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FOREWORD TO SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1983

HARRY C. MARTIN†

Several years ago the North Carolina Law Review began publishing an annual "Survey of Developments in North Carolina Law." The work typically included discussions of significant decisions of the Supreme Court of North Carolina, decisions of the Court of Appeals of North Carolina, decisions of the federal courts construing North Carolina law, and changes in the statutory law. The present Survey reviews the developments for the 1983 calendar year.

When requested to prepare a Foreword for this work, I recalled that for many years the Harvard Law Review had published a similar review of the decisions of the Supreme Court of the United States. I thought perhaps I could find some instruction from the Foreword in that law review. Upon discovering that the foreword ran on for sixty-four pages, I abandoned that research source. (I hasten to add that I am a proud graduate of the Harvard Law School, 1948.) Believing that most, if not all, opinions (including mine) are too long, I determined to apply that rule to this present endeavor.

The Survey issues of the North Carolina Law Review have been of great benefit to the bench and bar alike, and I assume that they are of even greater assistance to current law students. As a tool to refresh the reader about changes in the law and as a research source when looking for that recent case in point, the Survey is invaluable. Since the Review commenced this work, the North Carolina Bar Association has presented a summary of recent important appellate decisions at its annual meetings. The Review's Survey was at least one, if not the sole, impetus for the Bar program.

The current Survey embodies some changes from the format of previous issues. The Survey no longer attempts to chronicle *all* the developments for the year. Others offer that service in a format that better ensures timely dissemination. Instead, the Survey attempts a selected, in-depth discussion of the most significant developments in North Carolina law. This approach should provide a more detailed analysis of those developments that warrant such treatment and will supplement the descriptive material and commentary that is available soon after the decisions are handed down. The Review made the changes to better serve its readers and welcomes any comments on whether the new format accomplishes this goal.

Along these lines, I would like to suggest an addition to the Survey. A statistical analysis of the work of the appellate courts could prove most useful

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to the bar and public in understanding the work of the courts. Perhaps some statistical review, similar to that provided in the Harvard Law Review, could be appended to the annual survey.

The continued development of the law is essential in a changing, dynamic society. Whether the law evolves as a result of social change, or vice versa, is debatable. Traditionally, the courts react to established fact situations; they are not self-starters. The legislature, on the other hand, often presents society with new legal standards and concepts. These in turn create new fact situations to which the courts eventually will be required to interpret and apply the law. The work of the courts does not involve pure legal problems, but, as Judge J. Braxton Craven, Jr. often said, it involves "people problems," some of which can be solved by legal methods. As the law is made for man, and not man for the law, it should speak with great clarity.

It is often said that the law is not a stagnant pool but a moving stream, sometimes slow and steady, sometimes rapid and turbulent, oftentimes clean and pure, oftentimes muddy and obscure. We are grateful for the annual chart of these new waters provided us by the North Carolina Law Review.

The Involuntary Dismissal Sanction for Rule 8(a)(2) Violations in Malpractice Complaints—A Reversion to Code Pleadings?

In *Harris v. Maready*¹ the North Carolina Court of Appeals effectively established a mandatory rule that dismissal with prejudice under rule 41(b)² is the proper sanction for violation of rule 8(a)(2)'s³ restriction on *ad damnum* clauses in professional malpractice actions. The *Harris* court reached this result by extending the court of appeals' holding in *Jones v. Boyce*.⁴ In *Jones* the court had upheld the dismissal of a legal malpractice suit even though plaintiff was a prison inmate appearing *pro se* who had filed a timely motion to amend his complaint⁵ under rule 15(a).⁶ *Harris* solidified this reversion to code-like pleading and created, in effect, a per se rule regarding sanctions for such 8(a)(2) errors. The court of appeals held that the trial court's refusal to dismiss plaintiff's legal malpractice action with prejudice was an abuse of discretion.⁷ The court therefore reversed the trial court's ruling and dismissed the suit with

1. 64 N.C. App. 1, 306 S.E.2d 799 (1983) (notice of appeal filed Oct. 21, 1983; case argued to the North Carolina Supreme Court Feb. 13, 1984). After this note was sent to press, the North Carolina Supreme Court, on August 28, 1984, reversed the court of appeals' holding in *Harris v. Maready*. The court held that a case in which the complaint violates rule 8(a)(2) should be dismissed only "when less drastic sanctions will not suffice." The supreme court identified "lesser sanctions" as including fines, reprimands, and the striking of the offending portions of the complaint.

2. N.C. R. Civ. P. 41(b) states:

(b) *Involuntary dismissal; effect thereof*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits.

3. N.C. R. Civ. P. 8(a)(2) states:

(a) *Claims for relief*—a pleading which sets forth a claim for relief . . . shall contain

(2) A demand for judgment for the relief to which he deems himself entitled Provided, however, in all professional malpractice actions . . . , wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000)

4. 60 N.C. App. 585, 299 S.E.2d 298 (1983).

5. See *id.* at 586, 299 S.E.2d at 300; see Record at 10, *Jones*. *Jones* filed his motion to amend Oct. 1, 1981, 21 days after Boyce filed his 41(b) motion to dismiss. See Record at 6-7, *Jones*.

6. N.C. R. Civ. P. 15(a) states:

(a) *Amendments*—A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

7. *Harris*, 64 N.C. App. at 16, 306 S.E.2d at 808. The *Harris* court upheld the lower court's dismissal for plaintiff's failure to comply with proper service of process. The complaint served "was not addressed to the partnership but was issued to 'Petree, Stockton, Robinson, Vaughn, Glaze & Maready, P.A.'" *Id.* at 8, 306 S.E.2d at 803. The court of appeals held that process therefore was served on a nonexistent corporation, *id.*, and defendant would be prejudiced if the court allowed plaintiff to amend her complaint to drop the "P.A." from her complaint so as to bring in properly the partnership as a defendant after the statute of limitations had run. *Id.* at 12,

prejudice.⁸ Thus, *Jones* and *Harris* create a Draconian pleading trap for the unwary, unversed and inept.

Plaintiff in *Jones* was tried and convicted of the first degree murder⁹ of his brother and subsequently filed a legal malpractice suit against his trial attorney.¹⁰ Appearing *pro se*, Jones included a prayer for damages totalling \$3,000,000 in his complaint.¹¹ After defendant filed an answer denying the allegations, plaintiff immediately sought leave of court under rule 15(a)¹² to amend his *ad damnum* clause. The trial judge denied the motion to amend and granted defendant's motion to dismiss with prejudice.¹³ The court of appeals affirmed.¹⁴

Harris involved a legal malpractice claim that arose out of an alleged conflict of interest.¹⁵ The complaint demanded compensatory damages of ten

306 S.E.2d at 806. Judge Arnold dissented as to this finding. *Id.* at 17, 306 S.E.2d at 808 (Arnold, J., dissenting).

Defendant Maready also was served incorrectly with process; he received a summons intended for plaintiff's former husband. "Delayed service of complaint on Maready was by certified mail, delivery to addressee only, signed for by 'Bonnie Lawson, authorized agent.'" *Id.* at 12-13, 306 S.E.2d at 806. No summons directed to defendant Maready ever was served upon him. *Id.* The court of appeals upheld the trial court's ruling that, as against Maready, the suit should be dismissed for invalid service of process. *Id.* at 14, 306 S.E.2d at 807.

8. *Id.* at 16, 306 S.E.2d at 808. Judge Webb dissented as to the holding of abuse of discretion. *Id.* (Webb, J., concurring in part and dissenting in part). The court of appeals reinforced its holding in *Harris* in a third 1983 decision, *Schell v. Coleman*, 65 N.C. App. 91, 308 S.E.2d 662 (1983). *Schell* involved an action for legal malpractice in which plaintiff's attorney sought nearly \$2,000,000 in damages. This specific prayer for relief violated rule 8(a)(2). *Id.* at 91, 308 S.E.2d at 663. The court of appeals reversed, specifically relying on *Jones* and *Harris*, holding that it was an abuse of discretion to order plaintiff to correct his complaint rather than to dismiss the action with prejudice. *Id.* at 94, 308 S.E.2d at 664. The court stressed that although the trial court's dismissal was discretionary, the *Schell* case illustrated the type of case that "justifies the extreme sanction of a Rule 41(b) dismissal." *Id.* See *infra* note 44. Judge Hill authored the decision and was joined by Judges Becton and Johnson.

9. Record at 2, 4, *Jones*.

10. *Id.* at 3. Jones alleged that he was placed in a prison mental health ward and kept on medication from the date of his incarceration in June 1976 until his discharge from the ward in October 1978. *Id.* at 2-3. Jones further alleged that defendant knew of this mental treatment and medication but nevertheless advised him to withdraw his appeal of the murder conviction in September 1976 and to sign a consent judgment settling a wrongful death suit instituted by the decedent's survivors. Jones alleged that defendant's advice to settle the wrongful death action was "not in plaintiff's best interest but rather . . . for his own personal gain." *Id.* Jones allegedly was under medication and psychiatric care at the time of the settlement. *Id.* at 3.

Defendant denied knowledge of Jones' alleged medication and impaired abilities. He maintained that Jones voluntarily dropped his appeal "against advice of counsel." Furthermore, defendant alleged that Jones asked him to seek a settlement of the wrongful death action. Jones allegedly wanted defendant to pay off Jones' creditors and his legal fees, and establish a trust fund for plaintiff's son with the balance of his estate. *Id.* at 4.

11. *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 300.

12. The rule 41(b) motion to dismiss was filed Sept. 10, 1981. Record at 6-7, and Jones' motion to amend his complaint was filed Oct. 1, 1981. *Id.* at 10.

13. *Id.* at 13-14.

14. The court of appeals' decision was written by Judge Whichard. Judges Arnold and Hill joined him.

15. *Harris*, 64 N.C. App. at 2-3, 306 S.E.2d at 801. The law firm of Petree, Stockton, Robinson, Vaughn, Glaze & Maready, primarily through partner W.F. Maready, represented plaintiff, Shirley Harris, in domestic matters against her husband Roger Harris. *Id.* William H. Petree, a partner in the firm, and Roger Harris were involved in independent business transactions and Shirley Harris alleged that this created a conflict of interest. *Id.* at 3, 306 S.E.2d at 801. She sued

million dollars and punitive damages of five million dollars.¹⁶ Unlike the trial court in *Jones*, however, the trial court in *Harris* denied defendant's motion to dismiss¹⁷ and allowed plaintiff to amend her complaint.¹⁸ In an opinion written by Judge Braswell,¹⁹ the court of appeals reversed and held that "the trial judge abused his discretion by failing to allow the defendants' motion to dismiss for a violation of rule 8(a)(2)."²⁰

Harris' factual setting, although substantially similar to that in *Jones*, differed in one significant respect: the flawed complaint was filed by a licensed attorney rather than an inmate appearing *pro se*. Furthermore, by holding that it was an abuse of discretion to deny the motion to dismiss, the *Harris* court established that involuntary dismissal for violations of rule 8(a)(2) is mandatory rather than discretionary.²¹ Because the court in *Harris* specifically adopted the reasoning in *Jones* and held that it was dispositive of the issue of sanctions for rule 8(a)(2) *ad damnum* violations,²² an analysis of *Jones* is

the law firm and joined Maready and Petree as individual codefendants. *Id.* at 2, 306 S.E.2d at 807.

16. *Id.* at 15, 306 S.E.2d at 807.

17. *Id.* at 16, 306 S.E.2d at 808.

18. *Id.* at 15, 306 S.E.2d at 808. Interestingly, the attempt to amend the complaint also was mishandled. Although the offending parts of the prayer for relief were corrected, the two adjacent paragraphs labeled "Damages" were not altered. Thus, the amended complaint still contained a request for \$5,000,000 in both general and punitive damages in apparent contravention of rule 8(a)(2). *Id.* at 15, 306 S.E.2d at 807. The court of appeals decided not to address this alleged pleading error or assign it any weight. Instead, the court simply held that the trial judge abused his discretion by refusing to grant defendants' motions to dismiss. *See id.* at 16, 306 S.E.2d at 808. *Harris'* attorney contended that the 8(a)(2) limitation did not apply to these paragraphs. First, the action was not "purely and simply a 'professional malpractice action.'" Appellant's North Carolina Supreme Court Brief at 26. Second, plaintiff alleged that the 8(a)(2) limitation related exclusively to the *ad damnum* clause in the complaint and the offending paragraphs were not in that clause, which had been corrected. *Id.* at 26-27.

19. Judge Webb dissented concerning the holding of abuse of discretion, *see supra* note 7. Judge Arnold concurred on that issue and dissented regarding the court's dismissal for failure of service of process. *Harris*, 64 N.C. App. at 17, 306 S.E.2d at 808-09.

20. *Harris*, 64 N.C. App. at 16, 306 S.E.2d at 808.

21. *See, e.g., id.* While the court limited its decision with the phrase "on the facts before us," the underlying message in *Harris* is clear: violations of the professional malpractice section of rule 8(a)(2) will be treated harshly. It is significant to note that there is no indication in *Harris* or *Jones* that the mistakes were made in bad faith. If the court of appeals imposes a dismissal of a suit in its entirety "on the facts" in *Harris* and *Jones*, it is difficult to postulate a fact pattern to which the sanction would not apply. Thus, the practical effect of *Harris* and *Jones* is a rule mandating involuntary dismissal. *See infra* note 45-46 and accompanying text.

22. *Harris*, 64 N.C. App. at 15, 306 S.E.2d at 808. The court noted that *Jones* was the first appellate case interpreting the rule 8(a)(2) damage restrictions and sanctions for violation thereof, although the court of appeals had foregone one other opportunity to rule on sanctions for violations of rule 8(a)(2) in *Thigpen v. Piver*, 37 N.C. App. 382, 246 S.E.2d 67, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978). In *Thigpen* the court dismissed the case under rule 41(d), which provides for dismissal with prejudice when a plaintiff takes a voluntary dismissal in a prior action and then institutes a new action on the same claim against the same defendant without paying the costs of the original action. *See* N.C. R. Civ. P. 41(d). Thus, the *Thigpen* court did not reach the 8(a)(2) issue. *Thigpen*, 37 N.C. App. at 388, 246 S.E.2d at 70.

Thigpen involved a medical malpractice suit in which plaintiff sought \$500,000 in damages. The trial judge applied a subjective good faith test to deny defendant's motion for an involuntary dismissal. The court concluded that "there was no intention on the part of either the plaintiff or his attorney to violate the provisions of Rule 8." Record at 30, *Thigpen*. Judge Small also declared as a matter of law that "[r]ule 8 does not provide for a mandatory dismissal by reason of the failure to comply with its provisions." *Id.*

imperative.

In *Jones* the court noted that, according to the *Report of the North Carolina Professional Liability Insurance Commission*,²³ the 1976 amendment to rule 8(a)(2), limiting damage clauses in malpractice actions, was the General Assembly's "response to a perceived crisis in the area of professional liability insurance."²⁴ The court also observed that the legislative purpose of the damage clause restriction, as defined by the *Insurance Report*, was to "avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded."²⁵ Interestingly, this report referred only to *medical* malpractice suits; the reputations of attorneys and other professionals were not mentioned.²⁶ The *Jones* court reasoned that, although rule 8(a)(2) provides no sanctions for its violation, "the General

23. REPORT OF THE NORTH CAROLINA PROFESSIONAL LIABILITY INSURANCE COMMISSION (March 12, 1976) (available in University of North Carolina at Chapel Hill Law Library) [hereinafter cited as *INSURANCE REPORT*]. The professional malpractice amendment to rule 8(a)(2) was enacted two months after this report, during the 1975 General Assembly's second session. Act of May 12, 1976, ch. 977, 1976 N.C. Sess. Laws 3. The General Assembly chose to limit the damage clause to a jurisdictional amount (\$10,000) rather than proscribe all mention of damage amount. See N.C. R. Crv. P. 8(a)(2).

24. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300 (dictum). Senator Tom Suddarth filed a minority report that challenged the existence of a medical malpractice crisis in North Carolina and alleged that the actual insurance problem existed in other states as a result of high malpractice awards in those states. *INSURANCE REPORT*, *supra* note 23, pt. II, at 4-5 (Minority Report). Because there is no recorded legislative history, discerning the legislators' intentions is problematic.

25. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300 (quoting *INSURANCE REPORT*, *supra* note 23, at 33), quoted in *Harris*, 64 N.C. App. at 16, 306 S.E.2d at 808; *Schell v. Coleman*, 65 N.C. App. 91, 93, 308 S.E.2d 662, 664 (1983).

Newspaper articles detailing *Jones*' suit, including the amount of damages sought, appeared in both of Raleigh's major newspapers two days after *Jones* filed his suit. See *Raleigh News and Observer*, Aug. 15, 1981, at 23, col. 1; *Raleigh Times*, Aug. 15, 1981, at 5-B, col. 6. Much lengthier articles detailing the legal malpractice claim in *Harris*, including the damages sought, appeared in the Winston-Salem papers after Mrs. *Harris* filed her suit. See *Winston-Salem Journal*, Feb. 4, 1982, at 12, col. 1; *Winston-Salem Sentinel*, Feb. 3, 1982, at 23, col. 5. Copies of the Winston-Salem articles are included in the *Harris* record. Record at 29-30, *Harris*.

26. See, e.g., *INSURANCE REPORT*, *supra* note 23, at 6 ("[T]he malpractice dilemma . . . began to surface in North Carolina in 1974 . . . St. Paul was the principal malpractice insurer in North Carolina, underwriting policies for over 90% of the physicians and surgeons practicing in the state as well as 75 hospitals."); *id.* at 13 ("the crisis created by the lack of availability of medical malpractice insurance has abated"); *id.* at 25 ("[P]ortions of the following analysis have been reprinted from 'A Legislator's Guide to the Medical Malpractice Issue.'").

No mention is made in the report of anything other than the needs of *medical* malpractice insurers. Furthermore, the statutes mentioned in the report, WIS. STAT. ANN. § 655.009(1) (West 1980) and TENN. CODE ANN. § 29-26-117 (1980), are limited to medical malpractice claims. The Wisconsin medical malpractice statute is cited in the *Jones* opinion. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300. Therefore, if the General Assembly enacted the rule 8(a)(2) *ad damnum* restriction on the basis of either the *INSURANCE REPORT* or the Wisconsin Statute, or both, then it is arguable that the rule was intended to apply only to medical malpractice, but was artfully drafted to include all professional malpractice.

In her brief to the North Carolina Supreme Court, plaintiff in *Harris* also has raised the argument that singling out of professionals as a group is unconstitutional. Appellant's North Carolina Supreme Court Brief at 30-31, *Harris*. Indiana, however, has a statute similar to the North Carolina statute. It excludes mention of any dollar amounts in medical malpractice claims, IND. CODE ANN. § 16-9.5-1-6 (Burns 1983), and the Indiana Supreme Court has held that this statute neither violates the due process and equal protection clauses of the United States or Indiana constitutions, nor the free speech and writing provisions of the Indiana Constitution. *Johnson v. St. Vincent, Inc.*, 404 N.E.2d 585, 604-05 (Ind. 1980).

Assembly . . . must have intended application of the 41(b) power of dismissal" because "absent application of the Rule 41(b) [sanction] . . . , litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment."²⁷

The United States Supreme Court expressly rejected similar reasoning in *Surowitz v. Hilton Hotels Corp.*²⁸ In *Surowitz* the United States Court of Appeals for the Seventh Circuit had affirmed a rule 41(b) involuntary dismissal on the grounds that failure to impose sanctions for violations of Federal Rule of Civil Procedure (FRCP) 23 (now rule 23.1) would destroy the effect of the rule.²⁹ The Supreme Court rejected that rationale and articulated the policy consideration underlying modern pleading rules.³⁰

The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. *These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court.* If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil

27. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300. Despite this assertion, a New York court rejected involuntary dismissal as too drastic in an analogous situation. In *Pizzigrilli v. Van Kessel*, 100 Misc. 2d 1062, 420 N.Y.S.2d 540 (1979), plaintiffs included demands for \$1,500,000 and \$1,000,000 in a medical malpractice suit. *Id.* at 1066-67, 420 N.Y.S.2d at 543-44. Defendants moved to dismiss the counts in question pursuant to a New York statute that prohibits any statement of money damages in medical malpractice cases. *Id.* at 1066, 420 N.Y.S.2d at 542. See N.Y. CIV. PRAC. LAW § 3017(c) (McKinney Supp. 1983-84). The court rejected defendants' motion:

Defendant hospital contends that the third and fourth causes of action (in connection with which specific sums are demanded as damages) should be dismissed because they violate the mandates of Section 3017(c). So drastic a remedy as this appears unauthorized by CPLR 3017(c). Motions for relief pursuant to CPLR 3017(c) . . . are designed to correct pleadings, rather than to dismiss them.

Pizzigrilli, 100 Misc. 2d at 1065, 420 N.Y.S.2d at 542. Rather than dismissing the action, the court ordered that the offending portions of the *ad damnum* clause be stricken and that plaintiffs serve an amended pleading. *Id.* at 1067, 420 N.Y.S.2d at 544.

28. 383 U.S. 363 (1966). *Surowitz* involved a shareholder derivative suit brought under FED. R. CIV. P. 23 (current version at FED. R. CIV. P. 23.1), which required that the complaint be verified by oath. Mrs. Surowitz, a Polish immigrant with a limited educational background and virtually no English language skills verified the complaint as it was explained to her by her son-in-law, an attorney. Upon oral examination Mrs. Surowitz was unable to demonstrate any understanding of her complaint, and Judge Hoffman dismissed the suit with prejudice for her violation of rule 23. The court of appeals affirmed. *Surowitz v. Hilton Hotel Corp.*, 342 F.2d 596 (1965), *rev'd*, 383 U.S. 363 (1966).

29. *Surowitz*, 383 U.S. at 372-73 n.5. The United States Court of Appeals for the Seventh Circuit had held that for rule 23 to have any effect, a minimum requirement that plaintiff have a general understanding of the complaint was not unreasonable. The Supreme Court rejected the court of appeals' rationale. *Id.*

30. See *Foman v. Davis*, 371 U.S. 178, 181 (1962) ("It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal purpose of pleading is to facilitate a proper decision on the merits.").

rules, was written to further, not defeat the ends of justice.³¹

Rules 8 and 15 of the North Carolina Rules of Civil Procedure recognize the policy articulated in *Surowitz*.³² Rule 8 parallels FRCP 8 and requires only "notice pleading,"³³ rather than the complex machinations required under code pleadings. Rule 15 parallels FRCP 15;³⁴ it demands that leave to amend after a responsive pleading is filed be "freely given where justice so requires."³⁵ Nevertheless, North Carolina rule 41(b), which is identical to FRCP 41(b),³⁶ expressly authorizes a court to dismiss a suit with prejudice if the plaintiff fails to comply with the rules.³⁷ The issues presented in *Jones* and *Harris* were: How should these conflicting rules and policies be balanced, and at what juncture should the courts impose dismissal, the harshest penalty available for pleading errors?³⁸

The *Jones* and *Harris* courts both glossed over these fundamental questions, and instead focused on the narrower issue of whether the trial court abused its discretion in granting the rule 41(b) motion to dismiss.³⁹ The two opinions contained only one sentence on this policy question that arises whenever the trial court dismisses an action on a pleading technicality.⁴⁰ By emphasizing the discretionary nature of the court's power to allow or deny rule 41(b) motions to dismiss,⁴¹ the court of appeals avoided the question of the

31. *Surowitz*, 383 U.S. at 373 (emphasis added). Although the presumption favoring trial on the merits is not absolute, it is strong and not easily overcome. Coupling North Carolina rule 8(a)(2) with an automatic sanction of involuntary dismissal should be characterized as a "booby trap" under the *Surowitz* language.

