugenics and the social consequences of hereditarian views, see M. HALLER, EUGENICS (1963).

45. Ferster, *supra* note 2, at 591; Comment, *supra* note 44, at 602 n.14.

46. Ferster, *supra* note 2, at 591 (citing A. DEUTSCH, THE MENTALLY ILL IN AMERICA 357, 357-58 (2d ed. 1949)); *see also* Comment, *supra* note 44, at 603 (discussing the roots of the eugenics movement).

47. Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 998-99 (1977); Ferster, *supra* note 2, at 592; Comment, *supra* note 44, at 603.

48. Dr. Harry Sharp developed the surgical technique of vasectomy in 1889. Ferster, *supra* note 2, at 592. Sharp performed approximately 700 sterilization operations at the Indiana State Reformatory before Indiana passed a statute authorizing sterilization. Comment, *supra* note 44, at 603. Scalpingectomy, a surgical method of sterilizing females, was developed in France at about the same time. *Id.*

49. Act of March 9, 1907, ch. 215, 1907 Ind. Acts 377 (held unconstitutional in Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921)), *repealed by* Act of February 23, 1963, ch. 17, 1963 Ind. Acts 12.

50. Ferster, *supra* note 2, at 594.

51. Ferster, *supra* note 2, at 595. This pattern continued despite the fact that sterilization statutes undergoing judicial review prior to 1925 were uniformly declared unconstitutional. *Id.* at 593. Some were struck down on equal protection grounds. *See* Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 938 (1918); Smith v. Bd. of Examiners, 85 N.J.L. 46, 88 A. 963 (Sup. Ct. 1913); *In re* Thomson, 103 Misc. 23, 169 N.Y.S. 638, *aff'd mem.*, 185 A.D. 902, 171 N.Y.S. 1094 (1918). Others failed because of procedural inadequacies. *See* Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921); Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933). For a survey of early eugenic sterilization statutes including state by state statistical information, see H. LAUGHLIN, EUGENIC STERILIZATION (1926).

52. Comment, *Sterilization Petitions: Developing Judicial Guidelines*, 44 MONT. L.R. 127, 128 (1983).

53. 274 U.S. 200 (1927).

54. *Id.* at 207. Respondent was a feebleminded woman who was the daughter of a feeble-

because the scientific premise upon which it rests—that mental retardation occurs primarily as a result of genetically inferior parents—has been discredited.[55] It has been established that a significant percentage of mental deficiencies are caused by nonhereditary factors such as trauma and environment[56] and that with the exception of a few specific diseases, mentally retarded parents are not significantly more likely to bear mentally retarded offspring than nonretarded parents.[57] As a result of these findings, in recent years several states have repealed their sterilization statutes.[58] In other states, courts have found jurisdiction to order sterilization without the benefit of statutory guidance when acting in the best interests of retarded individuals.[59]

North Carolina has long been among the states most active in sterilizing the mentally retarded.[60] North Carolina's first statute authorizing involuntary ster-

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minded mother, and was herself the mother of an allegedly feebleminded daughter. The United States Supreme Court held Virginia's sterilization statute to be a reasonable exercise of the state's police power and not a violation of either the due process or equal protection clauses of the fourteenth amendment. *Id.* at 205-08.

55. Serious doubt about the scientific validity of the theory that mental diseases generally are passed on through heredity has existed for a long time. The Committee of the American Association for the Investigation of Eugenic Sterilization concluded in 1936 that "[o]n the whole, eugenics receives scant support on any scientific basis from genetics" and that "any law concerning sterilization passed in the United States under the present state of knowledge should be voluntary and regulatory rather than compulsory." THE COMMITTEE OF THE AMERICAN NEUROLOGICAL ASSOCIATION FOR THE INVESTIGATION OF EUGENIC STERILIZATION REPORT 69, 78 (1936).

For an analysis of the validity of eugenic theory in light of modern genetic knowledge, see Murdock, *Sterilization of the Mentally Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 926-28 (1974); Note, *Eugenic Sterilization: A Scientific Analysis*, 46 DEN. L.J. 631 (1969) [hereinafter cited as Note, *A Scientific Analysis*].

For an argument that the North Carolina Supreme Court's reliance on *Buck* is cause for questioning the validity of *Moore*, see Note, *North Carolina Compulsory Sterilization Statute Held Constitutional Against Challenge That It Constituted an Unlawful Invasion of Privacy. In re* Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (1976), 8 TEXAS TECH L. REV. 436, 444 (1974).

56. Note, *A Scientific Analysis, supra* note 55, at 639-41. Of the two broad categories of mental deficiency recognized, deficiencies in one category—psychotic and neurotic illnesses—are considered developmental or environmental in origin. *Id.*

57. The child of a parent who is afflicted with a genetic disease that is carried in dominant genes, such as Down's Syndrome, has a 50% chance of inheriting the disease. Murdock, *supra* note 55, at 926. A child whose parents carry a disease that is manifested only in recessive genes can inherit the disease only if both parents carry the same defective trait. *Id.* "Typically, abnormal and especially lethal characteristics are recessive in nature . . . ." Note, *A Scientific Analysis, supra* note 55, at 642. Therefore, in the majority of cases, it is impossible for the child of a mentally retarded parent to inherit the parent's deficiencies.

It has been estimated that there are ten to thirty times more carriers of genetic diseases than persons actually afflicted with them. Murdock, *supra* note 55, at 927 (quoting Bligh, *Sterilization and Mental Retardation*, 51 A.B.A. J. 1059, 1062 (1965)). Over 80% of all mentally retarded children are born to nonretarded parents. *Id.* at 926 (citing Gamble, *What Proportion of Mental Deficiency is Preventable by Sterilization?*, 57 AM. J. MENTAL DEFICIENCY 123, 124 (1952)). Thus, for a eugenic program to be effective, it has been estimated that at least 10% of the population would have to be sterilized. Murdock, *supra* note 55, at 927 (quoting Bligh, *Sterilization and Mental Retardation*, 51 A.B.A. J. 1059, 1062 (1965)).