32. See N.C. R. Civ. P. 8, 15.

33. N.C. R. Civ. P. 8(a)(1). This rule requires only a "short and plain statement" that puts all parties and the court on notice.

34. *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enters.*, 36 N.C. App. 673, 678, 245 S.E.2d 782, 785 (1978) ("[E]xcept for differences in time allotments . . . , Rule 15(a) of the North Carolina Rules is identical to its federal counterpart.").

35. N.C. R. Civ. P. 15(a).

36. See *Joyner v. Thomas*, 40 N.C. App. 63, 65, 251 S.E.2d 906, 908 (1976).

37. N.C. R. Civ. P. 41(b) ("[F]or failure of the plaintiff . . . to comply with these rules . . . a defendant may move for dismissal.").

38. See 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE'S FED. PRACTICE* ¶ 41.12 (1982). The fundamental issue—whether a plaintiff should lose his cause of action because of pleading errors—is identical in *Jones* and *Harris*. The two cases, however, differ in one crucial aspect. *Jones* involved a complaint filed by a *pro se* layperson, see *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300, while the improper complaint in *Harris* was filed by an attorney. See Record at 52, *Harris*.

39. See *Harris*, 64 N.C. App. at 16, 306 S.E.2d at 808; *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 299.

40. That sentence, which was located in *Jones*, was:

While leave of court 'shall be freely given when justice so requires,' G.S. 1A-1, Rule 15(a), and while justice might often so require where a layman appearing *pro se* inadvertently fails to conform to technical legal requirements, judicial discretion may properly be exercised to subordinate these concerns to readily discernible countervailing legislative intent.

Jones, 60 N.C. App. at 587, 299 S.E.2d at 300 (citations omitted). In a similar setting, the United States Supreme Court rejected the use of such reasoning to give force to a federal rule regarding pleading procedure. See *supra* notes 30-31 and accompanying text.

41. *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 300. See *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 445, 267 S.E.2d 511, 514 (1980). Defendant in *Mumford* alleged that plaintiff had failed to properly state a claim for relief. The court allowed plaintiff the opportunity to amend, which plaintiff declined, and the court then dismissed the case with prejudice.

intent and purpose of the rule 15(a) admonition to grant leave to amend when justice so requires. Because rule 41(b) provides the discretionary power to grant such dismissals,⁴² the court held that no abuse of discretion occurred in *Jones*.⁴³ In *Harris*, however, the court of appeals failed to explain why the trial court's refusal to dismiss was an abuse of discretion.⁴⁴

By choosing the harshest available sanction, the court of appeals ignored two alternative analyses, either of which would have resulted in a better rule of law. First, the court could have examined the cases in light of the clear North Carolina policy favoring freely granted amendments to cure defective pleadings. Second, even if the court felt a need to impose a sanction for violation of rule 8(a)(2), the court could have selected a less harsh penalty to ensure that parties who "inadvertently fail to conform to technical legal requirements"⁴⁵ do not lose potentially valid causes of action. Either of these alternatives would reflect more properly the underlying premise of the North Carolina Rules of Civil Procedure "that decisions be had on the merits and not avoided on the basis of mere technicalities."⁴⁶

The first, alternative analysis indicates that the court of appeals decisions in *Harris* and *Jones* run counter to the policy favoring liberal amendment of pleadings. Although North Carolina courts have stressed repeatedly that rule 15(a) is to be construed liberally,⁴⁷ the trial judge has discretion to permit or deny the offered amendments.⁴⁸ The trial judge's discretion, however, is not

42. *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 300. See *supra* note 37 and accompanying text.

43. *Jones*, 60 N.C. App. at 587-88, 299 S.E.2d at 300.

44. See *Harris*, 64 N.C. App. at 15-16, 306 S.E.2d at 807-08. If the power truly is discretionary, the court of appeals should have articulated the nature of the abuse of discretion that justified reversal. Subsequently, in *Schell v. Coleman*, 65 N.C. App. 91, 308 S.E.2d 662 (1983), the court ineffectively attempted to articulate its standard for abuse of discretion:

The court's holdings in these cases [*Jones* and *Harris*] do not dictate that a court must dismiss an action if there is a Rule 8(a)(2) violation. The Rule 41(b) power of dismissal is only a permissible sanction, not a mandatory one. Allowance of a motion to dismiss on the basis of a Rule 8 motion is discretionary with the court But as illustrated by *Harris*, an abuse of discretion may be found if the court denies a motion to dismiss when there was a flagrant violation of the rule.

Id. at 94, 308 S.E.2d at 664. The *Schell* trial court had rejected defendant's motion for dismissal, but ordered plaintiff to amend his prayer for relief, which plaintiff failed to do. *Id.* at 92, 308 S.E.2d at 663.

Although the court of appeals asserted that a 41(b) dismissal with prejudice for 8(a)(2) violations is a discretionary sanction in both its opportunities to review 8(a)(2) decisions, the court reversed the trial judge's discretionary ruling that the complaint be amended rather than dismissed. In addition, this standard of discretion apparently is related to whether the damage amounts improperly sought were reported in the news media; the court stressed that the print and radio media reported the specific damage claims in *Schell*. *Id.* at 94, 308 S.E.2d at 664-65. The damage requests in both *Jones* and *Harris* were published in local newspapers. See *supra* note 25.

45. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300.

46. *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972) (offered amendment sought to conform the pleadings to the evidence under rule 15(b)).

47. See *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977) (dictum); *Mangum v. Surles*, 281 N.C. 91, 98-99, 187 S.E.2d 697, 702 (1972); *Roberts v. William N. and Kate B. Reynolds Memorial Park*, 281 N.C. 48, 56, 187 S.E.2d 721, 725 (1972); *Watson v. Watson*, 49 N.C. App. 58, 60, 270 S.E.2d 542, 544 (1980).

48. See *Saintsing v. Taylor*, 57 N.C. App. 467, 471, 291 S.E.2d 880, 883, *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982); *Gladstein v. South Square Assocs.*, 39 N.C. App. 171, 177, 249 S.E.2d 827, 830 (1978), *disc. rev. denied*, 296 N.C. 736, 254 S.E.2d 178 (1979); *Willow Mountain*

unlimited. The supreme court has held that the trial court should allow the amendment "unless some material prejudice is demonstrated."⁴⁹ Although the trial judge's discretion is reversible only on a showing of abuse,⁵⁰ it has been held that denying a motion to amend without both a justification and a showing of prejudice to the defendant is an abuse of discretion.⁵¹

The only prejudice cited by the *Jones* and *Harris* courts was the possible harm to defendants' reputation if a large malpractice claim were reported in the news.⁵² No prejudice inheres in merely amending a flawed complaint to make it comply with 8(a)(2); the damage to defendants' reputation is not cured by denying leave to amend and dismissing the suit. The only other possible prejudice is indirect—higher malpractice rates.⁵³ This prejudice also arises from media publication of the suit and not the motion to amend. Since analysis of the *Jones* and *Harris* motions to amend reveals no undue prejudice to defendants, the court of appeals should have reversed the trial court in *Jones* for failure to grant leave to amend and should have affirmed the trial court's grant of leave to amend in *Harris*.

The second, alternative analysis indicates that the court of appeals erred when it chose involuntary dismissal rather than a less harsh penalty. Rule

Corp. v. Parker, 37 N.C. App. 718, 719-20, 247 S.E.2d 11, 12 ("extensive discretion"), *disc. rev. denied*, 295 N.C. 738, 248 S.E.2d 867 (1978); *Forbes v. Pillmon*, 18 N.C. App. 439, 440, 197 S.E.2d 226, 227 (1973) ("broad discretion"); *Helson's Premiums & Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 657, 177 S.E.2d 428, 431 (1970) ("broad discretion").

49. *Mangum v. Surles*, 281 N.C. 91, 98-99, 187 S.E.2d 697, 702 (1972). *See also* *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977) (dictum—"the burden is on the party objecting to the Amendments to show that he would be prejudiced thereby"); *Gladstein v. South Square Assocs.*, 39 N.C. App. 171, 177, 249 S.E.2d 827, 831 (1978) ("at the time of plaintiff's motion to amend to correct technical defects in her complaint, defendant would have suffered no discernible prejudice") *disc. rev. denied*, 296 N.C. 736, 254 S.E.2d 178 (1979); *vanDooren v. vanDooren*, 37 N.C. App. 333, 337, 246 S.E.2d 20, 23 ("the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party"), *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 258 (1978).

50. *See* *Rogers v. Rogers*, 39 N.C. App. 635, 636, 251 S.E.2d 663, 664 (1979).

51. *Ledford v. Ledford*, 49 N.C. App. 226, 271 S.E.2d 393 (1980). *Ledford*, relying on the Supreme Court's holding in *Foman v. Davis*, 371 U.S. 178, 182 (1962), held that "the trial judge abuses his discretion when he refuses to allow an amendment unless a justifying reason is shown The burden is on the objecting party to show that he would be prejudiced thereby." *Ledford*, 49 N.C. App. at 233, 271 S.E.2d at 398-99.

52. *Jones*, 60 N.C. App. at 587, 200 S.E.2d at 300; *Harris*, 64 N.C. App. at 16, 306 S.E.2d at 808 (quoting *Jones*). Neither the trial court nor the court of appeals in *Jones* mentioned any undue delay, bad faith, or other improper behavior by plaintiff; the court of appeals acknowledged *Jones*' "inadvertent" failure to satisfy the restrictions of rule 8(a)(2). *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300. Furthermore, no references to improper behavior are cited in *Harris*. The attorney who filed the improper complaint admitted that he did not know that rule 8(a)(2) applied to legal malpractice actions. Record at 52, *Harris*. *Cf. supra* note 26.

Rule 8(a)(2) implicitly assumes that a newspaper article which states that a professional has been sued for \$3,000,000 causes more damage to his reputation than an article which states that he has been sued for damages "in excess of \$10,000." At best, however, the relative magnitude of the loss of reputation is speculative. Arguably, the damage done to reputation, in whatever amount, results from the public report that the "professional" is being sued for malpractice and not the magnitude of the damages demanded. The court of appeals, however, accepted the INSURANCE REPORT's "harm to reputation" theory, *supra* note 25 and accompanying text, without debate. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300.

53. *See* Note, *Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint*, 53 DEN. L.J. 387, 403 (1976).

41(b) authorizes dismissal with prejudice in three circumstances. Failure to comply with the rules, which was the justification for dismissal in the *Jones* and *Harris* cases, is only one of the permissible grounds for dismissal. The other two grounds, failure to prosecute and failure to comply with orders of the court,⁵⁴ define more serious wrongdoing than the inadvertent pleading errors in *Harris* and *Jones*. Generally, the courts have been reluctant to dismiss cases falling in these two categories. The North Carolina and federal cases addressing sanctions for these offenses reflect the courts' efforts to apply less harsh penalties absent either evidence of *intentional* misconduct or such improper behavior that the court may infer *deliberate* abuse.⁵⁵

For example, in the leading North Carolina case involving dismissal for failure to prosecute, the court of appeals reversed a dismissal, holding that "[d]ismissal [under 41(b)] for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion."⁵⁶ The court derived its intent standard from the seminal United States Supreme Court case of *Link v. Wabash R.R.*⁵⁷ The *Link* Court signaled its unwillingness to enforce a dismissal with prejudice absent clear proof of deliberate dilatoriness.⁵⁸ Courts generally have imposed sanctions for failure to comply with a court order because such behavior implies a conscious or intentional failure to act.⁵⁹ Logically, violations of the rules of the court

54. N.C. R. Civ. P. 41(b). See *supra* note 2 for text of rule 41(b).

55. North Carolina's rule 41(b) is identical to FED. R. Civ. P. 41(b), see *supra* note 36 and accompanying text, and federal cases, therefore, are apposite. See, e.g., *Mangum v. Surles*, 281 N.C. 91, 97, 187 S.E.2d 697, 701 (1972) (federal decisions apposite because N.C. R. Civ. P. 15(b) virtually identical to FED. R. Civ. P. 15(b)); *Sutton v. Duke*, 277 N.C. 94, 98-99, 176 S.E.2d 161, 163 (1970) (federal decisions that rule 12(b) motion to dismiss is modern equivalent of common-law demurrer apposite because N.C. R. Civ. P. 12(b) is virtually a verbatim copy of federal rule 12(b)).

56. *Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973). Plaintiff in *Green* failed to take action for two years because he misunderstood the court calendaring procedure. The court emphasized the need for evidence "that the plaintiff had been deliberately proceeding in dilatory fashion." *Id.* (citing *Link v. Wabash R.R.*, 370 U.S. 626 (1962)). See *Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15 (citing *Green* with favor; "the record does not suggest that petitioner deliberately proceeded in dilatory fashion"), *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981); see also *Barbee v. Walton's Jewelers, Inc.*, 40 N.C. App. 760, 253 S.E.2d 596 (citing *Green* with favor; dismissal upheld when neither plaintiff nor attorney offered explanation for failure to appear when case called for trial), *disc. rev. denied*, 297 N.C. 608, 257 S.E.2d 435 (1979); *Thompson v. Peoples Bank & Trust Co.*, 24 N.C. App. 577, 211 S.E.2d 526 (1975) (same facts and holding as *Barbee*).

57. 370 U.S. 626 (1962).

58. The dismissal in *Link* was granted only after a six-year delay, two continuances, and a failure of counsel to appear at pretrial conference. *Id.* Although the Court adopted an agency theory to justify penalizing the client for her attorney's errors, the Court stressed that the attorney's actions were deliberate and that several opportunities to proceed were afforded plaintiff and counsel. *Id.* at 633-34, 636. See also *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir. 1982) (rule 41(b) dismissal by North Carolina federal district court for "sloppy" failure to retain local counsel held too drastic a sanction.); see *infra* notes 68-70 and accompanying text.

59. See *Hylar v. Reynolds Metal Co.*, 434 F.2d 1064 (5th Cir. 1970) (dismissal proper when plaintiff did not comply with court order to file amended complaint), *cert. denied*, 403 U.S. 912 (1971); *Agnew v. Moody*, 330 F.2d 868 (9th Cir.) (failure to amend complaint within 20 days as ordered), *cert. denied*, 379 U.S. 867 (1964). For a discussion of 41(b) dismissals in the federal courts, and the willingness of the courts to consider any reasonable excuse in order to avoid invol-

should be analyzed in the same manner, i.e., a showing of deliberate abuse should be required before severe sanctions are applied.

Violators of rule 8(a)(2) can be categorized as follows: (1) the layperson who files a *pro se* complaint without any knowledge of the pleading rule and errs inadvertently;⁶⁰ (2) the attorney who either is unaware of the rule or is unaware that the rule applies to his case;⁶¹ and (3) the attorney who intentionally violates the rule to damage the defendant's reputation or incite sensational media coverage to increase his reputation and fees, in contravention of the Code of Professional Responsibility.⁶² An evaluation of these categories of violators reveals that even if a penalty was deemed necessary, the court of appeals should have chosen a less severe remedy than involuntary dismissal.

The first and easiest category to analyze is the *pro se* plaintiff. In *Haines v. Kerner*⁶³ the United States Supreme Court held that a court should not dismiss summarily a complaint, especially a *pro se* complaint, unless "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"⁶⁴ The court of appeals acknowledged this policy favoring *pro se* litigants in *Jones*, yet still dismissed his case without any evaluation of the merits of his case.⁶⁵ Penalizing the *pro se* layperson by dismissing his suit with prejudice directly contravenes this policy. The typical *pro se* inmate, however, cannot be punished effectively in any other manner because he usually is judgment-proof, not subject to censure or ethical sanctions, and incapable of paying costs or attorneys' fees. One possible solution is to apply a "good faith" test to *pro se* litigants, dismissing their

untary dismissals, see R. RODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 32-44 (1981).

North Carolina courts have upheld the application of severe sanctions for violating discovery orders or rules. See *Laing v. Liberty Loan Co.*, 46 N.C. App. 67, 264 S.E.2d 381 (answer stricken and default judgment granted for failure to produce documents), *disc. rev. denied*, 300 N.C. 557, 270 S.E.2d 109 (1980); *Silverthorne v. Coastal Land Co.*, 42 N.C. App. 134, 256 S.E.2d 397 (dismissal when plaintiff failed to answer interrogatories), *disc. rev. denied*, 298 N.C. 300, 259 S.E.2d 302 (1979). It is worth noting that these dismissals are under rule 37(b)(2) and 37(d) and that the intentional nature of the action warrants such severe penalties. The parties in these cases had the opportunity to proceed and chose not to do so. Furthermore, unlike rule 8(a)(2), the power to dismiss is provided specifically within rule 37. See N.C. R. Civ. P. 37(b)(2)(C), 37(d).

60. See *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300. Jones is a fairly typical example of such a plaintiff—a prison inmate dissatisfied with his conviction and claiming that his attorney failed him.

61. See Record at 52, *Harris*. Harris' attorney informed the court that he was "unaware that Rule 8(a)(2) was applicable to an action against an attorney and further, because the Complaint contained other separate claims, that [he believed] such Rule was not applicable." *Id.*

62. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980). Ethical Consideration 7-25 specifies that an attorney "is not justified in consciously violating such rules [of evidence and procedure]." *Id.* at EC 7-25.

63. 404 U.S. 519 (1972).

64. *Id.* at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), quoted in *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978). The *Gordon* court also held that, "[w]hat might be a meritorious claim on the part of a *pro se* litigant unversed in the law should not be defeated without affording the pleader a reasonable opportunity to articulate his cause of action." *Gordon*, 574 F.2d at 1152.

65. *Jones*, 60 N.C. App. at 587, 299 S.E.2d at 300 (1983) ("justice might often so require [leave to amend] where a layman appearing *pro se* inadvertently fails to conform to technical legal requirements.").

suits with prejudice only upon a showing of intent to flaunt the rule.⁶⁶ In all other cases, courts should grant *pro se* litigants leave to amend their pleadings to conform to the rule. A good faith standard would give the court leverage to dismiss in cases of willful violations, but would ensure preservation of potentially valid causes of action when the error is inadvertent.

The second and third categories of potential 8(a)(2) violators—unwitting and unscrupulous attorneys—may be considered together. A more fundamental question underlies the issue of what sanctions to apply to these violators: should a client be punished for the errors of his attorney?⁶⁷ In *Chandler Leasing Corp. v. Lopez*⁶⁸ the United States Court of Appeals for the Fourth Circuit reversed a dismissal with prejudice for violation of a local rule of court⁶⁹ and adopted a test. The court “must ascertain (1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant . . . , and [(3)] the existence of a sanction less drastic than dismissal.”⁷⁰ The addition of a fourth criterion—the existence of clear evidence that the attorney deliberately included a specific damage clause despite knowledge of rule 8(a)(2)—would create a proper test for attorneys who misfile damage claims in malpractice suits.

The existence of viable lesser sanctions is a critical factor. Sanctions less drastic than dismissal with prejudice include conditional dismissal,⁷¹ assessment of attorneys’ fees, fines against the attorney, assessment of costs, and dismissal without prejudice.⁷² Any of these lesser sanctions, or a combination of them, should be levied against the attorney who filed the improper complaint,⁷³ absent the unlikely possibility that the client intended that the com-

66. See *Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 600-01 (1973) (plaintiff must show deliberate intent before dismissal is proper); 5 J. MOORE, J. LUCAS & J. WICKER, *supra* note 38, ¶ 41.12 (“[w]here, however, a reasonable excuse is offered for failure to comply with a rule or order, the court should . . . either refuse to dismiss, or provide in its order of dismissal that it does not constitute an adjudication upon the merits”); R. RODES, K. RIPPLE & C. MOONEY, *supra* note 59, at 32-44.

67. See generally R. RODES, K. RIPPLE & C. MOONEY, *supra* note 59, at 70-79. Although the courts have adopted a general agency analysis to hold the client responsible for the attorney’s failure to prosecute, see *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962) (dismissal only after six years of inaction, two continuances, and a failure to appear at pretrial conference), Rodes, Ripple and Mooney do not cite a single case in which a 41(b) dismissal with prejudice has been a sanction for a violation of a pleading technicality under the federal rules. See R. RODES, K. RIPPLE & C. MOONEY, *supra* note 59, at 30-41.

68. 669 F.2d 919 (4th Cir. 1982).

69. *Id.* at 920. The local rule required that out-of-state counsel retain local counsel. Plaintiff received three requests to comply before Judge Dupree dismissed the complaint.

70. *Id.* (citing *Davis v. Williams*, 588 F.2d 69, 69-70 (4th Cir. 1978)). The court reversed the dismissal, holding that although there was evidence of “sloppiness,” dismissal of an action with prejudice was too drastic a sanction for mere carelessness.

71. See N.C. R. Civ. P. 41(b). Rule 41(b) was rewritten to “make clear that the court’s power to dismiss on terms, that is, to condition the dismissal . . . extends to all dismissals other than voluntary dismissals under section 41(a).” *Id.*

72. See *Lopez*, 669 F.2d at 921.

73. See FED. R. Civ. P. 11. This rule allows the Court to place the potential cost of frivolous or unsubstantiated claims on the attorney. For a general treatment of the growing policy favoring the award of punitive attorneys’ fees for attorney misconduct, see Mallor, *Punitive Attorneys’ Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613 (1983).

plaint violate the rule.⁷⁴ Furthermore, the court should file an automatic complaint with the State Bar Association's disciplinary committee. Although one such complaint might not, and probably should not, lead to disciplinary action, it would create a record of improper conduct. Subsequent complaints for the same violation would indicate intentional abuse and could be treated more harshly.

It is significant to note that the limitation on *ad damnum* clauses contained in rule 8(a)(2) is of little practical value in stopping intentional abuse of the rule⁷⁵ because it is defeated so easily. To circumvent the purpose of the rule articulated by the *Jones* and *Harris* courts,⁷⁶ an unprincipled lawyer need only file a malpractice complaint alleging large specific compensatory and punitive damages, then immediately contact the press as to the nature of the suit and the amount of relief demanded. Then, without leave of court, he could amend the complaint to conform to the 8(a)(2) damage limitations. Because an efficient attorney or layperson easily could accomplish all of this in one or two days, the defendant would rarely, if ever file a responsive answer early enough to stop the plaintiff from amending his complaint as of right under rule 15(a).⁷⁷ The result is a sensationalized claim that cannot be dismissed involuntarily with prejudice under the rule created by *Jones* and *Harris*.⁷⁸

A procedural remedy for the foregoing scenario exists, but was not employed in the *Jones* or *Harris* proceedings. Once a plaintiff filed a complaint that contained an 8(a)(2) violation, even if amended as of right before a responsive pleading were filed, the court could order all proceedings stopped to determine whether the violation was intentional.⁷⁹ If the pretrial investigation revealed purposeful conduct on the part of the plaintiff or his counsel, the judge then would be warranted in either penalizing the attorney or dismissing the case with prejudice.⁸⁰ Once again, the four-prong test articulated above⁸¹

74. If the client knew of or encouraged the violations, or intentionally selected the attorney because he wanted such a complaint filed, the court should dismiss the action with prejudice under rule 41(b).

75. What difference could it possibly make as to the amount Mrs. Harris says she's been damaged? If such a rule were valid, why not a law that says you can't put in a pleading the "bad" things the "professional" did . . . or you can't tell who the "professional" is, requiring all suits against attorneys to be against "John Doe?" The rule itself is absurd. Enforcement by dismissal of a violative complaint would be a travesty.