58. One author counted ten states (Alabama, Arizona, California, Idaho, Indiana, Maine, Michigan, New Hampshire, North Dakota, South Dakota, Virginia) that repealed their sterilization statutes between 1973 and 1983. Comment, *supra* note 52, at 129 & n.28.

59. *See* cases cited *supra* note 27.

60. Writing in 1950, one commentator described North Carolina as "a State with public health officials, social agencies, and public institutions favoring [eugenic sterilization]." Dickinson, *Foreword* to M. WOODSIDE, STERILIZATION IN NORTH CAROLINA at vii (1950).

ilization of mentally disabled persons was passed in 1929.[61] Forty-nine people were sterilized in accordance with the statute before it was declared unconstitutional.[62] In 1933 the North Carolina Supreme Court held the statute violated the due process clause of the fourteenth amendment because it failed to provide notice or a hearing to persons subjected to sterilization.[63] A new statute was enacted shortly thereafter, containing provisions for notice and creating the State Board of Eugenics to hear contested cases.[64] Under this statute sterilizations were carried out at a brisk pace. In 1948 North Carolina ranked second in the country in the number of sterilizations performed.[65] In 1963 North Carolina performed 240 sterilizations, which comprised more than fifty percent of all reported sterilizations in the United States.[66]

The current North Carolina statute went into effect in 1975.[67] It applies to both institutionalized and noninstitutionalized mentally retarded persons.[68] Under the statute, county directors of social services are authorized to petition for sterilization operations.[69] In addition, a director has an affirmative duty to petition for sterilization whenever he or she believes that sterilization would be in the best interests of the retarded individual or would serve the public good, or whenever the retarded person would be likely to procreate a child who would have serious deficiencies or would be unable to care for children.[70] A hearing is available at respondent's request and procedural safeguards exist to protect the due process rights of retarded individuals.[71] The trial court must order steriliza-

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61. Act of Feb. 18, 1929, ch. 34, 1929 N.C. Sess. Laws 28, *repealed by* Act of April 5, 1933, ch. 224, § 21, 1933 N.C. Sess. Laws 345, 352.

62. M. WOODSIDE, *supra* note 60, at 9.

63. Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933).

64. Act of Apr. 5, 1933, ch. 224, 1933 N.C. Sess. Laws 345 (codified at N.C. GEN. STAT. §§ 35-36 to -57 (Michie 1933)).

65. M. WOODSIDE, *supra* note 60, at 21. While this statute was in effect, sterilizations were performed primarily with the consent of the mentally retarded person or a relative. *Id.* at 13; Ferster, *supra* note 2, at 601 n.35.

66. Note, *In re* Moore: *The Sound and the Fury and the Scalpel*, 8 N.C. CENT. 307, 311 (1977).

67. Act of Apr. 11, 1974, ch. 1281, 1973 N.C. SESS. LAWS 458 (codified at N.C. GEN. STAT. §§ 35-36 to -50 (1984)).

68. N.C. GEN. STAT. at §§ 35-36, -37 (1984).

69. *Id.*

70. The director must petition for sterilization:

> (1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, resident of an institution, or noninstitutional individual, that he or she be sterilized.
>
> (2) When in his opinion it is for the public good that such patient, resident of an institution, or noninstitutional individual, be sterilized.
>
> (3) When in his opinion such patient resident of an institution or noninstitutional individual would be likely, unless sterilized to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency; or, because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children.

N.C. GEN. STAT. § 35-39 (1984).

As originally enacted, the statute contained a fourth subsection: "when the next of kin or legal guardian of the retarded person requests that he file the petition," but this subsection was held unconstitutional, *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 455-56, and later repealed. Act of April 11, 1974, ch. 1281, 1974 N.C. Sess. Laws 458 (repealed by Act of March 7, 1981, ch. 102, 1981 N.C. Sess. Laws 66).

71. The petitioner must give notice to the respondent and to a court-appointed guardian *ad*

tion if it finds that the respondent is subject to the statute and that:

> because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child or children, or because the person would be likely, unless sterilized, to procreate a child or children which would have serious physical, mental, or nervous diseases or deficiencies.[72]

The constitutionality of the statute was first tested before the North Carolina Supreme Court in *In re Moore*.[73] In *Moore* the respondent challenged the statute on the grounds that it denied him procedural and substantive due process.[74] The court, relying on *Eisenstadt v. Baird*,[75] recognized the right of an individual to be free from governmental intrusion into the decision whether to bear children.[76] The court noted, however, that this right is not unqualified and must be weighed against state interests.[77] Although limitation of such a fundamental right can be justified only by a countervailing compelling state interest,[78] the public welfare may take precedence over an individual's procreative rights.[79] The court held that North Carolina's interest in protecting unborn children[80] and in preventing the procreation of children who will become a burden on the state was sufficiently compelling to justify sterilization.[81]

The *Moore* court also established the burden of proof that the state must meet before sterilization can be granted. The court noted that the statute lacked

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*litem*. N.C. GEN. STAT. §§ 35-40, -43 (1984). The respondent may request a hearing at which he or she will have the opportunity to present evidence and cross-examine the petitioner's witnesses.

72. *Id.* §§ 35-43.

73. 289 N.C. 95, 221 S.E.2d 307 (1976) (petition for sterilization of a minor on grounds that he would be likely to procreate a child or children who would have serious deficiencies).

74. *Id.* at 97-98, 221 S.E.2d at 309. The respondent also challenged the statute's constitutionality on the grounds that it denied retarded people equal protection and the right to cross-examine the petitioner's witnesses, that it constituted cruel and unusual punishment, and that it was vague and arbitrary. *Id.*

75. 405 U.S. 438 (1972) (Massachusetts statute prohibiting dissemination of contraceptives to unmarried persons held an unconstitutional denial of equal protection).