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79. See *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

80. *Id.*

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81. See *supra* notes 68-72 and accompanying text.

should be used to evaluate the validity of such a harsh sanction.

Application of the good faith test for *pro se* laypersons and the four-part test for attorneys, when coupled with the suggested procedural mechanism, would allow courts to punish willful abuses while providing less harsh sanctions for those who err inadvertently. Only the person responsible for the error—usually the attorney—would be penalized; his client's potentially valid causes of action would be preserved.

The rule of law established by the holdings in *Jones v. Boyce* and *Harris v. Maready* is unjust and should be repudiated by the North Carolina Supreme Court. The *Harris* rule—requiring dismissal of a plaintiff's potentially valid claim at an early pretrial stage in circumstances when the defendant would suffer no damage if the complaint were amended—contradicts North Carolina's strong policy favoring trial on the merits,⁸² and is particularly inappropriate when applied to *pro se* litigants. The *Jones* and *Harris* decisions have created a code-like pleading trap for the unwary, unversed and incompetent that snares the innocent and lets the guilty go free.

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82. See *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977); see also *supra* note 46 and accompanying text.

Vishay Intertechnology, Inc. v. Delta International Corp. **The Reach of North Carolina's Long-Arm Statute**

The question whether an out-of-state corporation's contacts with a state are sufficient to permit that state's courts to exercise jurisdiction consistent with due process under the state long-arm statute requires a careful application of complex factors. The interstate character of modern commercial transactions and recent United States Supreme Court pronouncements on the reach of long-arm jurisdiction¹ complicate the analysis. In *Vishay Intertechnology, Inc. v. Delta International Corp.*² the United States Court of Appeals for the Fourth Circuit held that, in limited circumstances, telephone and written communications between California and North Carolina were sufficient to satisfy the requirements of both the North Carolina long-arm statute and federal due process.

The *Vishay* court was faced with a defendant whose routine commercial practices involved little contact with North Carolina. The government of Korea unwittingly laid the foundation for multiple litigation when it solicited bids for sixty units of a measurement device. Vishay Intertechnology, Inc. (Vishay), a Delaware corporation that manufactures and sells such measurement devices through its North Carolina office, submitted the next-to-lowest bid on the devices through its agent in Korea. The bid was based on its foreign list price.³ Delta International (Delta), a California corporation, submitted the lowest bid on the devices. Delta's bid was based on an oral quotation of Vishay's *domestic* price for the instruments that allegedly was obtained deceptively.⁴

The alleged misrepresentation arose out of a complex series of events. Delta's vice-president had telephoned Vishay requesting one measurement device. He allegedly misrepresented himself as an agent of "Delta Corporation" and a Vishay order clerk mistakenly quoted the unit's domestic price. A Vishay supervisor who was preparing the written quotation, however, recognized Delta as an exporter. At his supervisor's request the order clerk notified Delta that the foreign price would apply.⁵ Delta insisted that the domestic price should apply, and Vishay withdrew the oral quotation. Delta next sent Vishay a purchase order for sixty units of the device at the domestic price;

1. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (Oklahoma court's exercise of jurisdiction offended minimum contacts requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). See generally Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407 (1980).

2. 696 F.2d 1062 (4th Cir. 1982).

3. Vishay charges higher prices in foreign markets than in domestic markets because overseas marketing involves greater sales commission, promotion, service, warranty, and technical assistance costs. *Id.* at 1064.

4. Although Vishay informed the Korean government that Delta's bid was obtained deceptively, Delta's bid was not disqualified because of the government's bidding policy. *Id.*

5. The order clerk contacted Delta's vice-president, who initially denied that Delta was an exporter. *Id.*

Vishay rejected the purchase order.⁶ In subsequent communications, Delta demanded that Vishay supply the devices at the domestic price, and threatened to sue if Vishay did not comply. Eventually, Delta did file suit against Vishay in a California federal district court, but the complaint was dismissed on the merits following a hearing. Delta eventually obtained similar devices from a competitor of Vishay, and sold them to the Korean government.⁷

Vishay then filed suit against Delta in the United States District Court for the Eastern District of North Carolina. Vishay sought damages for unfair and deceptive business practices, tortious interference with contractual relations, and abuse of process. The district court dismissed the complaint for lack of sufficient contacts between Delta and the State to satisfy the requirements of personal jurisdiction under North Carolina's long-arm statutes.⁸ The court of appeals reversed.⁹ The court concluded that Delta's contacts with North Carolina—three letters and five telephone calls to Vishay's North Carolina office—satisfied the requirements of the North Carolina long-arm statutes and federal due process.¹⁰

At the outset, the *Vishay* court noted that the North Carolina long-arm statutes¹¹ should be construed liberally, permitting the assertion of jurisdiction to the full extent allowed by due process.¹² Foreign corporations not transact-

6. The purchase order allegedly represented the first time that Delta indicated a need for more than one unit. Delta admitted that the 60 units were to be offered for resale to the Korean government. *Id.*

7. *Id.*

8. *Id.* at 1065.

9. *Id.* at 1063. The court first set forth the process for determining jurisdiction under a long-arm statute:

To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the applicable North Carolina law would allow the exercise of long-arm jurisdiction over Delta. If so, the court must determine if such an exercise of jurisdiction comports with due process.

Id. at 1064.

10. *Id.* at 1067-69.

11. North Carolina's comprehensive long-arm statute, N.C. GEN. STAT. § 1-75.4 (1983), was modeled after Wisconsin's long-arm statute. *See* WIS. STAT. ANN. § 801.05 (West 1977 & Supp. 1983). North Carolina General Statutes § 1-75.4(2) provides for the exercise of jurisdiction under any state statute that specifically confers jurisdiction. Thus, N.C. GEN. STAT. §§ 55-143 to -145 (1982), enacted in 1955 and redesignated as part of the North Carolina Business Corporation Act, remain in effect to provide alternative grounds for asserting jurisdiction over corporations. *See* 1 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§ 937.5-937.20 (2d ed. Supp. 1970); R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE §§ 32-1 to -9 (3d ed. 1983). N.C. GEN. STAT. § 55-145 (1982) grants jurisdiction over foreign corporations not transacting business in the State; it is the "most far-reaching of the statutes asserting jurisdiction over foreign corporations." 1 A. MCINTOSH, *supra* § 937.20, at 180 n.98.73. Section 55-145 had been called "the minimum contact statute" prior to the adoption of § 1-75.4. *See* Note, *Corporations—Jurisdiction over Foreign Corporations Not Qualified to Transact Business in North Carolina*, 44 N.C.L. REV. 449, 543 (1966). *See generally* Comment, *Jurisdiction over Foreign Corporations Not Transacting Business in North Carolina—A Changing Attitude*, 2 WAKE FOREST INTRA. L. REV. 1 (1966) (tracing development of North Carolina law under § 55-145).

12. "There is a clear mandate that the North Carolina long-arm statute be given a liberal construction." *Vishay*, 696 F.2d at 1065. N.C. GEN. STAT. § 1-75.1 (1983) provides: "This Article shall be liberally construed to the end that actions be speedily and finally determined on their merits." Furthermore, the drafters of the Business Corporation Act provide insight into the legislature's intent in adopting N.C. GEN. STAT. § 55-145 (1982).

ing business in the State also are subject to suit on any cause of action arising out of "tortious conduct" within the State under North Carolina General Statutes section 55-145(a)(4).¹³ Because Delta's initial solicitation of a price quotation and the resulting oral and written communications formed the facts necessary to prove Vishay's claims of unfair business practices and interference with contractual relations, the court of appeals concluded that these telephonic and written communications constituted "tortious conduct" within North Carolina. The court relied on *Murphy v. Erwin-Wasey, Inc.*,¹⁴ in which the United States Court of Appeals for the First Circuit had recognized the modern business practice of using mail service rather than personal messengers, and stated that "[w]here a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state."¹⁵ The

Foreign corporations are by Section 145 made subject to local suits by residents of North Carolina in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so "transacting business" as to be required to obtain a certificate of authority. *International Shoe Co. v. State of Washington* is thought to have removed the constitutional barriers against such an extension of jurisdiction over a foreign corporation which is not so transacting business as to come within the domestication requirements. Provision is also made for substantial service in this situation. It is thought that wise policy favors subjecting such foreign corporations to suit here for the convenience of residents of this state where it is constitutionally possible, since the alternative is to force our residents to bring their actions in foreign jurisdictions.

Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. REV. 26, 54 (1954) (emphasis added). Thus, "[e]ach of these statutes was apparently intended to extend the jurisdiction of the North Carolina courts over foreign corporations to what was on each occasion believed to be the ultimate limits allowed by due process." R. ROBINSON, *supra* note 11, § 32-1, at 477.

13. N.C. GEN. STAT. § 55-145(a)(4) (1982):

(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

....

(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

In *Munchak Corp. v. Riko Enters.*, 368 F. Supp. 1366, 1379 (M.D.N.C. 1973) the court stated, "[W]hen seeking to acquire personal jurisdiction under G.S. § 55-145(a)(4) a plaintiff must show: (1) that the cause of action arose in North Carolina; and (2) the defendant committed one or more acts which gave rise to the cause of action in this State."

14. 460 F.2d 661 (1st Cir. 1972). The long-arm statute applicable in *Murphy* allowed the court to obtain personal jurisdiction in a cause of action arising out of the person's "causing tortious injury by an act or omission in this commonwealth." MASS. GEN. LAWS ANN. ch. 223A, § 3(c) (West Supp. 1984). In *Murphy* the court stated that the delivery in Massachusetts by mail or telephone of a false statement originating outside the state, followed by reliance on the statement in Massachusetts, was an act within Massachusetts. *Murphy*, 460 F.2d at 664. This statement was not necessary to the court's holding, however, since false statements also were made face-to-face within the state.

15. *Murphy*, 460 F.2d at 664. The *Murphy* court relied on *Buckley v. New York Post Corp.*, 373 F.2d 175, 179 (2d Cir. 1967), in which the court stated that "damage to a person's reputation caused by sending a libel into the state where he lives could still be considered as arising from 'tortious conduct' in that state," because "it could well be said that that publisher directly inflicts damage on the intangible reputation just as the frequently hypothesized but rarely encountered gunman firing across a state line does on the body." After paraphrasing from the above-quoted passage, the *Murphy* court concluded:

We believe the same is true of the mailing of a fraudulent misrepresentation into a state. We would be closing our eyes to the realities of modern business practices were we

Vishay court rejected defendant's arguments that *Murphy* was questionable authority,¹⁶ and noted that the *Murphy* rationale has been followed more often than rejected.¹⁷

In determining whether causing process to be served on *Vishay* also constituted "tortious conduct" within North Carolina for purposes of section 55-145, the court looked to comparable cases in other federal courts.¹⁸ The court

to hold that a corporation subjects itself to the jurisdiction of another state by sending a personal messenger into that state bearing a fraudulent misrepresentation but not when it follows the more ordinary course of employing the United States Postal Service as its messenger.

Murphy, 460 F.2d at 664.

16. *Vishay*, 696 F.2d at 1066. The only two cases relied on by Delta that rejected the *Murphy* rationale were *Margoles v. Johns*, 483 F.2d 1212 (D.C. Cir. 1973) and *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). Although both cases can be distinguished from *Murphy*, they both rejected *Murphy*.

Margoles was distinguishable because it involved a different type of long-arm statute than that at issue in *Murphy*. Nevertheless, the *Margoles* court criticized the apparent distinction drawn in *Murphy* between intentional acts causing a "tortious injury" within the state and negligent acts creating a condition from which damage might later arise. Referring to the *Murphy* court's reasoning, the *Margoles* court remarked: "Evidently an intentional act . . . is a type of continuing wrong which carries its perpetrator mysteriously along and thrusts him, constructively of course, into the domain of the injurious consequences. The law regarding jurisdictional matters is confusing enough; it needs less legal fictions, not more." *Margoles*, 483 F.2d at 1220.

Weller was distinguishable from *Murphy* on the basis that *Weller* subjected officers of a corporation to jurisdiction. Disregarding this distinction, the *Weller* court observed that "*Murphy* . . . was rejected by the Court of Appeals for the District of Columbia in *Margoles v. Johns*." *Weller*, 504 F.2d at 930. The court concluded "the decision in *Margoles* is sound, and we will follow it." *Id.* at 931.

In another case cited by Delta, *Kolikof v. Samuelson*, 488 F. Supp. 881 (D. Mass. 1980), the court distinguished *Murphy*. *Kolikof*, 488 F. Supp. at 883. *Kolikof* also gave one of the best explanations of the *Murphy* rationale: "In a misrepresentation case such as *Murphy*, the nature of the information transmitted across state lines is a crucial element of the alleged tort since it is the words themselves which are intended to bring about the injury." *Id.*

17. *Vishay*, 696 F.2d at 1066-67 (citing *Ammon v. Kaplow*, 468 F. Supp. 1304 (D. Kan. 1979)). See also *Brown v. Flowers Indus.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1275 (1983); *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974); *J.E.M. Corp. v. McClellan*, 462 F. Supp. 1246 (D. Kan. 1978).

In addition to the cases cited by *Vishay*, the most telling case is *Burner v. Burnham*, 13 Mass. App. Ct. 158, 430 N.E.2d 1233 (1982), in which the Massachusetts appellate court followed *Murphy*'s interpretation of the Massachusetts long-arm statute. *Burner* concerned a misrepresentation, perpetrated by mail and telephone, of the acreage in a land sale. Plaintiffs relied on the misrepresentation. The appellate court found that jurisdiction existed "particularly in the light of Federal cases in the First Circuit," then outlined the cases both following and rejecting the *Murphy* cases. *Burner*, 430 N.E.2d at 1236-37. The Oregon Supreme Court also has cited the *Murphy* rule with approval. See *State ex rel. Academy Press, Ltd. v. Beckett*, 282 Or. 701, 581 P.2d 496 (1978); *BRS, Inc. v. Dickerson*, 278 Or. 269, 563 P.2d 723 (1977); *State ex rel. Advanced Dictating Supply v. Dale*, 269 Or. 242, 524 P.2d 1404 (1974).

18. *Vishay*, 696 F.2d at 1067. In *Simon v. United States*, 644 F.2d 490 (5th Cir. 1981), the alleged tortious injury was based upon defendant's wrongful acts in influencing an Atlanta trial judge to issue a bench warrant for plaintiff's arrest. The subpoena was served on plaintiff by federal marshals in Louisiana. The United States Court of Appeals for the Fifth Circuit held that "the service in Louisiana of the subpoena ticket, improperly issued at the direction of Neal, was a cause-in-fact, or substantial factor, in the tort by Neal alleged as a cause of action in Simon's complaint," and thus was within the Louisiana long-arm statute. *Id.* at 499. See LA. REV. STAT. ANN. § 13:3201(c) (West 1968) ("causing injury or damage by an offense or quasi offense committed through an act or omission in this state"). In *Hamilton, Miller, Hudson & Fayne Travel Corp. v. Hori*, 520 F. Supp. 67 (E.D. Mich. 1981), the court held that service of an Illinois summons and complaint in Michigan constituted a tortious act under the Michigan long-arm statute. See MICH. STAT. ANN. § 27A.705(2) (Callaghan 1976) ("the doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort"). Since both statutes contain an

deduced the following general rule from these opinions: "[I]f an out-of-state defendant causes process to be served upon an in-state plaintiff, and the plaintiff subsequently sues the defendant in plaintiff's state, the state wherein the alleged abusive process was served, on a cause of action arising out of such abusive service of process," then personal jurisdiction exists over the defendant.¹⁹ The court applied this rule and concluded that the service of process on Vishay in North Carolina subjected Delta to North Carolina jurisdiction for purposes of Vishay's claim of abusive service.

North Carolina General Statutes section 1-75.4(4)²⁰ provides that state courts may exercise jurisdiction over a local injury arising out of a defendant's act occurring outside the state if certain business activities are being carried on by the defendant within the state.²¹ In determining whether Delta's conduct satisfied the section 1-75.4(4)(a) solicitation requirement, the court relied on two federal district court cases interpreting that section.²² The court held that

express causation standard in the statutory language, a finding that abusive service of process falls within the statutes is easier than in the case of the North Carolina "tortious conduct in this State" requirement. To exercise personal jurisdiction in North Carolina, a court must employ *Murphy*-type fictions to conclude that an out-of-state act was within the state for jurisdictional purposes.

19. *Vishay*, 696 F.2d at 1067.

20. N.C. GEN. STAT. § 1-75.4(4) (1983) provides that jurisdiction may be asserted in the following circumstances:

(4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

- a. Solicitations or services activities were carried on within this State by or on behalf of the defendant; or
- b. Products, materials or things processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

By separating the foreign act/local injury grounds from the "wholly local" tort grounds, the legislature intended to avoid two problems encountered by other state statutes. 1 A. MCINTOSH, *supra* note 11, § 937.10 at 166 n.53. The first problem the statute was designed to avoid was having to decide whether "tortious acts" applies only to wholly local torts. *Id.* The second problem has been described as follows:

The second is the constitutional problem, which to some courts has seemed formidable when jurisdiction is asserted on the basis of a single tortious activity occurring in substantial part outside the forum state The North Carolina statutory assertion is not this liberal in favor of plaintiffs and specifically requires an amount of contemporaneous bolstering activities which some courts have thought constitutionally required to support jurisdiction in the foreign act-local consequences cases. The degree of bolstering activities required will of course have to be decided on a case by case basis.

Id.

21. Vishay's claims of injury suffered in North Carolina were sufficient for jurisdictional purposes because a plaintiff need not *prove* injury under section 1-75.4(4)(a). *Vishay*, 696 F.2d at 1067-68.

22. *Id.* at 1068. The first case on which *Vishay* relied, *Munchak Corp. v. Riko Enters.*, 368 F. Supp. 1366 (M.D.N.C. 1973), held that the scouting of basketball players in North Carolina satisfied the "solicitation" requirement of § 1-75.4(4)(a), but did not satisfy the minimum contacts requirement of the due process standard. Noting that § 1-75.4 was intended to be construed liberally, the court stated:

Accordingly, there is no need to engage in a laborious analysis of the meanings of key terms in the two alternative requirements in the provisos set forth in § 1-75.4(4). To strictly construe the terms as set forth in those subsections so as to defeat in personam jurisdiction when such jurisdiction would be constitutionally permissible would conflict with the legislative and judicial mandate. Rather, it is concluded that the activities of the defendant, which include preliminary contacts with North Carolina basketball players

"Delta's written communications, especially the mailing of the purchase order, and telephone conversations with Vishay satisf[ie]d the solicitation requirement."²³ Thus, the court concluded that Delta's conduct fell within two provisions of the North Carolina long-arm statutes.

Having satisfied the first prong of the jurisdictional inquiry, the court of appeals turned to the due process prong.²⁴ The court quoted the applicable standard established in *International Shoe Co. v. Washington*:²⁵

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."²⁶

The court, however, refused to apply the quantitative analysis suggested by Delta, and instead focused on Delta's initiation of contacts with Vishay. The court concluded that, by initiating contact with Vishay Delta intended to avail itself of the benefits and protections of North Carolina laws.²⁷ Once again, the court of appeals relied on *Murphy*, in which the United States Court of Appeals for the First Circuit stated that:

[T]he element of intent also persuades us that there can be no constitutional objection to Massachusetts asserting jurisdiction over the out-of-state sender of a fraudulent misrepresentation, for such a sender has thereby "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."²⁸

The intentional character of Delta's contact with Vishay also met the foresee-

with some expectation of future contract negotiations, and the knowing participation in athletic contests, at least some of which will be shown on television throughout the United States, including North Carolina, can reasonably be included within the solicitation and marketing activities embodied in the subject statutory provisions.

Id. at 1371-72.

In contrast, "Delta's contacts were more contractual in their intent than were the 'preliminary contacts' considered in *Munchak*." *Vishay*, 696 F.2d at 1068 (quoting *Munchak*, 368 F. Supp. at 1372). For an analysis of the *Munchak* decision, see Note, *Munchak Corp. v. Riko: Putting a Little Polish on International Shoe*, 52 N.C.L. Rev. 809, 850 (1974).

The second case relied on by *Vishay*, *Federal Ins. Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D.N.C. 1972), *aff'd mem.*, 473 F.2d 909 (4th Cir. 1973), concluded that magazine advertisements were solicitations "by or on behalf of" the manufacturer under § 1-75.4(4). *Id.* at 856. These advertisements, however, were in conjunction with a state-wide network of distributorships and service centers. "The cumulative result of Piper's activity is an established program in North Carolina of solicitation of customers, sales of Piper aircraft, and the provision of a network of authorized service facilities for local Piper owners." *Id.*

23. *Vishay*, 696 F.2d at 1068.

24. See *supra* notes 9, 12 and accompanying text.

25. 326 U.S. 310 (1945).

26. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

27. *Vishay*, 696 F.2d at 1068. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

28. *Murphy*, 460 F.2d 661, 664 (1st Cir. 1972) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

ability test enunciated in *World-Wide Volkswagen Corp. v. Woodson*.²⁹ Delta could reasonably have expected to be haled into court in North Carolina to answer Vishay's claims arising out of the contacts initiated by Delta.

Among other factors relevant to the due process determination, the court noted that Vishay's cause of action arose out of Delta's contacts with North Carolina.³⁰ This fact distinguished several cases cited by Delta.³¹ The court also noted several state interests in determining whether the minimum contacts requirement had been satisfied.³² Finally, the court weighed the relative conveniences to the parties, concluding that the inconvenience to Delta in defending suit in North Carolina did not deny it due process.³³

The *Vishay* decision represents a logical approach to modern commercial transactions that is consistent with the policy expressed in the North Carolina long-arm statutes.³⁴ When telephone calls and written communications form an integral part of a tort claim, those communications may be said to be "tor-

29. 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there:").

30. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). "[I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single, or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action *unconnected* with the activities there." *Id.* at 317.

31. See, e.g., *Munchak Corp. v. Riko Enters.*, 368 F.Supp. 1366 (M.D.N.C. 1973) (Defendant's contacts were insufficient to meet due process standards for personal jurisdiction.). In *Munchak* "[a]n important factor in the court's decision was the fact that the alleged contacts with North Carolina were unrelated to the claim for relief asserted." Note, *supra* note 22, at 856.

32. The interests of North Carolina that the court listed were: (1) plaintiff was a North Carolina resident; (2) plaintiff sought relief under the North Carolina unfair trade practices statute; (3) the cause of action centered on the production of \$130,000 worth of goods that would have been manufactured in North Carolina; and (4) the Delta contacts with North Carolina were essential elements of Vishay's claims. *Vishay*, 696 F.2d at 1069. By including the state's interest in the litigation in its determination whether the minimum contacts requirement was met, the court erroneously caused a "subtle shift in focus from the defendant to the plaintiff." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). In *Rush* the Supreme Court cautioned against this shift in focus by stating:

Such an approach is forbidden by *International Shoe* and its progeny. If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice."

Id. at 332 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "In other words, these other factors may confirm or defeat jurisdiction, but they may not create it." *Louis*, *supra* note 1, at 421. Thus, the *Vishay* court should have stated that the interest of North Carolina is a relevant factor in determining whether the exercise of jurisdiction is fair, only *after* determining that sufficient contacts were present.

33. "While the defendant's witnesses are located in California, since Delta initiated the contested series of events, its inconvenience in transporting those witnesses to North Carolina when weighed against the inconvenience that would result to Vishay if it had to file suit in California" does not deny due process. *Vishay*, 696 F.2d at 1069.

34. For a discussion of the legislative intent behind N.C. GEN. STAT. § 1-75.4 (1983) and *id.* § 55-145 (1982), see *supra* notes 11-12.

Prior to *Vishay*, the federal courts construed North Carolina's long-arm statutes more narrowly than the North Carolina Supreme Court. It was noted that "the North Carolina Supreme Court is more ready to grant jurisdiction to protect North Carolina residents, quite naturally, and . . . it has taken the supposedly liberal interpretation offered by *International Shoe* more to heart than have federal courts." Note, *supra* note 11, at 457-58. *Vishay* brought the federal court's approach to § 55-145 into line with the State court's view.

tious conduct" within the state and may satisfy the minimum contacts test.³⁵ Similarly, characterizing a purchase order and other communications as "solicitation activities" is appropriate given the policy underlying section 1-75.4. Although no North Carolina appellate court has adopted such a broad interpretation of the solicitation requirement, language in several cases supports this construction.³⁶

In finding Delta's conduct to be within the reach of the North Carolina long-arm statutes and sufficient to satisfy due process requirements, the United States Court of Appeals for the Fourth Circuit adequately protected unwilling defendants from the burdens of litigating in a distant forum. The *Vishay* approach permits courts to assert jurisdiction only in cases in which the communications in issue form an essential part of the plaintiff's tort claim. The *Vishay* holding, however, does not permit a court to exercise jurisdiction if communications unrelated to the tort claim were transmitted to North Carolina because the due process requirements of foreseeability and purposeful conduct would not be satisfied.

Thus, the *Vishay* court recognized the realities of modern commercial practice. Routine interstate solicitations and purchase orders may provide insufficient contacts to justify one state's assertion of personal jurisdiction over an out-of-state defendant in a typical breach-of-contract suit. Fraudulent or misrepresentative communications, however, are not routine commercial practices. The *Vishay* decision recognized that when fraudulent or misrepresentative communications form the basis of a plaintiff's claim, they also may justify a court's assertion of personal jurisdiction. Denying jurisdiction in such circumstances would allow defendants to act irresponsibly with relative impunity, knowing that they would not be held accountable for their actions in the forum state.

The *Vishay* court's expansive reading of the provisions of the North Carolina long-arm statute represents a thoughtfully reasoned analysis, and should

35. These communications are to be distinguished from situations in which the cause of action sounds in contract, not tort. In such situations, the same telephone calls may not constitute "tortious conduct" in the State, and may not fall within that provision of the long-arm statute.

36. The following cases emphasized, among other factors, defendant's solicitations in North Carolina in finding due process contacts sufficient: *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977) (defendant actively solicited orders for its coins from North Carolina residents through several mass mailings to North Carolinians); *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963) (foreign corporation sent list of available rides through mails to operators of amusement parks in North Carolina, thereby soliciting orders); *Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 251, 273 S.E.2d 509, 513 (1981) (solicitation of employment through advertisement in a newspaper of wide circulation in North Carolina, long distance telephone conversations by defendant's agent with an undetermined number of residents, and approximately 28 mailed letters containing "conditional offers of employment" that North Carolina residents received at their homes), *disc. rev. denied*, 302 N.C. 398, 279 S.E.2d 352 (1981); *Delprinting Corp. v. C.P.D. Corp.*, 49 N.C. App. 449, 271 S.E.2d 548 (1980) (written memoranda on Illinois corporation's stationery requested plaintiff corporation to ship books to churches in five states); *Parris v. Garner Commercial Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29 (insurer had sent letter to plaintiff's counsel, and policy was mailed in an envelope bearing insurer's trademark), *disc. rev. denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). Two federal district court cases have construed § 1-75.4(4) broadly. *Munchak Corp. v. Riko Enters.*, 368 F. Supp. 1366 (M.D.N.C. 1973); *Federal Ins. Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D.N.C. 1972), *aff'd mem.*, 473 F.2d 909 (4th Cir. 1973). Both cases are discussed *supra* note 22.

give adequate guidance to other courts in applying the provisions to particular activities of corporations. The North Carolina courts should adopt the *Vishay* holding because its interpretation of the North Carolina long-arm provisions implements the express legislative policy of protecting the interests of North Carolina residents.

ELIZABETH ANN UPCHURCH

Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Treble Damages and the Void-for-Vagueness Doctrine

North Carolina General Statutes section 75-1.1¹ has been the "center-piece" of the law of unfair trade practices since its enactment in 1969.² Unlike its federal counterpart, section 5 of the Federal Trade Commission Act,³ section 75-1.1 is enforceable in a private damage action brought by an aggrieved competitor or consumer,⁴ and damages awarded in a private action brought pursuant to section 75-16 are trebled automatically.⁵ To establish a violation of section 75-1.1, a plaintiff must prove that the defendant engaged in "unfair methods of competition" or "unfair or deceptive acts or practices" in or affecting commerce.⁶ Rather than enumerating a list of illegal acts, practices, and

1. N.C. GEN. STAT. § 75-1.1(a) (1981) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The original version of § 75-1.1(a) provided that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Act of June 12, 1969, ch. 833, § 1, 1969 N.C. SESS. LAWS 930. This version was amended in 1977. Act of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. SESS. LAWS 984. This amendment conformed § 75-1.1 to the exact wording of § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1) (1976). Although the justification for the amendment was not made explicit, the timing of the amendment suggests that the legislature was responding to the North Carolina Supreme Court's decision in *State ex. rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977), which had distinguished the scope of the North Carolina and Federal Trade Commission Act provisions. See Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 207, 210 (1982); see also Comment, *The North Carolina Consumer Protection Act of 1977*, 56 N.C.L. REV. 547, 548 nn.7-8 (1978).

2. Aycock, *supra* note 1, at 210-11.

3. 15 U.S.C. § 45(a)(1) (1982).

4. See N.C. GEN. STAT. § 75-16 (1981). Section 75-16 expressly provides a private cause of action to any person, firm, or corporation injured as a result of any act in violation of § 75-1.1.

If any person shall be injured or the business of any person, firm, or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

A private cause of action under § 5 of the Federal Trade Commission Act has been rejected by a great majority of the courts. See *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981); *Fulton v. Hecht*, 580 F.2d 1243 (5th Cir. 1978), *reh'g denied*, 585 F.2d 520, *cert. denied*, 440 U.S. 981 (1979); *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). See also 4 CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES*, § 24.01 n.22 (1983). But cf., *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976).

5. See N.C. GEN. STAT. § 75-16 (1981). For text of § 75-16, see *supra* note 4. In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), the court stated:

Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages to be automatic once a violation is shown. To rule otherwise would produce the anomalous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.

Id. at 547, 276 S.E.2d at 402.

6. N.C. GEN. STAT. § 75-1.1(a) (1981). For text of § 75-1.1(a), see *supra* note 1. The statute has two components: an unfair-methods-of-competition component and an unfair-or-deceptive-

methods of competition, the general assembly decided "that the most useful tool that could be made available . . . to stop fraud and deception was the operative language of Section 5."⁷ Thus, the general assembly followed Congress' definition, "advisedly adopt[ing] a phrase which . . . does not 'admit of precise definition but the meaning and application of which must be arrived at by what [the Supreme Court] elsewhere has called "the gradual process of judicial inclusion and exclusion."'"⁸

Because of the potential for enormous liability under this mandatory treble damage provision and the uncertainty surrounding the precise boundaries of section 75-1.1, a number of defendants have challenged the constitutionality of section 75-16 as applied to section 75-1.1 on the grounds of the void-for-vagueness doctrine.⁹ This note will analyze the application of the

acts-or-practices component. To understand the analysis applied by the courts when interpreting a claim under § 75-1.1, "[t]he unfair-method-of-competition component should be examined separately from the unfair-or-deceptive-acts-or-practices component." Aycock, *supra* note 1, at 217. The unfair-method-of-competition component derives its meaning from interpretations of § 5 of the Federal Trade Commission Act and the North Carolina common law. In *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979), the court of appeals stated that, "the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others." The court cautioned putative defendants "to exercise care not to step over the necessarily vague but nonetheless real boundary line dividing fair conduct from foul which the court from time to time may be called upon to draw." *Harrington*, 38 N.C. App. at 404, 248 S.E.2d at 745 (emphasis added).

Although unfair methods of competition historically have been the most fertile ground for litigation, the rise in the consumer movement and increased state consumer protection activities have focused increasing attention on the unfair-or-deceptive-acts-or-practices component. See Comment, *The Trouble with Trebles: What Violates G.S. 75-1.1?*, 5 CAMPBELL L. REV. 199 (1983). In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), a consumer action alleging misrepresentation concerning services to be provided to lessees in a mobile home park, the North Carolina Supreme Court gave the statute a broad reading and attempted to outline "what, as a matter of law, makes a trade practice 'unfair or deceptive.'" *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403.

Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. As also noted in *Johnson*, [300 N.C. at 265, 266 S.E.2d at 622,] under section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. Consistent with federal interpretations of decisions under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act.

Id. The court concluded that "[u]nfairness and deception are gauged by consideration of the effect of the practice on the marketplace . . . and the effect of the actors's conduct on the consuming public." *Id.*

7. Morgan, *The People's Advocate in the Marketplace—The Role of The North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRA. L. REV. 1, 19 (1969).

8. Federal Trade Comm'n v. R.F. Keppel & Bros., 291 U.S. 304, 312 (1934), (quoting Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 648 (1931)). In *Keppel*, the Supreme Court discussed the purpose of § 5 of the Federal Trade Commission Act and the Senate Committee on Interstate Commerce's rejection of a specific enumeration of acts deemed unfair. *Id.* at 310-12 nn.1-2.

9. In *L.M. Hammers v. Lowe's Cos.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980), Judge Parker recognized the constitutional question but was not required to reach the issue on the record before the court.

Admittedly, the language of [the] statute, proscribing as it does "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or

treble damage provision to section 75-1.1 and the constitutional requirement that a statute "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."¹⁰

The applicable standard for determining whether a given statute is unconstitutionally vague in violation of the due process clause of the fourteenth amendment to the United States Constitution depends on whether the statute is penal or criminal and whether it is considered civil legislation or economic regulation.¹¹ If the mandatory treble damages are judged by the standard applicable to penal statutes, the statute "must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation."¹² If the statute is considered economic regulation and the mandatory trebles predominantly remedial, however, "greater leeway is allowed,"¹³ and "[a] finding of vagueness will . . . result only where 'the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all,' . . . or where . . . men of common intelligence must necessarily guess at its meaning and differ as to its application."¹⁴ Although the nature of the vagueness inquiry under these standards and the ultimate decision whether the statute is "too vague" or "sufficiently definite" to pass constitutional scrutiny is not readily apparent, the practical effect of the selection of a given standard may be determinative.

Whether the stricter standard of definiteness applicable to penal statutes should apply to the North Carolina statute depends on the legislative intent behind section 75-1.1 and its effect on putative defendants. Section 75-1.1 was enacted in response to a growing need for state legislation to supplement section 5¹⁵ "so that local business interests could not proceed with impunity, se-

affecting commerce," is extremely broad, so broad and vague, indeed, as to render the triple damage penalty provided by G.S. 75-16 in a private action brought for violation of the vague language of G.S. 75-1.1 at least of questionable validity. On the present record, however, we do not reach that constitutional question.

L.M. Hammers, 48 N.C. App. at 154, 268 S.E.2d at 259-60.

More recently, the United States District Court for the Eastern District of North Carolina cited Judge Parker's skepticism and once again raised the issue. *See Terry's Floor Fashions v. Burlington Indus.*, 568 F. Supp. 205, 216 (E.D.N.C. 1983).

The North Carolina statute is vague, has been the subject of widely varying judicial interpretations, and is of questionable constitutionality. The North Carolina appellate courts have yet to provide a clear and consistent interpretation of the provisions of this act. Indeed, defendants argue very persuasively that the act is unconstitutionally vague, and at least one panel of the North Carolina Court of Appeals has indicated its skepticism as to the constitutional validity of § 75-1.1.

Id. at 216. Because the court dismissed the action on jurisdictional grounds, the constitutional question was not resolved.

10. *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

11. *See infra* notes 47-49 and accompanying text.

12. *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). *See also United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

13. *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

14. *Horn v. Burns*, 536 F.2d 251, 254 (8th Cir. 1976) (citations omitted).

15. *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400. *See also* Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission*

cure in the knowledge that the dimensions of their transgressions would not merit federal action."¹⁶ Rather than placing the entire burden of business regulation on the Attorney General or creating a North Carolina commission to enforce section 75-1.1, the general assembly decided to place primary responsibility for the enforcement of the statute on private parties. Treble damages were extended to claims under section 75-1.1 for the purposes of encouraging private enforcement by making it economically feasible to bring an action in which possible money damages were nominal, and increasing the incentive for reaching a settlement.¹⁷ As such the private enforcement provisions are more analogous to section 4 of the Clayton Act¹⁸ than section 5 of the Federal Trade Commission Act.¹⁹

The North Carolina Supreme Court in *Marshall v. Miller*²⁰ considered the purpose of the State's unfair and deceptive trade practices act²¹ and the role of the treble damage provision.²² The court concluded that the "[l]egislature intended to establish an effective private cause of action for aggrieved consumers in this State."²³ As such, the court reiterated its earlier characterization of 75-16 as a "hybrid."

[I]t is an oversimplification to characterize G.S. 75-16 as punitive.

Jurisprudence, 48 GEO. WASH. L. REV. 521 (1980). The various state consumer protection acts passed during the 1960s and 1970s to supplement § 5 of the Federal Trade Commission Act "had their genesis in various forms suggested to the states by the Federal Trade Commission." *Id.* at 521 n.2. See generally Lovett, *State Deceptive Trade Practices Legislation*, 46 TULANE L. REV. 724, 730-31 (1972); Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271, 275 (1970); COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION C4-C5 (1970).

16. *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403.

17. *Id.* at 550, 276 S.E.2d at 403-04. See 2 P. AREEDA & D. TURNER, ANTITRUST LAW 149-50 (1978); Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 900 (1970).

It could be argued that the incentive provided by treble damages is not needed in the context of an unfair-methods-of-competition claim, and thus that this component should not be subject to mandatory treble damages. Because the plaintiffs and the defendants in an unfair-methods-of-competition claim usually are competing businessmen and the amount in controversy is likely to be greater than an unfair-or-deceptive-acts-or-practices claim, the plaintiff has more incentive to bring a private action whether or not treble damages are available. This view, however, ignores the small businessman whose actual damages, like the consumer, might be small relative to the sales revenues of his larger competitor or supplier. The existence of an effective private cause of action may mean the difference between continued operations or bankruptcy. Moreover, the continuing "unfair methods of competition" may have a secondary effect, effectively passing on the damage to the ultimate consumer in the form of higher prices or misleading advertising. Thus, under the better view, both components of § 75-1.1 and the corresponding treble damage provisions should be viewed as part of a broader scheme to maintain the legitimacy and integrity of competition and ethical standards in the marketplace.

18. 15 U.S.C. § 15(a) (1982). Section 15 provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

19. *Marshall*, 302 N.C. at 542, 276 S.E.2d at 399. See also *Survey of North Carolina Law, 1980—Commercial Law*, 59 N.C.L. REV. 1070, 1073 (1981).

20. 302 N.C. 539, 276 S.E.2d 397 (1981).

21. *Id.* at 543, 549-50, 276 S.E.2d at 400, 403-04.

22. *Id.* at 546-47, 276 S.E.2d at 403-04.

23. *Id.* at 543, 276 S.E.2d at 400.

The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. It is, in effect, a hybrid.²⁴

Whereas the legislature's primary focus appears to be remedial, the effect on a defendant convicted for a violation of section 75-1.1 is more akin to a penalty.²⁵ The individual defendant is not concerned whether his treble damage payment is exacted for the remedial purpose of maintaining fair and ethical standards of competition or for the purpose of punishing his past transgressions; he cares only that his liability is three times the actual damages proved by the plaintiff. Since there is no limit to the treble damage award, putative defendants face enormous potential liability and the possibility of financial ruin.²⁶

In light of these conflicting views concerning the nature of the treble damage provision as applied to section 75-1.1, it is important to consider the application of the remedy by the North Carolina courts and the federal courts' interpretation of the similar treble damage provision under the federal anti-trust laws. In *Marshall* the supreme court rejected defendants' contention that bad faith was an essential element of a section 75-1.1 treble damage claim.²⁷ This holding follows directly from the court's conclusion that "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace,"²⁸ and supports the "remedial" purpose of the statute. If, for example, the statute primarily was punitive or penal in nature, the treble damage remedy would be inappropriate in actions asserting an unwitting violation of section 75-1.1. Since the defendant would not have been aware that his business practices were in violation of the statute, he could not have taken steps to comply with the statutory proscriptions. Thus, the *Marshall* holding supports the "remedial" nature of section 75-16.²⁹

24. *Id.* at 546, 276 S.E.2d at 402.

25. See *Singleton v. Pennington*, 568 S.W.2d 367, 376 (Tex. Civ. App. 1978), *rev'd*, 606 S.W.2d 682 (Tex. 1980). See also Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?*, 62 N.C.L. Rev. 1139 (1984).

26. See *Singleton v. Pennington*, 568 S.W.2d at 376, *rev'd*, 606 S.W.2d 682 (Tex. 1980).

27. 302 N.C. at 546, 276 S.E.2d at 401.

28. *Id.* at 548, 276 S.E.2d at 403. *Marshall* involved a consumer challenge under the unfair-or-deceptive-acts-or-practices component. A similar "effect-on-the-marketplace" test was espoused by the court of appeals with reference to the unfair-methods-of-competition component in *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 248 S.E.2d 739 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

Unfair competition has been referred to in terms of conduct "which a court of equity would consider unfair." *Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942). Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged . . . by determining its intended and actual effects upon others.

Id. at 400, 248 S.E.2d at 744.

29. This distinction is clarified by § 75-15.2, which provides for a civil penalty at the discretion of the presiding judge if certain specified conditions are satisfied. By making the penalty provisions for § 75-15.2 discretionary and maintaining the mandatory treble damages provision, the legislature has indicated the disparate purposes and functions of these sections. See *Holley v.*

Further support for the proposition that the paramount concern of the treble damages provision is maintenance of the integrity of the marketplace rather than punishment of past violations is found in the federal courts' interpretations of the nature of the federal, antitrust, treble damages under the Clayton Act.³⁰ In *Pfizer, Inc. v. India*³¹ the United States Supreme Court noted that, "[i]n light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a 'person' entitled to sue for treble damages,"³² and reiterated its previous conclusion that the provision had two purposes: "to deter violators and deprive them of 'the fruits of their illegality' and to compensate victims of antitrust violations for their injuries."³³ As such, the great majority of the courts have held that the primary purpose of this provision is compensatory and remedial.³⁴ Thus, the plaintiff is representing not only his personal interests, but the public interest as well.³⁵

A number of decisions in Texas and Illinois support the conclusion that the treble damage provision is primarily remedial. In *Singleton v. Pennington*³⁶ the Texas Court of Civil Appeals and the Texas Supreme Court

Coggin Pontiac, Inc., 43 N.C. App. 229, 237-38, 259 S.E.2d 1, 6-7, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

30. Prior to the enactment of N.C. GEN. STAT. § 75-1.1 (1980), § 75-16 provided for treble damages for violation of § 75-1, North Carolina's "little Sherman act." As such, § 75-16 was modeled after the federal, antitrust, treble damage provision, 15 U.S.C. § 15 (1984). Logic dictates that the decision to incorporate § 75-1.1 in Chapter 75 of the General Statutes in 1969, and therefore subject § 75-1.1 violations to mandatory treble damages (note the wording and operation of § 75-16), indicated that the purpose of the treble damage provision as applied to § 75-1.1 was identical to the purpose as applied to § 75-1. Otherwise the same statutory provision would have divergent purposes, depending on which section was violated.

31. 434 U.S. 308 (1978).

32. *Id.* at 313.

33. *Id.* at 314. See also *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

34. See *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506, 509 (D. Colo. 1952) and cases cited therein. Also, in *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977), the United States Court of Appeals for the Ninth Circuit summarized the nature of the treble damages.

On the other hand, § 4 is basically a remedial provision. It provides treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." While § 4 does play an important part in penalizing and deterring wrongdoing, . . . it was designed primarily as a remedy.

Id. at 498 (citations omitted). See also *Vold, Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L.J. 117, 147-59 (1940).

In *Herald Co. v. Harper*, 410 F.2d 125 (8th Cir. 1969), the United States Court of Appeals for the Eighth Circuit was faced with an action to enjoin the operation of the Clayton Act's treble damages provision. Plaintiff alleged ten separate constitutional infirmities with the provision. *Herald Co. v. Harper*, 293 F. Supp. 1101, 1102 n.1 (E.D. Mo. 1968). The court dismissed the action "for want of a substantial constitutional question," *Herald Co.*, 410 F.2d at 131, and thus rejected plaintiff's contention that the provision should be treated as if it were a criminal statute. The court stated that, "[a]ssuming arguendo that the statute is punitive in nature, 'this is not enough to label it as a criminal statute,' to which all the constitutional safeguards of a criminal proceeding attach." *Id.* at 130.

35. See *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279-80 (9th Cir. 1976). This view has been expressed with regard to N.C. GEN. STAT. §§ 75-1.1, 75-16 (1981) by a commentator. See Comment, *supra* note 17, at 900.

36. 568 S.W.2d 367 (Tex. Civ. App. 1978), *rev'd*, 606 S.W.2d 682 (Tex. 1980).

considered the Texas Deceptive Trade Practices Act³⁷ in the context of an "innocent misrepresentation by a seller of second-hand goods who [was] not in the business of selling such goods."³⁸ The court of civil appeals rejected plaintiff's contention that the statute was remedial rather than punitive³⁹ and stated that "[f]rom the point of view of the seller, any exaction over and above that necessary to compensate the buyer for his loss is punitive."⁴⁰ Because of this punitive element and the potential for draconian liability, especially in the context of class actions, the court of appeals applied the "due process requirement applicable to criminal penalties."⁴¹ To construe the statute to comport with the due process standard of reasonable notice, the court interpreted the act to require a showing of intent to deceive.⁴²

On appeal, however, the Texas Supreme Court overruled the court of civil appeals and construed the statute as remedial economic regulation.⁴³ Although the court noted that "[t]he fact that a statute limits punishment to acts done 'knowingly' or requires specific intent as a prerequisite to punishment has been given weight by courts rejecting challenges made on the ground of vagueness,"⁴⁴ the court concluded that the requirement of specific intent merely would make the statute more restricted, not necessarily more specific.⁴⁵

In *Scott v. Association for Childbirth at Home*⁴⁶ defendant contended that section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act was unconstitutionally vague because it affected rights protected by the first and fourteenth amendments and because it was a penal statute.⁴⁷ Although the statute did not provide for multiple damages, a civil penalty of up to \$50,000 could be imposed.⁴⁸ The court applied the economic regulation

37. TEX. BUS. & COM. CODE ANN. §§ 17.41 to .63 (Vernon Supp. 1977).

38. *Singleton*, 568 S.W.2d at 369.

39. *Id.* at 376. At the time of this case, the Texas statute provided for mandatory treble damages. See *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). The Texas statute declared that "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce," were unlawful. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1977). Subsection (b) enumerated a "laundry list" of specific violations in addition to the general proscription of § 17.46(a). The court of civil appeals addressed the constitutional claim in *Singleton* under the assumption that defendant was not guilty of a § 17.46(a) per se violation, but was guilty only under the § 17.46(a) "umbrella" provision. *But see infra* note 43.