76. *Moore*, 289 N.C. at 102, 221 S.E.2d at 311-12.

77. *Id.*

78. Roe v. Wade, 410 U.S. 113, 154-155 (1973).

79. *Moore*, 289 N.C. at 103, 221 S.E.2d at 312 (citing Buck v. Bell, 274 U.S. 200 (1927)).

80. "[W]hen there is overwhelming evidence . . . that a potential parent will be unable to provide a proper environment for a child because of his own mental illness or mental retardation, the state has sufficient interest to order sterilization." *Moore*, 289 N.C. at 103, 221 S.E.2d at 312 (quoting Cook v. State, 9 Or. App. 224, 230, 495 P.2d 769, 771-72 (1972)).

81. The court identified the welfare of the respondent as being among its "chief concerns," leading some commentators to conclude the court meant that the state's concern for the best interests of the retarded person is among the compelling state interests that provide the constitutional justification for sterilization. *See* Note, *Compulsory Sterilization of the Mentally Ill and Retarded: In re* Sterilization of Moore, 30 SW. L.J. 775, 779 (1976). The court specifically stated that the state's interests in the welfare of the potential child and in preventing the creation of burdens upon the state "rise to the level of a compelling state interest" and therefore, are sufficient to justify sterilization. *Moore*, 289 N.C. at 103, 221 S.E.2d at 312-13. In contrast, when discussing the interests of the retarded person, the court merely pointed out that sterilization "at certain times *may* be in the best interests of that individual" and that the state "*may* only be providing for the welfare of the individual . . . ." *Id.* at 103-104, 221 S.E.2d at 312-13 (emphasis added). Although the interests of the retarded person may sometimes coincide with the state's interests, there is no suggestion that sterilization should not be ordered in cases where it does not.

any language specifying the required burden of proof.[82] The court determined that the general assembly had intended to provide sufficient safeguards to prevent misuse of the statute, and to give effect to that intent the court held that clear, strong, and convincing evidence is required before authorization for sterilization may be granted.[83]

The next challenge to the sterilization statute came in *North Carolina Association for Retarded Children v. State of North Carolina.*[84] A three judge panel of the United States District Court for the Middle District of North Carolina considered whether the statute created an arbitrary and capricious classification in violation of the fourteenth amendment of the United States Constitution.[85] The district court found that, although only rarely would a competent doctor recommend involuntary sterilization, extreme cases do exist in which it is possible to predict with substantial accuracy that the offspring of a mentally retarded person would also be retarded or that the person would be incapable of discharging the responsibilities of parenthood.[86] Consequently, the court found that there are "rare and unusual cases [in which] it can be medically determined that involuntary sterilization is in the best interest of either the mentally retarded person or the state or both"[87] and upheld the statute.[88]

The court reasoned that "it must have been the sense of the legislature to require only that which is necessary"[89] and that sterilization is unnecessary un-

82. *Moore*, 289 N.C. at 108, 221 S.E.2d at 315.

83. *Id.*

84. 420 F. Supp. 451 (1976). This case was severed from a significantly larger lawsuit involving a broad range of statutes relating to the treatment, training, and education of mentally retarded children. The constitutionality of the sterilization statute as applied to mentally retarded children was the only issue presented.

85. U.S. CONST. amend. XIV.

86. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 454-55.

87. *Id.* at 455.

88. The court struck down subsection four, which imposed a duty upon county directors of DSS to petition for sterilization at the request of the next of kin or legal guardian of the retarded person, holding it an unconstitutional, arbitrary, and capricious delegation of power. *Id.* at 456. For the language of subsection four, see *supra* note 70. The court reasoned that placing such complete confidence in all guardians is unwarranted. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456.

In one recent study, 64% of the parents of mentally retarded people surveyed believed they should be allowed to make decisions about sterilization for their children without intrusion by the state. Wolfe & Zarfas, *Parents' Attitudes Toward Sterilization of Their Mentally Retarded Children*, 87 AM. J. MENTAL DEFICIENCY 122, 127 (1982). Parents generally support sterilization of their retarded children—one study found sterilization to be favored by 71% of the parents surveyed—and tend to pressure their children's guardians to aquiesce to it. *Id.* at 125.

Some courts have recognized, however, that parents' interests may conflict with those of their children. *North Carolina Ass'n for Retarded Children,* 420 F. Supp. at 456; *In re* Guardianship of Hayes, 93 Wash. 228, 236, 608 P.2d 635, 640 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 553, 307 N.W.2d 881, 897 (1981). In the words of one author, "[d]iminished worry, convenience, a wish to be relieved of responsibility for close supervision, and inability to deal with a difficult problem may cause even the most well-intentioned parent to act against the retarded person's best interests." Comment, *Protection of the Mentally Retarded Individual's Right to Choose Sterilization: The Effect of the Clear and Convincing Evidence Standard*, 12 CAP. U.L. REV. 413, 418 (1983); *accord* Murdock, *supra* note 55, at 932-33. *But see Moore*, 289 N.C. at 109, 221 S.E.2d at 316 (respondent's mother is unquestionably in a position to know what is best for the future of her child).

89. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 457.

less there is a likelihood of impregnation.[90] Accordingly, it construed section 35-43 to require that, before sterilization may be authorized, the petitioner must show that the respondent "is likely to engage in sexual activity without utilizing contraceptive devices and is therefore likely to impregnate or become impregnated."[91]

The North Carolina sterilization statute was next construed in *In re Johnson*.[92] In *Johnson* the North Carolina Court of Appeals addressed the problem of how to establish the state's burden of proof when it seeks to sterilize a retarded individual on the ground that he or she would be unable to care for a child. The court held that "a presumption of unfitness founded solely on retardation is unwarranted."[93] Instead, "[t]he petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child."[94] Evidence that, in addition to being mentally retarded, the respondent "had exhibited emotional immaturity, the absence of a sense of responsibility, a lack of patience with children, and [had engaged in] continuous nightly adventures with boyfriends followed by daily sleep and bed rest" was held sufficient to demonstrate her inability to provide a reasonable domestic environment.[95]

*Truesdell* is a milestone in the history of sterilization in North Carolina. The new standards, which require proof that sexual activity is likely to occur and consideration of the respondent's best interests before sterilization may be authorized, are likely to have a significant impact on the number of sterilizations performed in North Carolina.[96] The exact nature of that impact is as yet unclear, however, because the decision raises several unanswered questions.