40. *Singleton*, 568 S.W.2d at 376.

41. *Id.*

42. *Id.* at 381.

43. *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980). The Texas Supreme Court concluded that defendant violated two of the specified per se violations enumerated in TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon Supp. 1977), and that, therefore, it did not have to decide whether the language of § 17.46(a) was unconstitutionally vague. *Pennington*, 606 S.W.2d at 688. Since the same treble damages provision was being applied, however, the supreme court's rejection of the court of civil appeals' characterization of the effect of the statute as primarily penal is applicable equally to § 17.46(a).

44. *Pennington*, 606 S.W.2d at 689.

45. *Id.* The court added that "[i]t is unquestionably true that deception is more reprehensible when done intentionally and that liability for treble damages is less harsh when intent is present. The necessity or reasonableness of specific enactments, however, is a matter of legislative discretion." *Id.* at 689-90.

46. 88 Ill. 2d 279, 430 N.E.2d 1012 (1981).

47. *Id.* at 285-86, 430 N.E.2d at 1016.

48. *Id.* at 288, 430 N.E.2d at 1017.

vagueness standard and held that the terms " 'unfair methods of competition' and 'unfair acts or practices' have a sufficiently definite and well-established meaning to overcome the allegation of vagueness."⁴⁹

The general assembly's intent in enacting section 75-1.1 and the corresponding treble damages provision make it apparent that the primary purpose of the North Carolina scheme is economic regulation. Both the state and federal courts have recognized that although the treble damages remedy is partially punitive,⁵⁰ the statute is not penal.⁵¹ Although the statute can be interpreted as punitive from the standpoint of the defendant who is forced to pay a damage award exceeding the amount necessary to compensate the plaintiff,⁵² the remedial and private enforcement objectives of section 75-16 cannot be ignored.⁵³ Thus, the proper "fair notice" test required by the due process requirement of the fourteenth amendment is the test applied to regulatory statutes governing business activity. Because North Carolina's statute is primarily for economic regulation, the courts should not invalidate the statute on the grounds of vagueness unless it does not convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."⁵⁴

The determination of whether section 75-1.1 is unconstitutionally vague in light of the mandatory treble damage remedy must begin with sound principles of statutory construction. Since section 75-1.1 does not implicate constitutionally protected first amendment freedom,⁵⁵ the statute must be interpreted in light of the facts of each particular case.⁵⁶ Furthermore, acts of the legisla-

49. *Id.* at 290-91, 430 N.E.2d at 1018.

50. See *supra* notes 24 and 33 and accompanying text.

51. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402; *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237-39, 259 S.E.2d 1, 6-7, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). See also *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049, 1058 n.5 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981).

52. See *Singleton*, 568 S.W.2d at 376.

53. See *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402; *Holley*, 43 N.C. App. at 237-39, 259 S.E.2d at 6-7.

54. *United States v. Petrillo*, 332 U.S. 1, 8 (1947).

55. See *Scott*, 88 Ill. 2d 279, 285-88, 430 N.E.2d 1012, 1015-17 (1981).

[The Supreme Court has repeatedly emphasized that the first amendment is not a bar to State regulation prohibiting false, misleading or deceptive commercial speech. "By definition, commercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech 'a limited measure of protection,' it is also true that 'the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.'" Thus the investigation and regulation of unfair or deceptive business practices under the Act does not, because it cannot, impinge upon constitutionally protected speech. Since the Act prohibits only such speech as amounts to a fraudulent or deceptive practice, *i.e.*, false or misleading advertising, it can affect only speech that is by definition outside the ambit of first amendment protection, and within the scope of permissible State regulation.

Id. at 287, 430 N.E.2d at 1016 (citations omitted).

56. See *United States v. Mazurie*, 419 U.S. 544, 550 (1975). See also *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *State v. Covington*, 34 N.C. App. 457, 460, 238 S.E.2d 794, 796 (1977).

In *National Dairy* the Supreme Court repeated the distinction between vagueness challenges to statutes that arise under the first amendment and those concerning economic regulation.

ture are presumed to be constitutional,⁵⁷ and therefore, "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language."⁵⁸

Although section 75-1.1 admittedly is phrased in broad language, it is not so vague as to be no rule or standard at all⁵⁹ or so indefinite as to require "men of common intelligence . . . [to] guess at its meaning and differ as to its application."⁶⁰ When section 75-1.1 was enacted the phrases "unfair methods of competition" and "unfair or deceptive acts or practices" had a long history of case-by-case interpretation under section 5 of the Federal Trade Commission Act. The North Carolina courts have stated repeatedly that Federal Trade Commission decisions and judicial interpretations of section 5 may be used as a guide in determining the scope and meaning of the statute.⁶¹ In addition, claims under section 75-1.1 must be construed with reference to the numerous legislative inclusions that have been added as per se violations since 1969.⁶² Given section 75-16's remedial purpose and role in the maintenance of ethical standards of fair dealing in the marketplace, there is no reason to treat sections 75-1.1 and 75-16 differently than section 5 of the Federal Trade Commission Act for the purpose of a vagueness challenge. Thus, the opinion of the United States Court of Appeals for the Seventh Circuit in *Sears, Roebuck & Co. v. Federal Trade Commission*⁶³ is equally relevant to the North Carolina scheme.

[T]he phrase [unfair methods of competition] is no more indefinite than "due process of law." The general idea of that phrase as it appears in constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based on accumulating experience. If the expression, "unfair methods of competition," is too uncertain for use, then under the same condemnation would fall the

In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. We are thus permitted to consider the warning provided by § 3 not only in terms of the statute "on its face" but also in the light of the conduct to which it is applied.

National Dairy, 372 U.S. at 36.

57. See *Mitchell v. Financing Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968). See also *National Dairy*, 372 U.S. at 32.

58. *National Dairy*, 372 U.S. at 32. The constitutionality of the Sherman Act was upheld by the Supreme Court in *Nash v. United States*, 229 U.S. 373 (1913), against an attack on vagueness grounds. Mr. Justice Holmes' oft-quoted remark is particularly relevant in this instance. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death." *Id.* at 377.

59. See *A.B. Small Co. v. American Sugar Ref.*, 267 U.S. 233, 239 (1925).

60. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). See *Horn v. Burns*, 536 F.2d 251, 254 (8th Cir. 1976).

61. *Marshall*, 302 N.C. at 542, 276 S.E.2d at 399.

62. See *supra* note 1 and accompanying text.

63. 258 F. 307 (7th Cir. 1919).

innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unjust discrimination," and the like. This statute is remedial and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions," or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted.⁶⁴

Although it is conceivable that a given interpretation could make the statute unconstitutionally vague,⁶⁵ section 75-1.1 as applied is sufficiently definite to withstand constitutional scrutiny. Given the predominantly remedial purpose of section 75-16 and the extensive body of law that has developed under the aegis of section 5 of the Federal Trade Commission Act, section 75-1.1 is no more vague than many of the other terms which the law has accepted, interpreted, and refined over the years. Although commentators and defendants might quarrel with the necessity and reasonableness of the treble damages provision⁶⁶ or prefer a different formulation of the definition of an unfair trade practice, these considerations are a matter of legislative discretion.

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64. *Id.* at 311.

65. If, for example, the North Carolina courts were to extend N.C. GEN. STAT. § 75-1.1 (1981) and the treble damages of § 75-16 to a simple breach of contract between two private citizens not engaged in business for profit, it is conceivable that § 75-1.1 and the mandatory treble damage provision of § 75-16 would be deemed unconstitutionally vague as applied.

66. See Aycock, *supra* note 1, at 264. Professor Aycock notes that "the treble damage provision might be a double-edged sword." *Id.* at 223.

Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?

North Carolina General Statutes section 75-1.1 prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."¹ Section 75-16 establishes a private cause of action for "any person, firm or corporation" injured by a violation of section 75-1.1.² Any damages assessed pursuant to section 75-1.1 are trebled automatically.³ Whether a plaintiff seeking relief under section 75-1.1 may recover punitive damages in addition to treble damages is unsettled. North Carolina courts never have awarded both statutory treble damages and punitive damages;⁴ they have, however, stopped short of declaring treble and punitive damages to be mutually exclusive.⁵

Most recently, the availability of the statutory treble damages and punitive damages was considered in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*⁶ In this diversity action, the United States Court of Appeals for the Fourth Circuit denied an award of treble and punitive damages. Although the result was reached on grounds other than mutual exclusivity,⁷ the majority of the court expressed doubt that the North Carolina courts would uphold an award of punitive damages and statutory treble damages.⁸ A review of the North

1. N.C. GEN. STAT. § 75-1.1 (1981).

2. *Id.* § 75-16.

3. *Id.* See also *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981).

4. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981); *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

5. See *supra* note 4. *Accord* *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 719 (4th Cir.) (Bryan, J., dissenting), *cert. denied*, 104 S. Ct. 155 (1983).

6. 705 F.2d 712 (4th Cir.), *cert. denied*, 104 S. Ct. 155 (1983).

7. In *Atlantic Purchasers* plaintiffs brought an action for fraud and breach of express warranty in connection with the purchase of an airplane. *Id.* at 714. Plaintiffs alleged that the airplane's engines had been operated for more hours than defendants represented, that the necessary airworthiness inspections had not been performed as claimed, and that the log books had been doctored to substantiate these representations. *Id.* The jury awarded compensatory damages of \$31,000 and punitive damages of \$15,000. *Id.* After the verdict was returned, plaintiffs moved to treble the compensatory damages pursuant to N.C. GEN. STAT. § 75-1.1 (1981), and sought attorneys' fees pursuant to N.C. GEN. STAT. § 75-16.1 (1981). Plaintiffs had made no use of, or reference to, these statutory provisions prior to their motion. They denied that an award of punitive damages was inconsistent with statutory treble damages and suggested that if they were inconsistent, "the punitive damages should be eliminated and the actual damages trebled." *Atlantic Purchasers*, 705 F.2d at 714-15. The district court denied the motion. The court of appeals affirmed. Although the court of appeals recognized that the jury's special verdict supported liability and treble damages under §§ 75-1.1 and 75-16, they determined that granting plaintiffs' motion would unfairly prejudice defendants. The court concluded: "Fundamental fairness requires in such a case, where the statutory remedy may increase greatly the defendant's liability, that the opposing party be notified of the possibility of the unusual relief prior to the plaintiff's tender of a proposed judgment on the verdict." *Id.* at 717.

8. *Atlantic Purchasers*, 705 F.2d at 716 n.4. The dissenting opinion supported the availability of the statutory recovery. Moreover, the dissent argued that an award of punitive damages

Carolina cases considering relief under section 75-1.1, of analogous North Carolina statutes with multiple damage provisions, and of statutes and judicial precedent in other jurisdictions, reveals the soundness of the court of appeals' prediction. Moreover, an award of statutory treble and punitive damages exceeds the parameters of the statutory scheme envisioned by the legislature in enacting section 75-1.1.

Analysis of this issue begins with a consideration of the substantive provisions of section 75-1.1 and the characteristics of treble and punitive damages. Since the 1960's, North Carolina and most other states have enacted consumer protection legislation⁹ designed to parallel and supplement the Federal Trade Commission Act.¹⁰ These state statutes were derived from various alternative legislative schemes suggested to the states by the Federal Trade Commission (FTC)¹¹ and the Commission on Uniform State Laws.¹² The FTC encouraged such statutes because enforcement of the FTC Act's section 5 prohibition against "unfair or deceptive acts or practices"¹³ could not be accomplished solely by the FTC.¹⁴ In 1969 North Carolina adopted the broadest of the suggested forms and enacted section 75-1.1.¹⁵ Although various common-law causes of action for unfair or deceptive trade practices had been recognized in North Carolina,¹⁶ the General Assembly reacted favorably to FTC encouragement of state legislation because the legislature perceived that the common-law remedies were inadequate.¹⁷ Section 75-1.1, however, does not supersede common-law causes of action. A plaintiff may pursue re-

does not preclude an award of treble damages for a violation of § 75-1.1. *Id.* at 718-21 (Bryan, J., dissenting).

9. Although the North Carolina legislation was enacted in part to provide enhanced consumer protection, Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRA. L. REV. 1, 18-20 (1969), relief is not restricted to consumers. See N.C. GEN. STAT. § 75-1.1 (1981). See also *Atlantic Purchasers*, 705 F.2d 712 (4th Cir.), *cert. denied*, 104 S. Ct. 155 (1983); *United Roasters, Inc. v. Colgate Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

10. 15 U.S.C. §§ 41-77 (1982).

11. [T]he FTC offered three alternative drafts of an Unfair Trade Practices and Consumer Protection Law: Alternate Form No. 1 contains the broad language of § 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition and unfair or deceptive acts or practices" in trade or commerce; Alternate Form No. 2 outlaws all forms of fraudulent, deceptive and sometimes unfair acts or practices in trade or commerce; and Alternate Form No. 3 itemizes the deceptive practices proscribed, and usually contains a "catch-all" clause reaching all other forms of deception.

Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 521-22 n.2 (1980).

12. *Id.* at 521-22.

13. 15 U.S.C. § 45(a)(1) (1982).

14. Leaffer & Lipson, *supra* note 11, at 522.

15. Act of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930.

16. See, e.g., *Roberson v. Williams*, 240 N.C. 696, 83 S.E.2d 811 (1954) (fraud). The North Carolina courts have continued to recognize common-law unfair trade practices since 1969. See *Griffin v. Wheeler Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976) (implied warranty); *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974) (fraud).

17. See *Marshall v. Miller*, 302 N.C. 539, 543-44, 276 S.E.2d 397, 400 (1981).

lief under the common law and section 75-1.1 in the same action.¹⁸

Unlike the FTC Act, which does not provide for a private cause of action based on its violation,¹⁹ section 75-16 allows a private cause of action and provides treble damages²⁰ to encourage private enforcement of section 75-1.1.²¹ Trebling damages "makes more economically feasible the bringing of an action where the possible damages are limited."²² The North Carolina Supreme Court also has recognized that: "The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations."²³ As an additional deterrent, the statutory scheme provides for the award of attorneys' fees for *willful* misconduct.²⁴

The legislature did not define what constitutes "unfair methods of competition" or "unfair or deceptive trade practices"; the scope of section 75-1.1 and the conduct that it proscribes are to be defined by the courts.²⁵ The North Carolina Supreme Court has determined that a violation of section 75-1.1 and an award of treble damages pursuant to section 75-16 do not require intentional wrongdoing by the defendant.²⁶ The defendant is judged on the effect of his actions rather than his intent.²⁷ The court also has established a bifurcated private-action procedure. Initially, the jury determines the facts. The court then determines, as a matter of law, whether the defendant engaged in unfair methods of competition or unfair or deceptive trade practices.²⁸ If it finds a violation, the court *must* treble the compensatory damages that are established by the jury's fact finding.²⁹

18. See *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 358, 285 S.E.2d 325, 327 (1982).

19. See *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981); *Fulton v. Hecht*, 580 F.2d 1243, 1249 n.2 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). See also 4 R. CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES*, § 24.01 (4th ed. 1983).

20. N.C. GEN. STAT. § 75-16 (1981). Section 75-16 was enacted in 1913 as part of the original Chapter 75: Monopolies, Trusts and Consumer Protection. Act of Mar. 3, 1913, ch. 41, § 14, 1913 N.C. Sess. Laws 66. All provisions of Chapter 75 are subject to the treble damage provision of § 75-16, except § 75-56 (regulating debt collection practices). Accordingly, when § 75-1.1 was enacted in 1969 it became subject to § 75-16 as well. See Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 205, 258 (1982) [hereinafter cited as Aycock, *North Carolina*]. In 1977, § 75-16 was amended to delete the requirement that damages be assessed by the jury, thus making the award of treble damages automatic if compensatory damages were assessed. See *id.* at 258 n.365. See generally Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. REV. 199 (1972).

21. See *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 235, 259 S.E.2d 1, 5, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

22. *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 404 (1981).

23. *Id.* at 546, 276 S.E.2d at 402.

24. N.C. GEN. STAT. § 75-16.1 (1981 & Supp. 1983).

25. See Aycock, *North Carolina*, *supra* note 20, at 211. For a discussion of the judicial interpretation of unfair methods of competition and unfair or deceptive trade practices under 75-1.1, see generally N. ALLEN, *ANTITRUST AND TRADE REGULATION: THE LAW IN NORTH CAROLINA* §§ 10-2, 10-3 (1982); Aycock, *North Carolina*, *supra* note 20 at 211-23; Comment, *The Trouble with Trebles: What Violates G.S. § 75-1.1?*, 5 CAMPBELL L. REV. 119, 123-57 (1982).

26. *Marshall v. Miller*, 302 N.C. 539, 545-46, 276 S.E.2d 397, 401-402 (1981).

27. *Id.* at 548, 276 S.E.2d at 403.

28. *Hardy v. Toler*, 288 N.C. 303, 310, 218 S.E.2d 342, 346-47 (1975).

29. See *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981); N.C. GEN. STAT. § 75-16 (1981).

Although both treble and punitive damages are awards in excess of compensatory damages, the justification for awarding statutory treble damages pursuant to section 75-16 contrasts sharply with the common-law justification for punitive damages. The treble damage provision has been recognized as partially punitive in nature and partially an encouragement to private enforcement.³⁰ Punitive damages, however, are awarded for the sole purpose of punishing and deterring others from similar behavior.³¹ Unlike an award of treble damages under section 75-16, an award of punitive damages requires a showing of "intentional wrongdoing,"³² "willful conduct,"³³ or "outrageous conduct."³⁴

Because treble and punitive damages serve different purposes and are not awarded for the same policy reasons, it has been argued that a plaintiff should be able to recover both measures of damage.³⁵ Furthermore, the availability of punitive and treble damages for violations of section 75-1.1 arguably effectuates the state's goals of punishment, deterrence and encouragement of private enforcement.³⁶ Opponents, however, contend that treble and punitive damages are mutually exclusive. They argue that an award of both is duplicative because each measure has a punitive element.³⁷ The resolution of this conflict can be advanced by considering North Carolina cases involving unfair methods of competition or unfair or deceptive trade practices and by analyzing analogous statutes in North Carolina and other jurisdictions. Ultimately, however, legislative intent should govern the resolution of this controversy.

The issue whether treble and punitive damages are mutually exclusive arises when a plaintiff pursues, in the same suit, a cause of action for a violation of section 75-1.1 and a common-law cause of action. The plaintiff could seek treble damages for the statutory violation and punitive damages for the

30. See *supra* notes 21-23 and accompanying text; *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

31. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112-13, 229 S.E.2d 297, 302 (1976).

32. *Id.*

33. *Hardy v. Toler*, 288 N.C. 303, 306, 218 S.E.2d 342, 344-45 (1975).

34. *Id.* To determine punitive damage, the court submits a separate punitive damage issue to the jury and instructs the jurors that such an award should not be made if they have not found compensatory damages. The propriety and amount of punitive damages, however, is within the complete discretion of the jury. See *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 300-01 (1976); *Phillips v. Universal Underwriters Ins. Co.*, 43 N.C. App. 53, 56, 257 S.E.2d 671, 673 (1979).

35. See, e.g., *Atlantic Purchasers*, 705 F.2d at 718-20 (Bryan, J., dissenting); Roberts & Martz, *Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions—The Ohio Consumer Sales Practices Act*, 42 OHIO ST. L.J. 927, 959 (1981); Note, *Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?*, 54 N.C.L. REV. 963, 965 n.15 (1976). Cf. *Armott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979) (although reversed, the district court awarded treble and punitive damages for a violation of the Sherman Antitrust Act); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 198 N.W.2d 363 (1972) (although reversed, the Wisconsin Circuit Court awarded treble and punitive damages for a violation of the Wisconsin Antitrust Act).

36. See Parker, *The Deterrent Effect of Punitive Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286, 287 (1973).

37. See, e.g., *Atlantic Purchasers*, 705 F.2d at 716 n.4; *Hardy v. Toler*, 288 N.C. 303, 312, 218 S.E.2d 342, 348 (1975) (Huskins, J., concurring); Roberts & Martz, *supra* note 35, at 959. See also *infra* note 78 and accompanying text.

common-law violation.³⁸ The North Carolina Court of Appeals has determined that both theories may be submitted to the jury.³⁹ Consequently, in the same action a jury might award compensatory damages, find a common-law violation, and establish facts constituting a violation of section 75-1.1, which would entitle plaintiff to treble damages.⁴⁰ If the common-law violation involved intentional wrongdoing, the jury conceivably could award punitive damages as well.⁴¹ The North Carolina Court of Appeals, however, has also determined that a plaintiff may recover under the statutory or common-law cause of action, but not under both.⁴² Thus, it appears that the plaintiff would be required to choose a theory of recovery after the verdict is returned.⁴³ Because each measure is tied to a specific theory of recovery, the plaintiff's choice of a theory would be an election of remedies.⁴⁴ A plaintiff could not choose the statutory theory and receive treble as well as punitive damages—the measures of damage would be mutually exclusive.

The foregoing conclusion does not resolve the treble/punitive issue. A plaintiff might pursue a section 75-1.1 cause of action seeking treble damages pursuant to section 75-16 and punitive damages for the statutory violation on the basis of intentional wrongdoing. Again, a jury might award compensatory and punitive damages and find facts constituting a violation of section 75-1.1. Because an election between theories of recovery would be unnecessary, a court would be faced squarely with the mutual exclusivity question. Although the North Carolina courts never have considered the availability of common-law punitive damages in this context, they have considered the availability of punitive damages in connection with other North Carolina statutes that provide for multiple damage recovery.

North Carolina General Statutes section 20-348 provides for an award of treble damages to those injured by a violation of the North Carolina Vehicle Mileage Act.⁴⁵ In *Roberts v. Buffaloe*⁴⁶ the North Carolina Court of Appeals

38. See, e.g., *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

39. See *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 358, 285 S.E.2d 325, 327 (1982). See also *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 990-91 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981) (N.C. GEN. STAT. § 75-1.1 (1981) diversity action).

40. See *supra* note 29 and accompanying text.

41. See *supra* notes 32-34 and accompanying text.

42. See *Marshall v. Miller*, 47 N.C. App. 530, 541-42, 268 S.E.2d 97, 103 (1980), *modified on other grounds*, 302 N.C. 539, 276 S.E.2d 397 (1981); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 105-06, 245 S.E.2d 801, 807-08, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978). See also *Atlantic Purchasers*, 705 F.2d at 716 n.4.

43. The North Carolina courts that have considered a suit such as the hypothetical described here did not address the availability of treble and punitive damages. Although none of these courts awarded both remedies, the results were reached on grounds other than mutual exclusivity. See *supra* note 38.

44. Presumably the plaintiff could elect the cause of action and accompanying measure of damage which yielded the largest award.

45. N.C. GEN. STAT. §§ 20-340 to -350 (1983).

46. 43 N.C. App. 368, 258 S.E.2d 861 (1979).

rejected the possibility of an award of punitives along with the treble damage remedy.⁴⁷ The court ruled that common-law punitive damages were precluded by the statute.⁴⁸

North Carolina General Statutes section 1-539.1 provides for an award of double damages to those injured by a wrongful cutting of timber, under trespass. At common law, damages for wrongful timber cutting could be enhanced, as a penal measure, if the trespasser was a "knowing wrongdoer."⁴⁹ Such damages were calculated by valuing the timber where cut and enhancing that measure by the value added by the trespasser's labors. Thus, the plaintiff was awarded the full value of the timber as held or disposed by the defendant.⁵⁰ In *Jones v. Georgia-Pacific Corp.*⁵¹ plaintiff sought double damages pursuant to section 1-539.1 and enhanced damages. The North Carolina Court of Appeals rejected such an award. The court characterized the common-law enhanced damage measure and the statutory damages as mutually exclusive.⁵²

The above decisions suggest that the North Carolina courts would find punitive and treble damages for violation of section 75-1.1 to be mutually exclusive. Court interpretations of the "little FTC Acts" of other states also are instructive in resolving the punitive/treble damage issue. Legislation concerning unfair trade practices and consumer protection now has been enacted in forty-eight other states.⁵³ These statutes, however, offer limited assistance. Of the forty-eight, only one-third provide for multiple damages.⁵⁴ Many of the states that provide for multiple damages also require a showing of intentional misconduct.⁵⁵ Because an award of treble damages under section 75-16 does not require intentional misconduct,⁵⁶ it can be argued that punitive damages should be allowed when such conduct is present. In states where intentional misconduct is required for an award of multiple damages, the argument for punitive damages is less persuasive. These jurisdictions appear to have incorporated a punitive damages remedy into the statute.⁵⁷

47. *Id.* at 372, 258 S.E.2d at 863.

48. *Id.* The analogy between N.C. GEN. STAT. § 75-16 (1981) and *id.* § 20-348 (1983) is defective in one respect. A violation of § 75-1.1 and an award of treble damages under § 75-16 does not require a showing of intentional wrongdoing. *See supra* notes 26-27 and accompanying text. A violation of § 20-348, however, requires a showing that the defendant acted with "intent to defraud." N.C. GEN. STAT. § 20-348 (1983). Although it could be argued that punitive damages should be available for intentional wrongdoing that violates § 75-1.1, such an argument is less persuasive regarding § 20-348. *Roberts*, however, was not decided on this ground.

49. Dobbs, *Trespass to Land in North Carolina: Part II. Remedies for Trespass*, 47 N.C.L. REV. 334, 336-37 (1969).

50. *Id.*

51. 15 N.C. App. 515, 190 S.E.2d 422 (1972).

52. *Id.* at 518, 190 S.E.2d at 424.

53. *See* Leaffer & Lipson, *supra* note 11, at 531.

54. *See id.* at 560-64. "Multiple damages" refers to the doubling or trebling of compensatory damages.

55. *See, e.g.*, GA. CODE ANN. § 10-1-399(c) (1982); LA. REV. STAT. ANN. § 51:1409A (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 93A, § 11 (West 1975 & Supp. 1983); S.C. CODE ANN. § 39-5-140 (Law. Co-op. 1977); TENN. CODE ANN. § 47-18-109(a) (1979).

56. *See supra* notes 26-27 and accompanying text.

57. *But see* Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 382, 262 S.E.2d 820, 823 (1979) (although recognizing that a violation of the Georgia unfair trade practice

Those states that do not require intentional misconduct have not addressed the mutual exclusivity issue.⁵⁸ Although the North Carolina courts have emphasized that treble damages serve to encourage private enforcement,⁵⁹ other "nonintentional" jurisdictions highlight the punitive aspect of such an award.⁶⁰ This emphasis weighs against the award of punitive damages in addition to multiple damages.⁶¹ Thus, it appears that many states might find multiple damages and punitive damages to be mutually exclusive in an unfair or deceptive trade practice action. Because the language and interpretation of the North Carolina statutes differ significantly from other jurisdictions, however, the applicability of this conclusion to sections 75-1.1 and 75-16 is limited.

The North Carolina Supreme Court has held that federal decisions interpreting the FTC Act may be used as guidance in determining the conduct that constitutes a violation of section 75-1.1.⁶² Because the FTC Act does not provide for a private cause of action, however, it does not provide an analogy for resolving whether punitive damages may be recovered when treble damages are awarded under section 75-16. As noted by the North Carolina Supreme Court: "[T]he provisions for private enforcement found in [section 75-16] are more closely analogous to Section 4 of the Clayton Act,^[63] which provides for private suits with treble damage recovery for violation of federal antitrust laws."⁶⁴ The federal courts consistently have ruled that punitive damages are unavailable to a plaintiff who is awarded treble damages⁶⁵ for a violation of the Sherman Antitrust Act.⁶⁶ These courts have characterized treble damages as punitive, and accordingly, they view punitive damages as a double recov-

statutes required intentional conduct, the court suggested that punitive damages were "permissible" along with an award of "mandatory" treble damages under the statute).

58. See, e.g., *Roberts & Martz*, *supra* note 35, at 958 ("not clear" whether a plaintiff can recover treble damages under the Ohio unfair trade practice statutes and also recover punitive damages).

59. See *supra* notes 21-22 and accompanying text.

60. See, e.g., *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 274-75, 390 A.2d 566, 571 (1978) (Pashman, J., concurring). Cf. *Bailey Employment Sys. v. Hahn*, 545 F. Supp. 62, 73 (D. Conn. 1982) (punitive damages allowable under Connecticut unfair trade practice statutes in judge's discretion; court awarded compensatory damages doubled).

61. But see D.C. CODE ANN. § 28-3905(k)(1) (1981) (no requirement of intentional conduct to show violation of District of Columbia unfair trade practice statutes, but treble damages and punitive damages enumerated as possible awards).

62. See *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262-63, 266 S.E.2d 610, 620-21 (1980); *Hardy v. Toler*, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975).

63. 15 U.S.C. § 15(a) (1982).

64. *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981).

65. See, e.g., *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. (1979); *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936). Cf. *Hometown Builders, Inc. v. Atlantic Nat'l Bank*, 477 F. Supp. 717, 719-20 (E.D. Va. 1979) (finding "duplicative" an award of punitive damages along with the treble damage recovery of 12 U.S.C. § 1972 (1982), an "addition to the antitrust laws"). See also *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 409, 198 N.W.2d 363, 367-68 (1972) (noting that while the Wisconsin version of the Sherman Antitrust Act was designed to encourage private enforcement and punish violators, the award of punitives with statutory trebles "would amount to double recovery of a penalty and thus violate the basic fairness of a judicial proceeding required by the due process clause of the Fourteenth Amendment").

66. 15 U.S.C. §§ 1-7 (1982).

ery.⁶⁷ Treble damages are an exclusive remedy for the violation of the federal antitrust statutes.⁶⁸ Since the North Carolina courts have relied heavily on federal decisions interpreting section 5 of the FTC Act when interpreting section 75-1.1, the federal decisions concerning the availability of punitive and treble damages for violations of the federal antitrust laws also are instructive. These decisions suggest that the North Carolina courts would find punitive and treble damages to be mutually exclusive.

In *Marshall v. Miller*⁶⁹ the North Carolina Supreme Court considered whether a violation of section 75-1.1 should require a showing of intentional wrongdoing. The court recognized that legislative intent should govern its determination.⁷⁰ Likewise, legislative intent ultimately should govern whether punitive and treble damages are mutually exclusive under sections 75-1.1 and 75-16. Although the foregoing consideration of analogous statutes, both within and without the state, is instructive on how the North Carolina courts should resolve this issue, a sounder approach is to attempt to effectuate the legislature's statutory intent.

The void left by the lack of written legislative history regarding section 75-1.1 has been filled by the judiciary. As declared by the courts, the essence of the legislative intent was to supplement the common law in the area of unfair or deceptive trade practices,⁷¹ to encourage private enforcement,⁷² and to provide a punitive measure.⁷³ Thus, the General Assembly enacted section 75-1.1 creating "an entirely statutory cause of action"⁷⁴ and provided the existing treble damage provision of section 75-16 as the remedy for that cause of action. The result was a cause of action "broader than traditional common law actions,"⁷⁵ an "expansion" of the common law,⁷⁶ and a remedy more easily recovered than remedies at common law.⁷⁷ Thus, it is inconsistent with this scheme to interject common-law punitive damages upon the showing of intentional wrongdoing, an element not required under section 75-16.

The inconsistency between punitive damages and legislative intent is most apparent when considering the punitive intent of the treble damage provision. An award of treble damages under section 75-16 represents both an incentive

67. See *supra* note 65.

68. *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936).

69. 302 N.C. 539, 276 S.E.2d 397 (1981).

70. *Id.* at 543, 276 S.E.2d at 400.

71. See *id.*

72. See *id.*; *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 320, 233 S.E.2d 895, 900 (1977); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

73. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402; *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

74. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402.

75. *Id.* at 547, 276 S.E.2d at 402.

76. *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

77. For example, although at common law actionable fraud required an "intent to deceive," *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974), an award of treble damages for a violation of § 75-1.1 does not require intentional wrongdoing. See *supra* notes 26-27 and accompanying text.

for private enforcement and a punitive measure. The award is one; it cannot be apportioned between these aspects. Necessarily, an additional award of punitive damages overlaps and duplicates the punitive portion of treble damages. It would be a double recovery, prohibited in North Carolina, to the extent that the treble award represents a punitive element.⁷⁸ Thus, punitive damages and a treble damage recovery under section 75-16 should be deemed mutually exclusive.

It could be argued that because the statutory cause of action does not require intentional wrongdoing, the outrageous conduct associated with intentional wrongdoing demands an additional punitive remedy. This argument is particularly appealing when compensatory damages, even when trebled, result in a minimal award.⁷⁹ The response is two-fold. First, the legislature contemplated intentional conduct in connection with a violation of section 75-1.1. Under North Carolina General Statutes section 75-16.1, a plaintiff injured by a violation of section 75-1.1 may recover attorneys' fees upon a showing that the defendant acted "willfully." Section 75-16.1 also was intended to encourage private enforcement.⁸⁰ Although the award of attorneys' fees is not a punitive provision, it does enable the plaintiff to recover an increased award for intentional wrongdoing.⁸¹ Had the legislature intended punitive damages to be available in connection with violations of section 75-1.1, they would have provided such a remedy for intentional wrongdoing.

Second, in cases involving intentional wrongdoing in which treble damages are minimal, the plaintiff may pursue a common-law cause of action and seek punitive damages. Since a plaintiff may pursue the common-law and the statutory causes of action in the same suit,⁸² if punitive damages are warranted and are awarded by the jury, he may elect such a remedy in lieu of the statutory treble damages.⁸³

78. See *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954); *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified on other grounds*, 302 N.C. 539, 276 S.E.2d 397 (1981).

79. Cf. J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS § 198 (1972).

80. See *Marshall*, 302 N.C. at 549, 276 S.E.2d at 404. In *Marshall*, the court stated:

We further note that G.S. 75-16.1 also provides that an unsuccessful plaintiff may be charged with defendant's attorney fees should the court find that "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." This is an important counterweight designed to inhibit the bringing of spurious lawsuits which the liberal damage provisions of G.S. 75-16 might otherwise encourage.

Id. Thus, it is doubtful that the court would liberalize further the damages available for a violation of § 75-1.1 by legitimizing an award of punitive damages.

81. Like punitive damages, an award of attorneys' fees under § 75-16.1 requires a finding by the jury of some amount of compensatory damages. Compare *supra* note 34 and accompanying text with *Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980) (court denied an award of attorneys' fees because plaintiff did not suffer actual injury).

82. See *supra* notes 38-39 and accompanying text.

83. See *supra* notes 40-44 and accompanying text. Cf. *B.B. Walker Co. v. Ashland Chem. Co.*, 474 F. Supp. 651 (M.D.N.C. 1979). In *Walker*, plaintiff sued under both the North Carolina common law of unfair competition and § 75-1.1. Although the statute of limitations applicable to the statute had expired, plaintiff was awarded compensatory damages of \$10 and punitive dam-

One final ground for the mutual exclusivity of punitive and treble damages exists. Punitive damages should not be used to supplement a statutory scheme in which treble damages have been provided explicitly and no provision has been made for additional damages. When considering the availability of punitive damages along with double damages under the North Carolina statute governing wrongful cutting of timber,⁸⁴ the North Carolina Court of Appeals stated:

It is settled law that statutes in derogation of the common law or statutes imposing a penalty must be strictly construed. Strict construction . . . requires that everything be excluded from the operation of the statute which does not come within the scope of the language used, taking the words in their natural and ordinary meaning.⁸⁵

Because section 75-1.1 is in "derogation of the common law" causes of action for unfair or deceptive trade practices⁸⁶ and section 75-16 imposes a penalty,⁸⁷ strict construction is in order. Absent explicit legislative inclusion, punitive damages should be excluded from the statutory scheme.⁸⁸ Punitive damages and treble damages should be mutually exclusive.

In conclusion, the North Carolina cases that have interpreted sections 75-1.1 and 75-16 and the interpretations of analogous statutes within and without North Carolina suggest that the North Carolina courts should conclude that statutory treble damages and punitive damages are mutually exclusive. More importantly, the North Carolina courts' interpretation of the legislative intent suggests that the two measures should be mutually exclusive. Until the courts or legislature resolve this issue, however, the prudent plaintiff should pursue punitive damages under both the common-law and statutory causes of action.

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ages of \$250,000 under the common-law cause of action. Pursuant to § 75-16, recovery would have been limited to treble damages of \$30.

84. N.C. GEN. STAT. § 1-539.1 (1982). See *supra* notes 49-52 and accompanying text.

85. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 518, 190 S.E.2d 422, 424 (1972) (citations omitted).

86. See *supra* notes 74-77 and accompanying text.

87. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402.

88. *Cf. Hometown Builders, Inc. v. Atlantic Nat'l Bank*, 477 F. Supp. 717, 719 (E.D. Va. 1979) (in construing a federal antitrust treble damage provision, the court stated: "The absence of any discussion [in the legislative history] of punitive damages in excess of treble damages is a strong indication that such damages were not contemplated by Congress and were not implied in the statute."); *Marshall*, 302 N.C. at 547, 276 S.E.2d at 402 ("Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown."); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 409, 198 N.W.2d 363, 367 (1972) (because the Wisconsin antitrust statute explicitly creates treble damages, the statutory remedy is exclusive of punitive damages).

If the North Carolina legislature had intended punitive damages to be available, it could have enumerated trebles as well as punitives, as has been done in the District of Columbia. See D.C. CODE ANN. § 28-3905(k)(1) (1981).

North Carolina's License Revocation for Drunk Drivers: Minor Inconvenience or Unconstitutional Deprivation?

North Carolina General Statutes section 20-16.5, added by the 1983 North Carolina Safe Roads Act,¹ establishes a mandatory, immediate, ten-day, pretrial license revocation for certain drivers charged with driving while intoxicated (DWI).² Since possession of a driver's license is a property interest protected by the notice and hearing guarantees of due process,³ section 20-16.5 implicates these due process guarantees. The leading United States Supreme Court case in this area, *Mackey v. Montrym*,⁴ establishes a "balancing of competing interests" test to determine when the revocation of a driver's license without a prior hearing is constitutional.⁵ The test set out in *Mackey*, however, ignores the Court's earlier decision in *Bell v. Burson*.⁶ The *Bell* rule states that a presuspension hearing *always* must be held before deprivation of an important property interest⁷ unless an emergency⁸ exists. This note applies both the *Mackey* "competing interests" test and the *Bell* "emergency" test to section 20-16.5 and concludes that under either test the new provision is unconstitutional.

There are two types of individuals whose licenses are revoked under the mandatory provisions of section 20-16.5—those who refuse a chemical test after a DWI arrest, and those who take the test and show a blood alcohol concentration of 0.10 percent or more.⁹ The revocation occurs without a hearing. A judicial official¹⁰ determines, based on the revocation report filed by the charging officer and the chemical analyst,¹¹ whether there is probable cause to believe that the conditions requiring revocation are present.¹² If he finds

1. Act of June 3, 1983, ch. 435, § 14, 1983 3 N.C. Adv. Legis. Serv. 52 (codified at N.C. GEN. STAT. § 20-16.5 (1983)).

2. *Id.* DWI is the term applied to the impaired driving offenses consolidated under the Safe Roads Act.

3. See *infra* note 22 and accompanying text.

4. 443 U.S. 1 (1979).

5. *Id.* at 5.

6. 402 U.S. 535 (1971).

7. *Id.* at 537.

8. See *infra* notes 26-28 and accompanying text.

9. N.C. GEN. STAT. § 15A-101(1) (1983).

10. *Id.* § 15-105(5) defines a "judicial official" as "a magistrate, clerk, judge, or justice of the General Court of Justice."

11. *Id.* § 20-16.5(a)(4). Section 20-16.5(c) provides that "[i]f the person has refused to submit to a chemical analysis, a copy of the report to be submitted . . . may be substituted for the revocation report if it contains the information required by this section."

12. *Id.* § 20-16.5(b). The judicial official makes the probable cause determination only if the revocation report is filed with the judicial official while the DWI offender is present. *Id.* § 20-16.5(e). If a blood test is given, so that the offender already will have been released when the results are received, or if a DWI offender is given a citation rather than arrested, the procedure enumerated in § 20-16.5(f) applies. In that case the revocation report will be presented to the clerk of court, who will determine probable cause on the basis of the report and any other evidence presented to him. If probable cause is found the clerk will mail a revocation order to the offender. J. DRENNAN, THE SAFE ROADS ACT OF 1983: A SUMMARY AND COMPILATION OF STATUTES AMENDED OR AFFECTED BY THE ACT 24 (1983).

probable cause, the judicial official is required to enter an order revoking the individual's license for ten days.¹³ The revocation is absolute—no temporary permits or limited driving privileges are provided.¹⁴ Section 20-16.5(g), however, does provide for a postrevocation hearing to determine whether the revocation was proper. The judicial official must inform the individual charged with DWI, both personally and in the revocation order, of his right to a hearing.¹⁵ The individual then may submit a written request for a hearing, but his license remains revoked pending that hearing.¹⁶ The hearing must be held within three working days of the issuance of the order (five if the hearing is before a district court judge),¹⁷ and the decision is final.¹⁸

The fourteenth amendment guarantees an individual the due process protections of notice and hearing before being deprived of an important property interest.¹⁹ Due process analysis²⁰ of summary license revocation involves examination of two issues: whether the right in question is protected and what procedural protections must be accorded an individual possessing the right.²¹ Once granted, a driver's license is an important interest entitled to fourteenth amendment protection.²² Thus, the question of constitutionality centers on

13. N.C. GEN. STAT. § 20-16.5(e) (1983). The revocation period begins at the time the order is issued and the license surrendered and continues for ten days (or until the revocation is rescinded under § 20-16.5(g)), and a \$25 fee, *see id.* § 20-16.5(j), has been paid. If the person does not have a valid license, the revocation continues until ten days from the date the revocation order is issued. *Id.* § 20-16.5(e).

14. *Id.* § 20-16.5(i).

15. *Id.* § 20-16.5(e).

16. *Id.* § 20-16.5(g).

17. *Id.* If the hearing does not take place within these time limits, and the person contesting the revocation has not contributed to the delay, the revocation is rescinded. *Id.*

18. *Id.*

19. U.S. CONST. amend. XIV.

20. The constitutionality of pretrial license revocation has been challenged on other grounds than due process. Both equal protection and right-to-travel arguments have been proffered, but no court has accepted them.

Right-to-travel cases concern the right of a person to go to a certain location; they do not establish a constitutional right to travel by a certain mode of transportation. Suspension of a driver's license does not prevent an individual from traveling wherever and whenever he chooses; it merely limits his mode of getting there. *McGue v. Sillas*, 82 Cal. App. 3d 799, 805, 147 Cal. Rptr. 354, 357 (1978).

The equal protection argument asserts that, for some people, deprivation of a driver's license is equivalent to deprivation of the ability to work, causing a hardship of varying degrees. Section 20-16.5 presents no equal protection problems, however, because no particular class of persons is selected for suspension. *Cf. Kellum v. Thorneycroft*, 113 Ariz. 115, 116-17, 649 P.2d 994, 995-96 (1982); *Murphey v. Department of Motor Vehicles*, 86 Cal. App. 3d 119, 122-23, 150 Cal. Rptr. 20, 22 (1978); *Pepin v. Department of Motor Vehicles*, 275 Cal. App. 2d 9, 11, 79 Cal. Rptr. 657, 659 (1969).

21. *Bell*, 402 U.S. at 539.

22. *Bell* states that *how* possession is achieved is irrelevant to the protection granted:

Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural Due Process required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."

Id. at 539 (citations omitted). *See also* *Dixon v. Love*, 431 U.S. 105, 112 (1977). Therefore, that

whether the procedural due process requirements of notice and hearing are satisfied by pretrial revocation statutes.

In *Bell* the Supreme Court addressed the constitutionality of the Georgia Motor Vehicle Safety Responsibility Act,²³ which provided for automatic suspension of the license of any uninsured motorist involved in an accident, irrespective of fault, unless he posted security to cover the amount of damages. The Act provided an administrative hearing before suspension, but limited the issues that could be raised in this summary proceeding.²⁴ The Supreme Court held that this scheme violated the fourteenth amendment by failing to afford petitioner a prior hearing on liability, and stated that "except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and an opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective."²⁵

Bell left open the question of what constituted an emergency sufficient to justify dispensing with notice and the opportunity for a hearing. In *Fuentes v. Shevin*,²⁶ however, the Court defined "emergencies" for due process purposes. *Fuentes* dealt with state laws authorizing the prehearing seizure of property upon the *ex parte* application of any individual claiming a right to that property.²⁷ The Court established three requirements that had to be satisfied before such a seizure would be within the "emergency exception" to the due process requirement of a prior hearing.

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.²⁸

Following *Fuentes*, several courts applied this three-prong test to determine the constitutionality of pretrial driver's license revocation for failure to submit to chemical testing under implied consent laws.²⁹ All fifty states have

North Carolina courts have termed the possession of a driver's license a "conditional privilege" rather than a "right," *Joyner v. Garrett*, 279 N.C. 226, 235, 182 S.E.2d 553, 559 (1973), has no bearing on the State's power to terminate possession.

23. Motor Vehicle Safety Responsibility Act, GA. CODE ANN. § 92A-601 (1983).

24. The issue of fault could not be raised. The only evidence allowed to be considered during the administrative hearing was "(a) [whether] the petitioner or his vehicle [was] involved in the accident; (b) [whether] petitioner complied with the provisions of the Law as provided; or (c) [whether] petitioner [came] within any of the exceptions of the Law." *Bell*, 402 U.S. at 537-38.

25. *Id.* at 542 (citations omitted).

26. 407 U.S. 67 (1972).

27. *Id.* at 68.

28. *Id.* at 91.

29. See, e.g., *Slone v. Kentucky Dep't of Transp.*, 379 F. Supp. 652 (E.D. Ky. 1974), *aff'd*, 513 F.2d 1189 (1975); *Chavez v. Campbell*, 397 F. Supp. 1285 (D. Ariz. 1975); *Holland v. Parker*, 354 F. Supp. 196 (D.S.D. 1973); *Graham v. State*, 633 P.2d 211 (Alaska 1981).