The requirement that the petitioner show the respondent is likely to engage in sexual activity without using contraceptives raises the issue of how imminent the likelihood of such activity must be before sterilization is justified. The supreme court did not address this issue directly in *Truesdell*. The court of appeals, however, interpreted the rule established in *Shelton v. Tucker*,[97] which held that a state may not act to interfere with fundamental rights when a less

90. *Id.* at 456. The court of appeals in *Truesdell* stated that the district court adopted this construction to prevent the statute from being unconstitutional and agreed with the district court's reasoning. *See Truesdell*, 63 N.C. App. at 276-77, 304 S.E.2d at 804-05.

91. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456.

92. 45 N.C. App. 649, 263 S.E.2d 805 (1980).

93. *Id.* at 653, 263 S.E.2d at 809. Many mentally retarded persons are capable of being adequate parents. *See infra* note 128.

94. *Johnson*, 45 N.C. App. at 653, 263 S.E.2d at 809.

95. *Id.* at 653-54, 263 S.E.2d at 809. The court also considered testimony that the respondent had two boyfriends, one of whom wanted to marry her, had arranged to have an intrauterine device provided by DSS removed, had already had an abortion, and was unable to comprehend that pregnancy could result from intercourse. *Id.* at 650-51, 263 S.E.2d at 807.

In *Truesdell* the court of appeals pointed out that it had considered these factors in *Johnson* and concluded that it had already implicitly accepted the standards of *North Carolina Ass'n for Retarded Children*. *Truesdell*, 63 N.C. App. at 276, 304 S.E.2d at 804.

96. *Truesdell*, 63 N.C. App. at 279-80, 304 S.E.2d at 806. For a list of other standards *Truesdell* set forth, see *supra* note 25 and accompanying text.

97. 364 U.S. 479 (1960) (Arkansas statute requiring every teacher to file an annual affidavit listing every organization to which he or she had belonged or contributed to in the past five years was overly broad and therefore unconstitutional).

drastic alternative is available,[98] to require that the risk of pregnancy be "clear and present."[99] Thus, "a compelling interest . . . would seem to require that conditions created by the party against whom the State seeks to act must create a threat of immediate harm to that interest."[100]

The court of appeals' requirement that the danger of procreation be clear and present has the potential to render the sterilization statute completely ineffective. The state's interest in preventing procreation by those people subject to the statute can be effectuated only if the state can petition for sterilization before the danger of pregnancy becomes immediate. A strict interpretation of *Truesdell*, which would require evidence that the respondent has actually engaged in sexual activity without the use of contraception, would make it unlikely that sterilizations can be performed in time to prevent pregnancies. In *Truesdell*, for example, the DSS filed its petition for sterilization in 1977.[101] The trial court did not rule on that petition until more than three years later.[102] If a person is in "clear and present" danger of being impregnated or causing impregnation, a procedure that takes three years to implement is no remedy. If the state's interest is truly sufficient to justify interference with a fundamental right, arguably it is sufficient to justify interference at a time when it will achieve the desired goal.[103] Defining "clear and present" so as to strike the proper balance between the state's interest in performing sterilization before pregnancy occurs and the right of mentally retarded people to be free from an invasion of their fundamental rights is a challenge left for future courts to resolve.[104]

A related issue raised by the new standards concerns the nature of the evidence required to show that the respondent is likely to engage in sexual activity. The respondent's parents are the people most likely to have sufficient contact with the respondent so as to testify concerning his or her behavior. Parents of mentally retarded persons have interests which are not always consistent with

98. *Id.* at 488.

99. *Truesdell*, 63 N.C. App. at 281-82, 304 S.E.2d at 807-08.

100. *Id.* at 277, 304 S.E.2d at 805 (citing Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)); *see also* Sherlock & Sherlock, *supra* note 44, at 970 ("[Before sterilization a] demonstration should be required that the retarded person is sexually active to a degree sufficient to render procreation likely in the near future. It must be shown that procreation is *now* at risk, not that the retarded person once had intercourse or may potentially have intercourse in the future."); Note, *Constitutional Law—Legislative Naivete in Involuntary Sterilization Laws*, 12 WAKE FOREST L. REV. 1064, 1075 (1976) ("[S]cientific evidence belies any correspondence between statutes aimed at mental defectives and the State interest which the North Carolina Supreme Court [in *In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976)] assumed was compelling.").

101. *Truesdell*, 63 N.C. App. at 259, 304 S.E.2d at 794-95.

102. *Id.*

103. This statement does not suggest that the court erred in its holding, or that it failed to consider the practical effect of the standard it applied. It is possible that the court intended to strike the balance in favor of a strict immediacy requirement despite the consequences that such a rule would produce. If the court's holding is interpreted in this way, the decision ensures that the state interest at stake cannot be achieved and therefore casts doubt on the validity of carrying out sterilizations under any circumstances. If the court intended to create such a strict standard, that choice is of sufficient import that it deserved more direct treatment.

104. Courts applying a best interests analysis escape this dilemma. Under a best interests analysis, sterilization is justified whenever it is in the best interests of the individual respondent involved. Therefore, whenever sterilization is in that respondent's best interests, it is necessary.

those of their children.[105] As one commentator noted, parents of mentally retarded children find "the whole area of sexuality . . . immensely threatening, disturbing, and inconvenient."[106] As a result, their perceptions of their children's sexual interest and behavior are not likely to be objective. Furthermore, as a group, parents of mentally retarded children have a strong bias in favor of sterilizing their children.[107] Under these circumstances, basing a decision as important as the decision whether to authorize sterilization on parents' testimony about their own perceptions of the likelihood that their children will engage in sexual activity is questionable. The "clear, strong, and convincing" requirement set forth by the *Truesdell* court probably would not be satisfied by such testimony.

The burden of the petitioner, who must prove by clear, strong, and convincing evidence an imminent likelihood that the respondent will engage in sexual activity without using contraception, is a difficult burden to meet. The stringency of this requirement may lead well-meaning parents and health care personnel to commit egregious invasions of the privacy of mentally retarded persons while attempting to gather enough evidence to support a sterilization petition. Thus, the *Truesdell* standards created to protect the rights of mentally retarded persons may actually serve to promote even greater invasions of those rights.

The most troublesome aspect of *Truesdell* is the court's holding "that when the state petitions the court for a compulsory sterilization, some minimal 'best interests' standards are constitutionally required."[108] This requirement cannot be reconciled with the language of the sterilization statute. Section 35-43 specifically commands district judges to authorize sterilization upon a finding that, because of a physical, mental, or nervous deficiency, the respondent would probably be unable to care for a child or would be likely to procreate a child who would have a serious deficiency.[109] This statute does not allow a district court discretion to consider the best interests of the mentally retarded person. Furthermore, in upholding the statute the *Moore* court, although recognizing the procreative rights of mentally retarded persons, held that the state's interests are sufficient to take precedence over those rights.[110] Thus, the North Carolina Supreme Court has upheld a statutory test that allows sterilization of mentally retarded persons without regard to whether it is in their best interests.

By grafting a best interests analysis onto the existing statute, the *Truesdell* court created a standard for reviewing sterilization petitions which raises more

105. *See supra* note 88.

106. Lottman, *Sterilization of The Mentally Retarded: Who Decides?*, TRIAL, April, 1982, at 61-62.

107. *See supra* note 88.

108. *Truesdell*, 313 N.C. at 429, 329 S.E.2d at 635.

109. For the statutory language, see *supra* note 33. After *Truesdell*, a court also must find that the respondent is likely to engage in sexual activity and is unwilling or unable to use contraception before sterilization may be authorized. *See supra* text accompanying note 25.

110. *Moore*, 289 N.C. at 104, 221 S.E.2d at 313. Under the *Moore* court's analysis, a best interests analysis would be superfluous because whatever the interests of the respondent might be, the state's interests are controlling.

questions than it answers. These questions will arise most notably in cases in which a court finds that the statutory test is satisfied, but that sterilization is not in the respondent's best interests, or that sterilization is in the respondent's best interests, but that the statutory test is not satisfied. *Truesdell* provides little guidance as to which set of standards should take precedence in such cases.

The *Truesdell* court never suggested that the outcome of the best interests analysis could override the statutory standards. To allow it to do so would be tantamount to a judicial rewriting of the statute, creating a standard fundamentally inconsistent with the statute's original content. The decision whether to authorize sterilization would then rest on factors that played no role in the decision making process set out by the general assembly. Apparently, the court was unwilling to engage in that degree of judicial legislation.

If a best interests analysis is constitutionally required, however, presumably its result must be capable of affecting the disposition of the case. If a court is compelled to order sterilization upon a finding that the statutory standards are met, even though it finds that sterilization is not in the respondent's best interests, then the best interests analysis becomes an empty formality. It is difficult to believe that a constitutionally required analysis could be incapable of affecting the outcome of the case.

The potential for this kind of conflict existed in *Truesdell* itself. The trial court found that sterilization was in Truesdell's best interests, but refused to authorize sterilization because the statutory standards were not met.[111] The court of appeals dealt with this conflict by defining it out of existence. That is, the court stated flatly that "a determination that a proposed sterilization is in the respondent's best interests must include a determination that the respondent is sexually active *and* that no temporary measure for birth control or contraception will adequately meet the respondent's needs . . . ."[112] Thus, the court of appeals avoided the conflict between a best interests analysis and the statutory standards by defining best interests so that sterilization can be in the respondent's best interests only when the statutory standards are met. The court of appeals then applied this general rule without considering whether it held true for the individual in question.[113]

111. *Truesdell*, 63 N.C. App. at 263, 304 S.E.2d at 797. The trial court considered proof that sexual activity is likely a required element of the statutory standards. *Id.*

112. *Id.* at 289, 304 S.E.2d at 812.

113. The issue upon which the court of appeals' decision rested was whether the statute authorizing sterilization on the basis of the state's interests can be constitutionally applied to a respondent when the petitioner fails to show that the respondent is likely to be sexually active. Although the likelihood that the respondent will be sexually active is also a relevant factor in a best interests analysis, *see infra* note 115, the court of appeals did not purport to apply such an analysis.

The distinction between the role that the likelihood of sexual activity plays under the statutory standards and under a best interests analysis illustrates the fundamental difference between the two approaches. When, as under the statutory standards, sterilization is viewed as something the state does to a mentally retarded person in furtherance of the state's own interests, proof of sexual activity is necessary to ensure that the state does not act against the individual unless doing so is necessitated by a compelling state interest. *See Truesdell*, 63 N.C. App. at 279, 304 S.E.2d at 806. When, as under a best interests analysis, sterilization is only permitted when it serves the interests of the retarded person, no such artificial barrier is necessary. Moreover, under a best interests analysis, any rigid requirement is inappropriate because it can only serve as a barrier preventing the retarded

The argument that sterilization can be in a respondent's best interests only if he or she is likely to be sexually active is controversial.[114] Furthermore, this kind of analysis begs the question at the heart of a best interests analysis: whether sterilization is actually in the best interests of the *individual* respondent.[115] Determining the best interests of an individual respondent on the basis of generalizations about the best interests of all mentally retarded people fails to afford the respondent the opportunity to exercise his or her procreative rights, which is the very reason for undertaking a best interests analysis.[116]

The court of appeals' definition of best interests, however, has limited precedential value. The court of appeals only considered the best interests of the respondent in dicta, basing its decision on the constitutional requirement that the state may not invade a fundamental right when the invasion is not necessary to protect a compelling state interest.[117] At the time of the court of appeals' decision, no North Carolina court had held that a best interests analysis is constitutionally required, and the court of appeals did not purport to apply such an analysis.

The supreme court's opinion did little to clarify the best interests analysis described by the court of appeals. By accepting without comment the court of appeals' finding that sterilization was not in Truesdell's best interests, the

person from achieving his or her best interests. *In re* Grady, 85 N.J. 235, 263 & n.9, 426 A.2d 467, 481 & n.9 (1981); *see also In re* Moe, 385 Mass. 555, 569 n.10, 432 N.E.2d 712, 722 n.10 (1982) (a strict requirement of medical necessity is inappropriate because it may produce a result that conflicts with the choice the respondent would make if he or she were competent).

The court of appeals' opinion of the importance of a best interests analysis in the review of sterilization petitions is revealed by its statement that it is "doubtful whether compulsory sterilization can be ordered on the basis of undefined 'best interests' alone in view of the fundamental interest at stake." *Truesdell*, 63 N.C. App. at 289, 304 S.E.2d at 812.

114. *See infra* note 136.

115. The court of appeals found support for a strict requirement that sexual activity be likely in standards applied by courts in other jurisdictions which have considered sterilization petitions in the absence of statutory guidelines. The court of appeals interpreted these cases as applying standards substantially identical to those that it applied. *Truesdell*, 63 N.C. App. at 280-82, 304 S.E.2d at 806-07. Analysis of these cases, however, reveals that the court of appeals' interpretation does not address the distinction between a pure best interests analysis and an analysis that is strictly bound by a generalized rule. In *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981), the New Jersey Supreme Court specifically rejected both *North Carolina Ass'n for Retarded Children* and a proposed requirement of necessity. *Id.* at 263, 264 nn.8, 9, 426 A.2d at 481 nn.8, 9. In two of the cases cited by the court of appeals, the courts treated the likelihood of sexual activity as only one among several factors to be considered. Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 703, 447 A.2d 1244, 1254 (1982); *In re* Moe, 385 Mass. 555, 567-70, 432 N.E.2d 712, 721-22 (1982). In *In re* Guardianship of Eberhardy, 102 Wis. 2d 539, 578-79, 307 N.W.2d 881, 899 (1981), the Wisconsin Supreme Court held that Wisconsin courts should decline to exercise jurisdiction over sterilization petitions until the state legislature passes legislation condoning sterilization. Under the standards applied in *Moe*, the weight to be given each of the relevant factors varies according to the facts of the case. *Moe*, 385 Mass. at 569 n.10, 307 N.E.2d at 722 n.10. In Wyatt v. Anderholt, 368 F. Supp. 1383, 1384 (1973), the court did not mention the likelihood of sexual activity, although it did require a showing that no temporary birth control method would adequately meet the respondent's needs. In *In re* A.W., 637 P.2d 366, 375 (Colo. 1981), there was also no requirement concerning sexual activity, but petitioner was required to show that sterilization was "clearly necessary . . . to preserve the life or physical or mental health" of the respondent. Only one of the cases cited applied a requirement of proof that sexual activity is likely such as that applied in *Truesdell*. *See In re* Guardianship of Hayes, 93 Wash. 228, 608 P.2d 635 (1980).

116. *See infra* text accompanying notes 131-34.

117. *See supra* notes 32-33 and accompanying text.

supreme court avoided evaluating the analysis the court of appeals employed in reaching that finding.[118] Arguably, the fact that the court accepted the court of appeals' finding that sterilization was not in Truesdell's best interests implies approval of the court of appeals' analysis. The description of best interests analysis that the court provided, however, contrasts sharply with the court of appeals' treatment of Truesdell's interests. The court specifically stated that the court of appeals' standards were not an exclusive list and directed future courts to look for guidance to the more comprehensive analyses applied by courts in other jurisdictions.[119]

Although the supreme court's opinion does provide some guidance on the nature of the best interests analysis to be used by courts reviewing sterilization petitions, it provides little help to a court faced with the problem of determining what to do when the result of the best interests analysis conflicts with the result mandated by the statutory standards. As a result, a court faced with that situation will be caught in a dilemma; forced to ignore either the plain language of the statute or a standard that the North Carolina Supreme Court found to be constitutionally required.

The *Truesdell* court provided some insight into the reason it chose not to address this contingency when it stated that it was "persuaded and influenced by the standards promulgated by the states in other jurisdictions,"[120] but noted that "these courts were not required to judicially interpret a statute as is this Court."[121] The courts whose standards persuaded the *Truesdell* court generally applied best interests analyses that did not include any bright-line test regarding sexual activity.[122] Several of the courts specifically forbade any consideration of the state's interests.[123] The North Carolina Supreme Court, however, upheld the constitutionality of statutory standards based entirely on the state's interests in *Moore*[124] and interpreted those standards in *Truesdell* to require proof that

118. If the supreme court had reached the issue whether sterilization was in Truesdell's best interests, it would have been faced with the issue whether it was proper for the court of appeals to create and apply the rule that sterilization can be in a respondent's best interests only when the respondent is likely to be sexually active, in spite of the trial court's finding that sterilization was in Truesdell's best interest. If the supreme court had accepted the trial court's finding, it would have been squarely confronted with the conflict between the statutory and best interests standards.

119. *Truesdell*, 313 N.C. at 430-31, 329 S.E.2d at 635-36. The court's statement that "[t]he trial judge, in his discretion, may consider certain other factors that he considers to be reflective of the best interests of the respondent in any particular circumstance," *id.* at 430-31, 329 S.E.2d at 636, suggests a careful weighing of all the facts and circumstances of each particular case. This kind of analysis is markedly different from the court of appeals' strict application of a generalized rule defining the best interests of all retarded people.

Another significant indicator of the contrast between the supreme court's and court of appeals' treatment of a best interests analysis is that the courts whose standards the supreme court directed trial judges to rely upon, *see supra* note 27, generally applied a comprehensive best interests analysis in which likelihood of sexual activity was only one among many factors considered. *See supra* note 115.

120. *Truesdell*, 313 N.C. at 430, 329 S.E.2d at 635.

121. *Id.* at 429-30, 329 S.E.2d at 635.

122. *See supra* note 115.

123. *See, e.g., In re* A.W., 637 P.2d 366, 375-76 (Colo. 1981); Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 704-05, 447 A.2d 1244, 1254 (1982), *cert. denied*, 459 U.S. 1147 (1983); *In re* Grady, 85 N.J. 235, 262 n.8, 426 A.2d 467, 481 n.8 (1981).

124. *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

sexual activity be likely. As a result, North Carolina's courts must apply the statutory standards as modified by the requirement concerning sexual activity. At the same time, they are constitutionally required to apply some best interests standards. Producing a coherent integration of these incompatible sets of standards is a Herculean task. It is not surprising that the court declined to make the attempt when it was not forced to do so.

The *Truesdell* court was able to avoid addressing the potential for conflict between the standards only because it accepted the court of appeals' finding that in such a situation, application of either of the two standards would produce identical results. Eventually, a case will arise in which the conflict is directly at issue. The court's lament that, unlike other courts, it is required to interpret a statute[125] could be interpreted as a plea to the general assembly to free it from the burden that North Carolina's sterilization statute represents.

The time is ripe for the general assembly to address the problems raised by *Truesdell* by redrafting North Carolina's sterilization statute. The current statutory scheme, based on state interests, should be abandoned and replaced with a requirement that the reviewing court engage in a comprehensive analysis of the facts and circumstances of each case and base its decision solely upon the best interests of the individual respondent.[126]

The existing statute, as modified by the requirement of proof that sexual activity be likely, is plagued by serious deficiencies. Proving a clear and present danger of sexual activity is likely to be difficult. The requirement that the petitioner do so may mean that sterilization will rarely be performed in time to accomplish its purpose. Serious questions exist as to what type of evidence will be sufficient to meet this new requirement, and there is a significant danger that the stringency of the standard, rather than protecting the rights of retarded persons, will only subject them to increased invasions of privacy. Furthermore, because the current statute requires that rights yield to state interests, the North Carolina Supreme Court was constitutionally required to graft best interests standards onto the statute. The result is a mixture of incompatible standards that will be extremely difficult for trial courts to apply.

Ironically, although the purpose of the statute is to further state interests, it is not clear that it is effective in doing so. In *Moore* the interests purported to be furthered by the statute were identified as the state's interests in protecting potential children of mentally retarded parents and in preventing the procreation of children who may become a burden on the state.[127] The notion that potential children are protected when the state ensures that they will not be born is troublesome at best.[128] The new standards imposed by *Truesdell* make the peti-

125. *Truesdell*, 313 N.C. at 429-30, 329 S.E.2d at 635.

126. In such an analysis the likelihood of sexual activity as well as the other factors mentioned in *Truesdell*, *see supra* note 25, would be among the factors the court "considers to be reflective of the best interests of the respondent." *Truesdell*, 313 N.C. at 430-31, 329 S.E.2d at 636. The weight to be given each factor should vary according to the circumstances of each case. *See In re* Moe, 385 Mass. 555, 569 n.10, 432 N.E.2d 712, 722 n.10 (1982).

127. *See supra* note 81 and accompanying text.

128. The belief that sterilization is necessary to protect the unborn child is largely based on

tioner's burden difficult to meet.[129] The actual savings to the state that might result from sterilizations that would be performed under the current statute, but would be prohibited by a statutory test containing only best interests standards is not likely to be significant.[130]

The most important advantage of a best interests standard is that it is the only type of standard that truly protects the rights of the mentally retarded. The United States Supreme Court has described the procreative right as follows: "If the right of privacy means anything, it is the right of the *individual* . . . to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[131] The rights of mentally retarded persons extend beyond the right to be free from being subjected to sterilization when it is not necessitated by a compelling state interest. They have a right to make their own independent decision whether to procreate or refrain from procreating based entirely upon their own interests.[132] This right has been held to include a right to choose to be sterilized.[133] The right to procreative autonomy is too important to be forfeited just because the individual is incompetent to make that choice.[134] "To preserve that right and the benefits that a meaningful decision would bring to [a retarded person's] life, it may be necessary to assert it on her behalf."[135] If a court is to step into the shoes of a men-

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eugenic theories—theories which, except for cases involving a few specific diseases, are scientifically discredited. *See supra* notes 55-57 and accompanying text. Empirical evidence reveals that 90% of mentally retarded persons are only mildly retarded, Murdock, *supra* note 55, at 928, and that many are capable of providing the affection, care, and intellectual stimulation necessary for a reasonable environment for children. S. VITELLO & R. SOSKIN, MENTAL RETARDATION: ITS SOCIAL AND LEGAL CONTEXT 93-94 (1985); Note, *Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy*, 31 STAN. L. REV. 785, 789-90 (1979). Furthermore, among those individuals who have deficiencies in parenting ability, many can be adequate parents if they receive assistance from social agencies. *In re* Hayes, 93 Wash. 2d 228, 236-37, 608 P.2d 635, 641 (1980). It is questionable whether singling retarded persons out for sterilization, while permitting other groups likely to be inadequate parents, such as alcoholics or people previously convicted of child abuse, to have children qualifies as a rational method of protecting future children. The argument that unborn children of mentally retarded persons have an interest in having their potential parents sterilized necessarily implies that the family environments to which they would be exposed would be so bad that they have an interest in not being born. In light of the reverence with which society regards human life, such an argument is highly controversial at best. *See* Note, Azzolino v. Dingfelder: *North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims*, 63 N.C.L. REV. 1329 (1984); Note, *supra* note 81, at 778-79 & n.33.

129. *See supra* text accompanying notes 97-104.

130. The savings to the state resulting from the statute is measured by the cost of supporting those children who would not be born because of sterilizations that would be conducted under the present statute, but who actually would be born and become wards of the state if best interests standards were enacted. It is unlikely that the number of potential wards of the state would be significantly increased under best interests standards, particularly in light of the stringent standards imposed by *Truesdell*. *See supra* text accompanying notes 97-104. Furthermore, in view of the size of North Carolina's welfare burden, whatever difference in cost might result is unlikely to be significant.

131. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Massachusetts statute prohibiting dissemination of contraceptives held unconstitutional).

132. *In re* A.W., 637 P.2d 366, 369 (Colo. 1981); *In re* Moe, 385 Mass. 555, 565-66, 432 N.E.2d 712, 720 (1982); *In re* Grady, 85 N.J. 235, 263 n.9, 426 A.2d 467, 481 n.9 (1981).

133. Ruby v. Massey, 452 F. Supp. 361, 368 (D. Conn. 1978).

134. *In re* A.W., 637 P.2d 366, 369 (Colo. 1981); *In re* Moe, 385 Mass. 555, 565, 432 N.E.2d 712, 720 (1982); *In re* Grady, 85 N.J. 235, 250, 426 A.2d 467, 474 (1981).

135. *In re* Grady, 85 N.J. 235, 250-51, 426 A.2d 467, 475 (1981).

tally retarded person and exercise that person's right to make choices about procreation on his or her behalf, it must do so solely on the basis of that individual's best interests. In making such decisions, a court should not rely on general rules about the best interests of mentally retarded people as a class.

The determination of a mentally retarded person's best interests must always rest on a complex mix of circumstances. It is unrealistic to expect that any single bright-line test will adequately distinguish those individuals whose interests would be served by sterilization. The application of a strict requirement of sexual activity without consideration of the particular circumstances of each individual respondent may prevent sterilization when it would be in the individual's best interests and allow sterilization when it would not.[136]

Another benefit of a best interests analysis is that it would provide North Carolina courts with a simpler, more logically consistent standard by which to review sterilization petitions than that which exists in the wake of *Truesdell*. The best interests analysis is a familiar tool that is routinely applied in adoption and child custody cases[137] and in other instances in which courts must make important decisions on behalf of incompetent individuals.[138] Courts, which already employ a best interests analysis in making decisions in these sensitive areas, will be better able to apply a similar analysis in reviewing sterilization petitions than to interpret the conflicting sets of standards which now exist. Each petition will present its own unique set of considerations. The task of weighing and balancing these considerations as they vary from case to case is particularly well suited to the equitable powers of a court.

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> We do not pretend that the choice of her parents, her guardian *ad litem*, or a court is her own choice. But it is a genuine one nevertheless—one designed to further the same interests she might pursue had she the ability to decide herself. We believe that having the choice made in her behalf produces a more just and compassionate result than leaving . . . [the respondent] . . . with no way of exercising a constitutional right.

*Id.* at 261, 426 A.2d at 481.

Other courts view such a choice in a wholly different light. The Wisconsin Supreme Court rejected the *Grady* approach, stating: "It is not a personal choice, and no amount of legal legerdemain can make it so." *In re* Eberhardy, 102 Wis. 2d 539, 566, 307 N.W.2d 881, 893 (1981). The *Eberhardy* court argued that such a choice may reflect the best interests of parents or social workers rather than of the respondent. *Id.* at 573, 307 N.W.2d at 897. The court provided no solution of its own but merely directed Wisconsin courts to refuse jurisdiction over sterilization petitions. *Id.* at 578-79, 307 N.W.2d at 899.

136. Several of the courts upon which the supreme court relied thought that other factors might outweigh the likelihood of sexual activity because they included that factor as only one among many in their analyses. *See supra* note 115. There are reasons why sterilization might be in a retarded person's best interests regardless of whether he or she is likely to engage in sexual activity. *See* Note, *Procreation: A Choice for the Mentally Retarded*, 23 WASHBURN L.J. 359, 365-66 & nn.70-74 (1984) (citing factual examples from cases); Note, *Ruby v. Massey: Sterilization of the Mentally Retarded*, 9 CAP. U.L. REV. 191, 194 (1979). There is little reason to believe that just because the statutory standards are met, sterilization is in the best interests of the respondent. The statutory standards were not designed to further the interests of the respondent. *See supra* note 81. The very reason that best interests standards are constitutionally required is that the statutory standards do not adequately protect the respondent's interests. Otherwise, a best interests analysis would be superfluous.

137. *E.g.*, Tucker v. Tucker, 288 N.C. 81, 216 S.E.2d 1 (1975) (best interests of the child is the paramount consideration in custody disputes); *accord* Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, *disc. rev. denied*, 309 N.C. 460, 307 S.E.2d 362 (1983).

138. *E.g.*, *In re* Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982) (best interests analysis applied in commitment hearing); Wells v. Dickens, 274 N.C. 203, 162 S.E.2d 552 (1968) (court reviewing guardian's decision not to take against will must determine best interests of the incompetent).

Under the existing statute, mentally retarded people are forced to surrender the free exercise of a fundamental right, the right to procreation. Their sacrifice brings the state of North Carolina only very limited benefits. In attempting to balance these competing interests, North Carolina's courts have been forced to recognize an unworkable combination of contradictory requirements that does not further the interests of either the state or the mentally retarded citizen. There can be no guarantee that a best interests analysis will reach the result that is truly in the best interests of the respondent, but at least such a procedure would represent society's best attempt to serve those interests. Focusing on the respondent's interests instead of the state's interests—acting on behalf of the mentally retarded person instead of acting against the mentally retarded person—would give North Carolina's sterilization procedures a realistic possibility of achieving some beneficial results and thereby give it a legitimacy it now lacks.

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