"implied consent" laws.³⁰ Under these statutes, a motorist, simply by driving on the roads of a state, gives implied consent to chemical testing of his alcohol concentration level if he is arrested for DWI.³¹ If the motorist refuses a chemical test, his license is suspended for some statutorily determined period of time.³² Applying the *Fuentes* test, courts generally have held that license revocations under implied consent laws are not related directly to an emergency and, therefore, are unconstitutional under *Bell*.³³

The Supreme Court applied a different analysis, however, in *Mackey v. Montrym*,³⁴ and held a similar statute constitutional. Under the Massachusetts implied consent law challenged in *Mackey*, a driver's license was automatically suspended for ninety days upon refusal to take a breath analysis test when arrested for DWI.³⁵ The statute provided an immediate hearing before a state official at any time *after* the license was suspended, but provided no procedure for a presuspension hearing.³⁶ The Court stated that "the paramount interest the Commonwealth has in preserving the safety of its public highways . . . distinguishes this case from [*Bell*]." ³⁷ Thus, the Court, without discussion, assumed that the case presented an emergency, and that the requirement of a presuspension hearing therefore was negated. The Court, however, did not analyze the statute under the three-prong *Fuentes* test; instead, the Court applied the "balancing of interests" test, first set out in *Mathews v. Eldridge*,³⁸ to determine whether the procedure satisfied due process. In *Mathews* the Court had held that due process analysis requires consideration of three factors:

First, the private interest that will be affected by the official action;
second, the risk of an erroneous deprivation of such interest through

30. Note, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 32 RUTGERS L.J. 99, 99 n.2 (1980) (citing to the laws of all fifty states).

31. *Id.* at 101.

32. See, e.g., N.C. GEN. STAT. § 20-16.2 (1983) (automatic 12-month revocation).

33. In *Holland v. Parker*, 354 F. Supp. 196, 202 (D.S.D. 1973), the United States District Court for the District of South Dakota applied *Fuentes* to that State's implied consent law, stating, "[t]here is an important governmental and general public interest in keeping the drunk driver off the road Secondly, it could be argued that there is a special need for 'very prompt action,' and finally the person initiating the seizure is a 'government official' (a law enforcement officer)." Although the statute ostensibly met the *Fuentes* criteria, the *Holland* court found the statute unconstitutional under *Bell* because the summary procedure was not in response to an emergency. The court reasoned that since *only* those drivers who refused the test, and not those who failed the test, had their licenses revoked, it was clear that the summary revocation was not related directly to the State's need to keep drunk drivers off the road. The court's analysis does not apply to North Carolina's Safe Roads Act, since North Carolina's § 20-16.2 provides for revocation both for motorists who refuse alcohol testing and for those who show 0.10% or more blood alcohol concentration.

34. 443 U.S. 1 (1979).

35. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1983).

36. *Id.* § 24(1)(g) (West 1975). The hearing would have resolved all questions about whether grounds existed for the suspension. *Mackey*, 443 U.S. at 7.

37. *Mackey*, 443 U.S. at 17. The Court apparently based the distinction on the fact that *Bell* concerned revocation for failure to post security, a situation that did not threaten public safety.

38. 424 U.S. 319 (1976). *Mathews* involved termination of disability benefits. The Court balanced the governmental and private interests and determined that an evidentiary hearing is not required prior to termination of payments and that the administrative procedures set out in the Social Security Act comport with due process.

the procedures used, and the possible value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁹

The *Mackey* Court applied this test to the Massachusetts license suspension provision, recognizing the importance of the private interest affected, that of "continued possession and use of the license pending the outcome of the hearing."⁴⁰ The weight given to this important interest, as balanced against the governmental interest, was to be determined by weighing, in turn, three additional factors devised by the *Mackey* Court: the duration of the revocation; the availability of hardship relief; and the availability of prompt post-revocation review.⁴¹ Although acknowledging a substantial private interest, the *Mackey* Court also recognized the strength of the government's interest in preserving the safety of the highways⁴² and in easing fiscal and administrative burdens.⁴³ The availability of prompt postrevocation review for correction of any erroneous deprivation⁴⁴ tipped the balance in favor of the State interest; the *Mackey* Court therefore held that the Massachusetts implied consent statute was constitutional.⁴⁵ The Court believed that "the compelling interest in highway safety justifies the Commonwealth in making a summary suspension effective pending the outcome of the prompt postsuspension hearing available."⁴⁶

Justice Stewart, however, believed that *Bell* mandated a presuspension hearing in *Mackey*.⁴⁷ He reemphasized that under *Bell* the presuspension hearing requirement is negated only in an emergency, and stated that the Mas-

39. *Id.* at 335.

40. *Mackey*, 443 U.S. at 11. The Court in *Dixon v. Love*, 431 U.S. 105, 113 (1977), recognized that the interest in a driver's license is a substantial one, since the State cannot make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through postsuspension review procedures.

41. *Mackey*, 443 U.S. at 12.

42. *Id.* at 18. The Court found that summary suspension was justified because its existence acted to deter drunk driving and contributed to highway safety by removing drunk drivers from the roads.

43. *Id.* See also Reese & Burgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 AD. L. REV. 313 (1983). "[W]hen considering the government's interest, it is also necessary to determine whether that interest would be defeated or severely limited by the time delay inherent in providing a pre-deprivation hearing." *Id.* at 320 (citation omitted).

44. *Mackey*, 443 U.S. at 13. In construing this second prong of the *Mathews* test, the Court stated,

[T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. . . . And, when prompt post-deprivation review is available . . . we generally have required no more than that the deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Id. (citations omitted).

45. *Id.*

46. *Id.* at 19.

47. Justices Brennan, Marshall and Stevens joined Justice Stewart in dissent. *Id.*

sachusetts statute was not concerned with an emergency situation.⁴⁸ Justice Stewart acknowledged that "the dimensions of a prior hearing may . . . vary depending upon the nature of the case, the interests affected, and the prompt availability of adequate postdeprivation procedures," but believed that "when adjudicative facts are involved, when no valid governmental interest would demonstrably be disserved by delay, and when full retroactive relief cannot be provided, an after-the-fact evidentiary hearing on a crucial issue is not constitutionally sufficient."⁴⁹ The dissent believed that the *Bell-Fuentes* test, rather than the *Mathews* test, was applicable.

The Supreme Court has not determined the constitutionality of an implied consent statute that suspends licenses *both* for refusing to take a chemical test and for failing the test, but the Minnesota Supreme Court in *Hedden v. Dirkswager*⁵⁰ was faced with such a question. The Minnesota implied consent statute mandates a ninety-day suspension for failing a chemical test by registering blood alcohol concentration of .10 percent or more and a six-month suspension for refusing to take the test.⁵¹ The statute also provides for the automatic issuance of a temporary seven-day license upon revocation and establishes a form of postsuspension administrative review.⁵² The *Hedden* Court, relying on *Mackey*, held that the Minnesota scheme was constitutional.⁵³ The court stated that since "drunken drivers pose a severe threat to the health and safety of the citizens of Minnesota, the compelling interest in highway safety justifies the State of Minnesota in making a revocation pending the outcome of the prompt post-suspension hearing."⁵⁴

To determine whether section 20-16.5 is constitutional, the North Carolina courts probably will apply the *Mackey* test. The *Mackey* Court, however, incorrectly applied the balancing of interests test set out in *Mathews*.⁵⁵ The Supreme Court specifically stated in *Bell* that due process requires a presuspension hearing except in an emergency situation.⁵⁶ Thus, according to *Bell*, the *Mackey* Court should have applied the three-prong *Fuentes* test⁵⁷ to determine whether the Massachusetts prehearing revocation scheme was constitutional as an exception to the general rule requiring hearings.

The summary revocation of section 20-16.5 is unconstitutional under *Bell* because the ten-day automatic revocation of DWI offenders' licenses does not respond to an emergency. Under the first criterion of the *Fuentes* test, license revocation without prior hearing is justifiable only when it is "directly neces-

48. *Id.* at 20 (Stewart, J., dissenting) ("The suspension penalty itself is concededly imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction to induce drivers to submit to breath-analysis tests.").

49. *Id.* at 21-22.

50. 336 N.W.2d 54 (Minn. 1983).

51. MINN. STAT. ANN. § 169.123 (West Supp. 1983).

52. *Id.*

53. *Hedden*, 336 N.W.2d at 56.

54. *Id.* at 63.

55. See *supra* note 39 and accompanying text.

56. See *supra* note 25 and accompanying text.

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

sary to secure an important governmental or general public interest"⁵⁸ Further, under the second criterion, there must be a "special need for very prompt action" that is served by the revocation.⁵⁹ Although North Carolina has an important interest in protecting its citizens from drunk drivers,⁶⁰ the mandatory license suspension of section 20-16.5 goes far beyond what is "directly necessary" to effectuate that interest. Before automatic ten-day revocation of the DWI offender's license can be justified as a "directly necessary" response to an emergency situation, or to a "special need for very prompt action,"⁶¹ it must be presumed that these individuals would drive drunk during that ten-day period. Although there is a need for very prompt action when the driver is drunk and on the road, the fact that the driver may be removed from the road by arrest, and held until he is sober enough to drive, makes it unlikely that the ten-day revocation is "necessary and justified"⁶² by the need for prompt action. The act of arrest itself suffices to protect the government's interest in public safety by removing immediately the drunk driver from the highways. Thus, section 20-16.5 overreaches the governmental interest. Since the automatic, ten-day revocation is not "directly necessary" to keep North Carolina's roads safe, section 20-16.5 fails under the *Fuentes* emergency exception, and the prehearing suspension is unconstitutional under *Bell*.

The motivation behind the legislature's adoption of such a stringent measure, which bears only a tangential relationship to the interest it ostensibly seeks to protect, is clear. Justice Stewart's criticism of the Massachusetts license suspension provision examined in *Mackey* is applicable equally to the North Carolina provision: "The suspension penalty itself is concededly imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction"⁶³ Although there is a justifiable governmental interest in maintaining safe roads, there is an equally strong desire, among the legislators and the public, to punish DWI offenders. Commentary on the adoption of the Safe Roads Act bears out this presumption.⁶⁴ Proponents of the Act stressed the need for "an immediate 'slap in the face' to virtually all drivers charged with DWI" and for certainty of punishment for DWI offenders.⁶⁵ Indeed, the very title of the bill seems to indicate that punishment of drunk drivers was at least as important a force behind the enactment of the bill as protection of the citizenry.⁶⁶ Punishment of the DWI offender, even though

58. *Fuentes*, 407 U.S. at 91.

59. *Id.*

60. See, e.g., *State v. Carlisle*, 285 N.C. 229, 232, 204 S.E.2d 15, 16 (1974): "The purpose of a revocation proceeding is not to punish the offender, but to remove from the highway one who is a potential danger to himself and other travelers." (citation omitted). See also *Harrell v. Scheidt*, 243 N.C. 735, 740-41, 92 S.E.2d 182, 186 (1956).

61. *Fuentes*, 407 U.S. at 91.

62. *Id.*

63. *Mackey*, 443 U.S. at 30 (Stewart, J., dissenting).

64. See *infra* note 76 and accompanying text.

65. J. DRENNAN, LEGISLATION OF INTEREST TO PUBLIC OFFICIALS 117 (1983). See also J. DRENNAN, *supra* note 12, at 1.

66. The Safe Roads Act was entitled "An Act to Provide Safe Roads By Requiring Mandatory Jail Terms for Grossly Aggravated Drunken Drivers, Providing an Effective Deterrent

a legitimate governmental purpose when effectuated by other means, does not support license revocation without the usual due process requirement of prior hearing under either the *Bell-Fuentes* emergency rule or the *Mackey-Matthews* balancing test.

In applying the *Mathews* test, the *Mackey* Court implicitly overruled *Bell* in part. Because *Bell* requires a hearing *before* terminating an important property interest unless an emergency is involved,⁶⁷ there is no room under the *Bell* rule for weighing competing interests in determining whether a presuspension hearing is required. The *Mackey-Matthews* test, however, depends on balancing the private interest of "continued possession and use of the license pending the outcome of the hearing"⁶⁸ against the government's interest in safe roads. This private interest is an important one, and the balance can tip in favor of allowing prehearing revocation only when sufficient remedies to protect the private interest exist.⁶⁹ The *Hedden* court applied the *Mackey* test and found the prehearing suspension under the Minnesota implied consent law to be constitutional. That revocation scheme, however, unlike the North Carolina provision, provided for protection of the private interest in possession of the license.⁷⁰ Besides including provisions for prompt postrevocation review, the Minnesota statute allowed a limited driving permit to be granted in hardship cases.⁷¹ In addition, a seven-day, temporary license was granted to all offenders upon revocation.⁷² Since the statute in *Hedden* is analogous to section 20-16.5, the North Carolina courts are likely to apply the *Mackey* analysis to determine the constitutionality of the ten-day revocation.⁷³ Because section 20-16.5 is distinguishable from the Minnesota statute, however, the North Carolina statute arguably is unconstitutional even under the *Mackey* test.

Section 20-16.5 provides no protection for the private interest affected.⁷⁴ The ten-day revocation is automatic and absolute; no temporary license is granted. An automatic grant of a temporary license may not be required to protect the private interest, but some type of provision must be made for hard-

to Reduce the Incidence of Impaired Driving, and Clarifying the Statutes Related to Drinking and Driving." Act of June 3, 1983, ch. 435, 3 1983 N.C. Adv. Legis. Serv. 52.

67. See *supra* notes 23-25 and accompanying text.

68. *Mackey*, 443 U.S. at 11.

69. See *supra* notes 38-41 and accompanying text.

70. See *supra* notes 44-45 and accompanying text.

71. MINN. STAT. ANN. § 169.123 (West Supp. 1983).

72. *Id.*

73. The Minnesota statute and § 20-16.5 are not analogous. Section 20-16.5 augments North Carolina's implied consent law, and imposes an additional revocation penalty on DWI offenders. However, the Minnesota law is similar in that it does revoke licenses immediately for both failure of the test and refusal to take it.

74. For temporary permit provisions similar to the Minnesota provision in *Mackey*, see ALASKA STAT. § 28.15.165(a)(3) (Supp. 1983) (7 days); GA. CODE ANN. § 40-5-69(b) (Supp. 1983) (180 days or until license is suspended or revoked); IND. CODE ANN. § 9-11-4-7(b)(1) (Burns Supp. 1983) (until license is suspended); IOWA CODE ANN. § 312B.16 (West Supp. 1983) (20 days); MISS. CODE ANN. § 63-11-23(2) (Supp. 1983) (30 days); NEV. REV. STAT. § 484.385(1) (1983) (7 days); N.D. CENT. CODE § 39-20-03.1(1) (Supp. 1983) (20 days); OKLA. STAT. ANN. tit. 47, § 754(2) (West Supp. 1983) (30 days). Only Connecticut immediately revokes the license without issuing a temporary permit, but the revocation is only for 24 hours. CONN. GEN. STAT. ANN. § 14-227a(h) (West Supp. 1983).

ship cases. A provision that provides at least temporary relief to those individuals who depend on their ability to drive for their livelihoods would more likely survive the *Mackey* balancing test.⁷⁵

The ten-day revocation also tips the balance in favor of the private interest. A ten-day revocation may not appear to be oppressive, but the absolute nature of the revocation increases the severity of the sanction. The Governor's Task Force on Drunken Drivers⁷⁶ reasoned that "many drivers faced with a sudden ten-day loss of license would be able either to take time off as vacation or get friends and family to drive them for such a short period."⁷⁷ This response ignores the fact that many motorists depend on driving for their livelihood and may not be able to make other plans. For them, "such a short period" might well be economically disastrous.⁷⁸

Prompt postrevocation review is available under section 20-16.5, but revocation is not stayed pending appeal. The *Mackey* Court found that a stay provision, in conjunction with the temporary licenses, was sufficient to tip the balance in favor of the governmental interest. Given the recognized importance of the affected private interests, however, prompt postrevocation review is not sufficient to tip the balance in favor of the State. In sum, the unavailability of hardship relief and the duration of the revocation add up to an unconstitutional deprivation of private property by the State. Under either *Mackey* or *Bell*, section 20-16.5 is unconstitutional.

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75. A selective hardship provision would serve the government's goal as well as an absolute revocation procedure. Because of the possibility of equal protection arguments against selective permits, the administrative burdens, and the severe, unprotected intrusion of an absolute revocation on the private interest, a better solution is to issue automatically a temporary permit to all DWI offenders.

76. The Task Force drew up the recommendations for the Safe Roads Act. Watts, *The Drinking-Driving Problem: Assessing Some Proposed Solutions*, 48 *POPULAR GOV'T* 20, 30 (1983).

77. *Id.*

78. Justice Stewart recognized this in his *Mackey* dissent.

The Court has never subscribed to the general view "that a wrong may be done if it can be undone." We should . . . be even less enchanted by the proposition that due process is satisfied by delay when the wrong cannot be undone at all, but at most can be limited in duration. Even a day's loss of a driver's license can inflict grave injury upon a person who depends upon an automobile for continued employment in his job.

Mackey, 443 U.S. at 30 (Stewart, J., dissenting) (citation omitted).

Involuntary Outpatient Civil Commitment Expanded: The 1983 Changes

In 1983 the North Carolina General Assembly amended the state's involuntary commitment statutes to expand the use of outpatient commitment for the mentally ill.¹ The amended statutes contain three significant changes: a new standard for committing patients to outpatient care,² a definition of "outpatient treatment,"³ and procedural changes for more effective support and enforcement of the outpatient commitment laws.⁴ This note examines the constitutionality of the new outpatient commitment standard and the practical effects of the 1983 amendments.

Prior to the 1983 amendments, for a person to be involuntarily committed to either inpatient or outpatient treatment, the court had to find "by clear, cogent, and convincing evidence that the respondent [was] mentally ill or inebriate, and [was] dangerous to himself or others, or [was] mentally retarded, and, because of an accompanying behavior disorder [was] dangerous to others."⁵ Although the 1983 amendments do not change the criteria for committing a respondent to inpatient treatment,⁶ a new standard is provided for commitment to outpatient treatment:

If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that he is capable of surviving safely in the

1. See N.C. GEN. STAT. §§ 7A-451, -451.1, 122-8.1, -58.2, -58.3, -58.4, -58.5, -58.6, -58.6A, -58.7, -58.7A, -58.7A:1, -58.8, -58.8A, -58.10A, -58.10B, -58.11, -58.11A, -58.13 (Cum. Supp. 1983). The House Bill was titled "An Act to Expand the Use of Outpatient Involuntary Commitments for the Mentally Ill." 1983 N.C. Sess. Laws 638. Much of the background of the 1983 amendments to the commitment laws can be found in Miller & Fiddleman, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes*, 60 N.C.L. REV. 985 (1982), which chronicles the changes in the North Carolina commitment statutes through the 1979 amendments and provides an excellent discussion of the historical background of the civil commitment law. For a discussion of the North Carolina outpatient commitment statute from January 1978 through December 1979, see Hiday & Goodman, *The Least Restrictive Alternative to Involuntary Hospitalization, Outpatient Commitment: Its Use and Effectiveness*, 10 J. PSYCHIATRY & L. 81, 84-93 (1982). The 1983 amendments to the commitment law became effective January 1, 1984. 1983 N.C. Sess. Laws 638 § 27.

2. See N.C. GEN. STAT. §§ 122-58.4(c)(2), -58.6, -58.8(a)(2) (Cum. Supp. 1983).

3. See *id.* § 122-58.2(8).

4. See *id.* §§ 7A-451(6) (counsel provided at outpatient commitment hearing for indigent respondents), 7A-451.1 (payment to counsel representing indigent respondent at outpatient commitment hearing), 122-8.1 (disclosure of necessary information), -58.4 (directs examining physician to "give the respondent a written notice listing the name, address, and telephone number of the proposed outpatient treatment physician or center and directing the respondent to appear at the address at a specified date and time"; also directs examining physician to notify designated treatment center and to send the respondent a copy of both the notice and his examination report), -58.6A (procedures for examination and treatment pending hearing), -58.7A:1 (district court hearing procedures for outpatient commitment), -58.8A (immunity from liability for those involved in outpatient commitment), -58.10A (duties for commitment order follow-up), -58.10B (supplemental hearings for outpatient commitments), -58.11 (adding option of outpatient commitment at inpatient commitment rehearing), -58.11A (rehearings for outpatient commitments), -58.13 (release from an inpatient commitment—may request supplemental hearing to determine outpatient commitment need) (1981 & Cum. Supp. 1983).

5. See N.C. GEN. STAT. § 122-58.8(b) (1981).

6. See *id.* § 122-58.8(a)(1) (Cum. Supp. 1983).

community with available supervision from family, friends or others; that based on respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness as defined by G.S. 122-58.2(1); and that the respondent's current mental status or the nature of his illness limits or negates his ability to make an informed decision to voluntarily seek or comply with recommended treatment, it may order outpatient commitment for a period not in excess of 90 days.⁷

Thus, a patient who presently is not dangerous to himself or others may be committed to outpatient care if his treatment history indicates that he will become dangerous in the future.⁸

Does commitment based on these new criteria violate the fourteenth amendment's guarantee that a person shall not be deprived of liberty without due process of law?⁹ The United States Supreme Court has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."¹⁰ The constitutional standard for evaluating civil commitments requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."¹¹ The Court, however, also has acknowledged the state's interest in committing psychiatrically ill people and the state's power to protect its citizens:

The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emo-

7. *Id.* §§ 122-58.8(a)(2), -58.8(b)(1) (Cum. Supp. 1983). N.C. GEN. STAT. § 122-58.2(1) (1981) defines "dangerous to himself" to mean:

within the recent past: 1. The person has acted in such manner as to evidence: . . . That he would be unable without care, supervision, and the continued assistance of others . . . to exercise self-control, judgment, and discretion . . . , or to satisfy his need for nourishment, personal or medical care . . . ; or 2. The person has attempted suicide or threatened suicide and that there is a reasonable probability of suicide . . . ; or 3. The person has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation.

An individual is defined by the statute as "dangerous to others" if,

within the recent past, the person has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a manner as to create a substantial risk of serious bodily harm to another and that there is a reasonable probability that such conduct will be repeated.

Id.

8. The commitment criteria involve a question of degree. For example, if a mentally ill patient is not taking care of himself, but is not in immediate danger of "serious physical debilitation," whether the patient is dangerous is a question of fact. The outpatient commitment dangerousness criterion, however, does not include the "near-future" element. To be committed to outpatient care, the court must determine that the respondent "is in need of treatment in order to prevent further disability or deterioration which predictably would result in dangerousness." See N.C. GEN. STAT. §§ 122-58.2(1), -58.8(a)(2), -58.8(b)(1) (Cum. Supp. 1983).

9. U.S. CONST. amend. XIV.

10. *Addington v. Texas*, 441 U.S. 418, 425 (1979). See also *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967).

11. *Youngberg v. Romeo*, 457 U.S. 307, 325 (1982) (Blackmun, J., concurring); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

tional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.¹²

The Court's test weighs "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty"¹³ to determine whether a substantive due process right has been violated.¹⁴

Since the new outpatient commitment statute deprives a nondangerous individual who has not committed a crime of his liberty, it can be argued that the statute is unconstitutional. Outpatient commitment proceedings deprive the respondent of substantial rights. He is taken into custody, examined by a physician, brought into court, and required to follow his outpatient commitment treatment plan.¹⁵ The treatment plan may include almost any form of treatment that does not take place in an inpatient facility.¹⁶ It may include medication and may require supervision of the patient's living arrangement.¹⁷ The outpatient who fails to follow the prescribed treatment may be returned to custody and reevaluated.¹⁸

Even though substantial liberty interests of the individual are affected by the outpatient commitment process, the statute is constitutional. The committed outpatient is not confined in an inpatient facility. Thus, the state's interference with the outpatient's liberty is significantly less than in inpatient commitment. If the patient complies with his treatment plan, he is free to do as he pleases except during the times of actual outpatient treatment.¹⁹

Two state interests justify the statutes' limitations on the rights of the outpatient. First, the state has an interest in preventing the mentally ill patient from becoming dangerous.²⁰ Second, the state has an interest in providing treatment to mentally ill individuals who cannot otherwise seek or comply

12. *Addington v. Texas*, 441 U.S. 418, 426 (1979). For a discussion of the state's *parens patriae* and police powers, see S. HALLECK, *LAW IN THE PRACTICE OF PSYCHIATRY: A HANDBOOK FOR CLINICIANS* 126-28 (1980).

13. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). See also *Bell v. Wolfish*, 441 U.S. 520, 534 (1979); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972) ("The power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling interest in such deprivation."), *vacated and remanded*, 414 U.S. 473, *modified*, 379 F. Supp. 1376 (1974), *vacated and remanded*, 421 U.S. 957 (1975).

14. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

15. See N.C. GEN. STAT. §§ 122-58.4, -58.6, -58.7, -58.8 (Cum. Supp. 1983).

16. See *infra* notes 34-37 and accompanying text.

17. See N.C. GEN. STAT. §§ 122-58.2, -58.10A (Cum. Supp. 1983).

18. *Id.* § 122-58.10A(b).

19. The United States Supreme Court has applied substantive due process protection to civil inpatient commitments because of the loss of liberty involved in confining an individual to an inpatient facility. The Court, however, may be unwilling to extend this protection to the patient committed to outpatient treatment. For example, in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court held that "a State cannot constitutionally *confine* without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor*, 422 U.S. at 576 (emphasis added).

20. For a discussion of the problems associated with committing a patient under the police power of the state to prevent the patient from becoming dangerous, see S. HALLECK, *supra* note 12, at 127-28.

with necessary treatment.²¹ Under the outpatient commitment law, the patient must be mentally ill, must be "in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness,"²² and must be unable to make an informed decision regarding treatment.²³ Thus, in every case of outpatient commitment, both state interests are present.

To balance the state interests with the outpatient's loss of liberty, several points must be considered. Commitment to an inpatient facility, which involves a substantially greater loss of liberty, based on dangerousness to self or others has been found to be constitutional.²⁴ Although the standard for commitment to outpatient treatment is somewhat lower, it results in a lesser intrusion upon the liberty of the patient.²⁵ The statutory requirements are designed to limit outpatient commitments to those cases in which the patient would deteriorate to the point of requiring inpatient commitment *but for* the availability of outpatient commitment.²⁶ Thus, even though outpatient commitment entails a substantial loss of liberty, the patient is spared an even greater loss.

For these reasons, the state's interests in outpatient commitment outweigh the individual's liberty interests. If the committed outpatient satisfies the statutes' requirements and complies with his treatment plan, the intrusion on the liberty interests of the individual is minimized.²⁷ The outpatient commitment law, as amended, is constitutional.

Analysis of the 1983 amendment's practical effect indicates that, if applied cautiously, the amended outpatient commitment statutes can have positive results. Properly committed patients who comply with an appropriate treatment plan will not become dangerous to themselves or others²⁸ and will receive necessary treatment without having to enter an inpatient facility.²⁹ To

21. See S. HALLECK, *supra* note 12, at 127-28. See also *supra* note 12 and accompanying text.

22. N.C. GEN. STAT. §§ 122-58.4(c)(2), -58.6, -58.8(a)(2) (Cum. Supp. 1983). See Miller & Fiddleman, *supra* note 1, at 989 n.18 (1982):

The United States Court of Appeals for the District of Columbia was among the first to discuss the requirement for dangerousness as a criterion for involuntary commitment. Relying on District of Columbia statutes, the court supported the necessity of a demonstration of dangerousness in *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1968), and in *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968) (sexual psychopath laws). Stronger arguments, basing requirements for dangerousness on constitutional grounds, were soon forthcoming. See *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

23. See *supra* note 7 and accompanying text.

24. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (state "has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill"); *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine without more a nondangerous individual.").

25. See *supra* notes 6-8, 19 and accompanying text.

26. See *supra* notes 6-8 and accompanying text.

27. See *supra* note 19 and accompanying text.

28. To be committed, the respondent must be "in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness." N.C. GEN. STAT. § 122-58.8(a)(2) (Cum. Supp. 1983). Assuming the outpatient treatment is effective, the patient will not become dangerous.

29. See *infra* notes 34-37 and accompanying text.

a great extent, however, the effectiveness of outpatient care depends on the willingness of the patient to comply with the treatment plan. When a patient is involuntarily committed to outpatient care, his therapy is likely to be ineffective because he cannot be compelled to follow his treatment plan. Despite this potential drawback, the statutes' enforcement provisions³⁰ effectively protect the state's interests. Since the statutes' ability to protect state interests depends on the efficacy of the enforcement provisions, the state should reevaluate psychiatrists' role in enforcement.³¹ Psychiatrists should be required to perform police power functions only when outpatients fail to comply with treatment³² and "the provision of needed and effective treatment for the committed patients"³³ justifies the psychiatrists' enforcement role.

No specific form of outpatient treatment is required by the North Carolina statute. Practical problems may arise involving the availability and quality of the various types of treatment listed in the definition of "outpatient treatment." "Outpatient treatment" may include medication; individual or group therapy; day or partial-day programming activities; services and training, including education and vocational activities; supervision of living arrangements; and any other services"³⁴ North Carolina General Statutes section 122-58.2(8) identifies three goals of outpatient therapy. Outpatient therapy may be provided (1) to "alleviate the person's illness or disability,"³⁵ (2) "to maintain semi-independent functioning,"³⁶ or (3) "to prevent further deterioration that may reasonably be predicted to result in the need for inpatient commitment to a mental health facility."³⁷

Outpatient commitment proceedings, like inpatient commitment proceedings, begin with the filing of an affidavit and a petition with the clerk or magistrate for an order to take an individual into custody for examination by a qualified physician.³⁸ Although amended section 122-58.8 permits the state to commit individuals involuntarily to outpatient care if they presently are not dangerous but may become dangerous, the statutes relating to the affidavit's sufficiency and the magistrate's findings have not been amended to reflect this

30. N.C. GEN. STAT. §§ 122-58.10A, -58.10B, -58.11A (Cum. Supp. 1983).

31. See *infra* notes 58-62 and accompanying text.

32. See *infra* notes 61-62 and accompanying text.

33. Miller & Fiddleman, *supra* note 1, at 988 n.10 (1982).

34. N.C. GEN. STAT. § 122-58.2(8) (Cum. Supp. 1983).

35. *Id.*

36. *Id.*

37. *Id.*

38. N.C. GEN. STAT. § 122-58.3(A) (1981) provides:

Any person who has knowledge of a mentally ill or inebriate person who is dangerous to himself or others, or who is mentally retarded and, because of an accompanying behavior disorder, is dangerous to others may appear before a clerk or assistant or deputy clerk of superior court or a magistrate of district court and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a qualified physician. The affidavit shall include the facts on which the affiant's opinion is based. The respondent must be found in or be a resident of the same county as the clerk or magistrate.

new dangerousness standard.³⁹ Both provisions currently require a finding that the respondent is *presently dangerous* to himself or others.⁴⁰ Thus, a literal reading of the involuntary commitment statute yields the following illogical rule: a respondent must qualify for *inpatient* commitment under the higher dangerousness standard before he may be committed to *outpatient* therapy under the lower dangerousness standard. The remedy for this problem is simple. The General Assembly should amend section 122-58.3, which prescribes the petitioning procedure and magistrate's fact-finding standard, to comport with the new standards in section 122-58.8.

Assuming that the problem posed by the mismatched statutes is overcome by legislative action, magistrates will be authorized to require that a respondent be taken into custody and examined by a qualified physician if they reasonably believe that the respondent is mentally ill and will become dangerous without treatment. Following the physician's examination, a court could order the respondent to be committed to outpatient therapy if it found that the respondent satisfies four criteria. He must be mentally ill, capable of surviving safely in the community, in need of treatment to prevent his predictable deterioration into a dangerous person, and unable to make an informed decision to seek or comply with treatment voluntarily.⁴¹ The third criterion requires the court to make a very difficult factual determination.

How is a court to determine when a patient is not dangerous but is "in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness?"⁴² As a practical matter, the court will rely on the examining physician's evaluation. North Carolina General Statutes section 122-58.4 requires the physician to determine whether the respondent is presently dangerous⁴³ or predictably will become dangerous without treatment.⁴⁴ One criticism leveled at the dangerousness standard is that it is difficult to predict dangerousness in individual cases.⁴⁵ The type of patient who will be found to satisfy the outpatient commitment criteria is one who has not attempted suicide, mutilated himself, or inflicted or threatened serious bodily harm on another in the recent past, and who is not in danger of serious

39. See *id.* (affidavit statute). See also *id.* § 122-58.3(b) (1981 & Cum. Supp. 1983) (magistrate's findings). Section 122-58.3(b) provides:

If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and dangerous to himself or others, or is mentally retarded and, because of an accompanying behavior disorder, is dangerous to others, he shall issue an order to a law-enforcement officer . . . to take the respondent into custody for examination by a qualified physician.

40. See *id.* § 122-58.3.

41. *Id.* § 122-58.8.

42. *Id.*

43. *Id.* § 122-58.4(c)(1) (Cum. Supp. 1983) (examination by qualified physician—one criterion for inpatient commitment is dangerousness to self or others).

44. *Id.* § 122-58.4(c)(2) (examination by qualified physician—respondent must be in need of treatment to prevent further disability or deterioration which would predictably result in dangerousness to be committed to outpatient care).

45. S. HALLECK, *supra* note 12, at 130-32 (section entitled "Is Dangerousness Predictable, and are Psychiatrists any more Equipped to Predict it than Anyone Else?").

physical debilitation within the near future,⁴⁶ but who has been committed to inpatient treatment in the past and who shows signs of deteriorating. Judges should recognize that psychiatrists' predictions may not be accurate in individual cases.

Another potential problem is determining the length of the respondent's commitment to outpatient treatment. By statutory limitation, the period of initial commitment may not exceed ninety days.⁴⁷ Upon rehearing, "[i]f the respondent continues to meet the criteria" for outpatient commitment, "the court may order outpatient commitment for an additional period not in excess of 180 days."⁴⁸ The court may order additional periods of outpatient commitment for as long as the patient continues to meet the criteria for commitment.⁴⁹ The practical problem is that "[a]t any time that the outpatient treatment physician finds that the respondent no longer meets the criteria [for outpatient commitment], the physician shall notify the court and the case shall be dismissed."⁵⁰ This provision will require dismissal of a patient's case as soon as the patient does not satisfy any one of the criteria. In particular, the patient's case must be dismissed as soon as he becomes fully able "to make an informed decision to voluntarily seek or comply with recommended treatment."⁵¹ Although this criterion protects an important right of the respondent,⁵² it does not appear in the standard for commitment to an inpatient facility.⁵³ Under the amended outpatient commitment statutes, physicians and the courts will face the difficult task of determining when the respondent is able to make an informed decision about his treatment. The physician should not assume that the patient should be treated for the entire length of the commitment ordered by the court, and should be prepared to release the patient when he no longer meets all four criteria for outpatient commitment.

Finally, practical problems may arise with regard to the availability and quality of the various treatments listed in the statutes' definition of outpatient treatment.⁵⁴ The definition is very broad—it is not clear what services actually will be available to patients committed under the statute.

How well will outpatient commitment work? Will it further the specified

46. *Cf.* N.C. GEN. STAT. § 122-58.2 (1981). If the patient is in danger of serious physical debilitation within the near future, or has threatened or attempted suicide or bodily harm on another, then the patient should be committed to an inpatient facility. Outpatient commitments are "intended for the revolving door patient, not [the] first admission with no treatment history." Memorandum to Screening Staff at Dorothea Dix Hospital, Raleigh, North Carolina, February 21, 1984.

47. N.C. GEN. STAT. §§ 122-58.8(a)(1), -58.8(a)(2), -58.8(b)(1) (Cum. Supp. 1983).

48. *Id.* § 122-58.11A(c).

49. *See id.* § 122-58.11A.

50. *See id.* § 122-58.10A(b)(4).

51. *See id.* § 122-58.4(c)(2) (criteria for outpatient commitment). N.C. GEN. STAT. § 122-58.10A(b)(4) (Cum. Supp. 1983) requires dismissal as soon as any one of the criteria is no longer satisfied by the respondent.

52. This criterion protects the patient's right to determine his own treatment. This right may be taken away only if the patient is dangerous, as is the case in inpatient commitments, or if the patient is unable to make this decision for himself.

53. *See* N.C. GEN. STAT. § 122-58.4(c)(1) (Cum. Supp. 1983).

54. *See supra* text accompanying note 34.

goals in the statute?⁵⁵ A study of North Carolina's previous outpatient commitment statute was conducted in 1978 and 1979.⁵⁶ The patients studied had been committed under the stricter standard for dangerousness.⁵⁷ The results of the study were promising:

[O]utpatient commitments appear to be working very well, since more than two-thirds did not become dangerous enough within 90 days to invoke legal action to have them involuntarily hospitalized. . . . Of all respondents committed to outpatient treatment, only 15.7% in 1978 and 9.5% in 1979 were involuntarily hospitalized within 90 days by the court.⁵⁸

All persons involved in administering the outpatient commitment law should be interested in having the statute evaluated further. Long-term studies should evaluate whether and when patients require inpatient commitment after release from the outpatient treatment program.

One factor that will influence the success of the outpatient commitment law is the support given by the physicians who examine and treat the respondents. At each stage in the commitment process, the physician is placed in a difficult and potentially unpleasant position. The physician must examine the patient and determine whether the patient meets the commitment criteria.⁵⁹ If the respondent is committed to outpatient treatment, the outpatient treatment physician must "make all reasonable effort to solicit the respondent's compliance."⁶⁰ If the outpatient fails to comply with his treatment plan, the treating physician may request that the respondent be returned to custody for reexamination and possible commitment to an inpatient facility.⁶¹ Thus, the physician will be placed in an adversarial relationship with the patient and may have to perform the function of a police officer for the state.

Since "[c]linicians do not relish the role of incarcerators, an inevitable part of involuntary commitment; that role becomes tolerable only when there is justification in the provision of needed and effective treatment for the committed patients."⁶² So long as the statute results in "needed and effective" treatment, treating physicians should support the law. If a large percentage of

55. See *supra* notes 35-37 and accompanying text.

56. Hiday & Goodman, *supra* note 1, at 84-93 (1982).

57. *Id.* at 85. The 1983 amendment incorporated the lower standard for outpatient commitments and did not become law until January 1, 1984. See *supra* note 1 and accompanying text.

58. Hiday & Goodman, *supra* note 1, at 89-90. The study further concluded:

Without the use of outpatient commitment, all of the respondents of this present study would have been removed from their communities, separated from their social support systems, and involuntarily confined to the strange, abnormal environment of a mental hospital. Outpatient commitment has been effective in providing treatment and control of dangerousness while enabling respondents to maintain their roles and networks in familiar surroundings. Outpatient commitment not only is more rational in terms of human costs, but also is more rational in terms of financial costs to the taxpayer.

Id. at 91.

59. See N.C. GEN. STAT. § 122-58.4 (1981 & Cum. Supp. 1983). See also *supra* notes 44-46 and accompanying text.

60. N.C. GEN. STAT. § 122-58.10A(b)(1) (Cum. Supp. 1983).

61. *Id.* § 122-58.10A(b)(2).

62. Miller & Fiddleman, *supra* note 1 at 988 n.10.

the patients committed under the law do not comply with their treatment plans, however, the statute should be reexamined since the effectiveness of outpatient care depends on the willingness of the patient to comply with the treatment plan.

North Carolina's amended outpatient commitment statutes should prove beneficial to properly committed patients who comply with their outpatient treatment plans. It will provide them with necessary treatment without exacting an unreasonable loss of personal liberty. The statutes' provisions for handling cases in which the patient fails to comply or refuses to comply with treatment ensure that, whether the patient complies or not, other citizens will be protected from the patient becoming dangerous. Furthermore, the 1983 amendments to the outpatient commitment law should result in greater use of outpatient commitment for the mentally ill. The amendments expand the class of persons who may be committed to include patients whose mental illness will lead predictably to dangerousness. Proper application of the new law will benefit both the state and the patients committed under the law. The state should be aware of potential problems with the statute, however, and reevaluate its use and effectiveness in the years to come.

MARY JOY O'MEARA

Compulsory Education: Weak Justifications in the Aftermath of *Wisconsin v. Yoder*

Free exercise of religion is a right protected by the first amendment.¹ Despite the constitution's simple declaration, however, courts repeatedly have struggled to balance the individual's right to religious freedom against the state's competing interest in governing society.² This familiar dilemma recurred recently in the context of North Carolina's compulsory education statute.³ The United States Court of Appeals for the Fourth Circuit found in *Duro v. District Attorney, Second Judicial District of North Carolina*⁴ that despite plaintiff's religion-based aversion to structured education, North Carolina could compel plaintiff's children to attend state-sanctioned schools.⁵ The *Duro* court did not clarify how the competing interests in freedom of religion cases should be balanced, but merely added to the voluminous materials addressing the issue of an individual's freedom of religious expression in our society.

Duro and his wife have six children, five of whom are school-aged.⁶ The Duros are Pentecostals.⁷ Although this religion does not require that children be educated at home, the Duros' interpretation of Pentecostalism did.⁸ Specifically, Duro worried that exposing his children to people who did not share the family's religious beliefs would corrupt them. Additionally, he was opposed to what he called the "unisex movement where you can't tell the difference between boys and girls and [which advocates] the promotion of secular humanism."⁹ Because of these beliefs, Duro refused to enroll his children in

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The first amendment was applied to the states via the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

2. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *United States v. Seeger*, 380 U.S. 163 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Reynolds v. United States*, 98 U.S. 145 (1878). See generally Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

3. North Carolina's compulsory education statute requires regular school attendance for children between the ages of seven and sixteen. N.C. GEN. STAT. § 115C-378 (1983). The statute also provides: "No person shall encourage, entice or counsel any such child to be unlawfully absent from school." *Id.* Evidence that the parents were notified of thirty accumulated absences by their child that cannot be justified establishes a prima facie case that the parent is responsible for the absences. *Id.*

4. 712 F.2d 96 (1983), cert. denied, 104 S. Ct. 998 (1984).

5. Although North Carolina has deregulated nonpublic schools, all schools still must satisfy certain criteria. See N.C. GEN. STAT. §§ 115C-547 to -557 (1983).

6. *Duro*, 712 F.2d at 97.

7. *Id.* Although the *Duro* court did not examine the sincerity of Duro's religious views, many cases have pinpointed the genuineness of "religious" views as a relevant issue. See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Macintosh*, 283 U.S. 605 (1931); *Delconte v. State*, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

8. *Duro*, 712 F.2d at 97.

9. *Id.*

state-sanctioned schools and elected to have his wife teach them at home.¹⁰

Duro's refusal to send his children to school caused him to be charged in 1981 with violating the North Carolina compulsory school attendance law.¹¹ Duro filed suit alleging that the State's application of the statute was unconstitutional as applied because his religious beliefs prohibited him from sending his children to school. The federal district court granted Duro's motion for summary judgment.¹² The United States Court of Appeals for the Fourth Circuit reversed, holding that North Carolina could compel Duro to send his children to a regular school because the State's interest in compulsory education was stronger than his interest in freely directing his children's religious training.¹³

To understand the *Duro* decision, it is necessary to examine the 1971 United States Supreme Court decision in *Wisconsin v. Yoder*.¹⁴ *Yoder* involved a challenge to the constitutionality of the Wisconsin compulsory education statute as applied to the Amish people.¹⁵ On the basis of the Amish tenet that separation from the world is fundamental to salvation,¹⁶ the parents in *Yoder* removed their children from formal schools after the eighth grade so that they could be taught the attitudes, and be trained in the skills, necessary for life in the simple, agrarian Amish community.¹⁷

The *Yoder* Court, recognizing the importance of the free exercise of religion in our constitutional scheme, announced its guidelines for determining whether Wisconsin could compel the Amish to attend school past the eighth grade: "[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."¹⁸ The *Yoder* Court acknowledged that Wisconsin law compelled the Amish to perform acts undeniably at odds with their three hundred year-old religion;¹⁹ therefore, state compulsion could not be allowed under the first part of the test. The Court concluded that the second prong of the test was not

10. *Id.* The court noted that Mrs. Duro did not have a teaching certificate and never had been trained as a teacher. For a discussion of what qualifies as a school under N.C. GEN. STAT. § 115C-555 (1983), see *Delconte v. State*, 65 N.C. App. 262, 266-67, 308 S.E.2d 898, 902-03 (1983) (§ 115C-555(4) refers only to established educational institutions).

11. Duro was charged with four violations of N.C. GEN. STAT. § 115C-378 (1983); the warrants were quashed for technical defects. *Duro*, 712 F.2d at 97.

12. *Id.* The district court opinion was not published.

13. *Id.* at 99.

14. 406 U.S. 205 (1971). For a general discussion of *Yoder*, see Note, *Wisconsin v. Yoder: The Right to Be Different—First Amendment Exemption for Amish Under the Free Exercise Clause*, 22 DE PAUL L. REV. 539 (1972); Note, *Freedom of Religion—The Amish and Their Right to Reject Compulsory School Attendance Beyond the Eighth Grade*, 24 MERCER L. REV. 479 (1973).

15. *Yoder*, 406 U.S. at 209.

16. *Id.* at 210. The Amish shun modern conveniences to promote a purer, simpler lifestyle. See generally Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832; Note, *The Right Not to Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967).

17. *Yoder*, 406 U.S. at 211.

18. *Id.* at 214.

19. *Id.* at 218.

satisfied because Wisconsin's interest in compulsory education—having an informed citizenry—was fulfilled adequately by the Amish alternative to formal secondary school education.²⁰

Wisconsin's final argument was that exempting Amish from the statute denied the children their substantive right to an education.²¹ The *Yoder* Court rejected this argument for two reasons. First, since the criminal penalties of the statute fell upon the parent, not the child, it was the parents' interests in religious freedom that was impeded. Second, the *Yoder* Court recognized the fundamental interest that parents have in guiding the religious future and education of their children and characterized their interest as an "enduring American tradition."²² In conclusion the *Yoder* Court stated:

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, . . . and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education²³

The Court emphasized that the exemption from the statute was narrow and was not intended to undermine the general applicability of the statute.²⁴

The court of appeals' decision in *Duro* relied heavily on language in the *Yoder* opinion, but reached a different result. The *Duro* court began by identifying the two issues that *Yoder* had characterized as mandatory considerations: whether the individual's religious expression was being infringed upon by the state, and whether the state had demonstrated a competing, overriding, compelling interest.²⁵ The *Duro* court recognized the validity of plaintiff's allegation that his religious expression was being hampered by the State and allowed him to satisfy the first prong of the *Yoder* balancing test. Despite the

20. *Id.* at 235. The *Yoder* Court also noted that because they had received a basic education, Amish children would be prepared to reenter secular society if they desired. *Id.* at 224. Some commentators doubted whether an eighth grade education adequately prepares a person for worldly life. See, e.g., Note, *The Balancing Process for Free Exercise Needs a New Scale*, 51 N.C.L. REV. 302, 308-09 (1972).

21. *Yoder*, 406 U.S. at 229. Justice Douglas' dissenting opinion was based on the right of the child to an education. See *id.* at 241-49 (Douglas, J., dissenting). See also Comment, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506, 1515-31 (1974); cf. Note, *supra* note 20, at 309-10.

22. *Yoder*, 406 U.S. at 232.

23. *Id.* at 235.

24. *Id.* at 236. Many commentators believed that because the *Yoder* exception was so narrow, the case set a meaningless precedent. See Note, *Balancing Test Employed to Resolve Conflict Between State Statute and Resulting Burden on Free Exercise of Religion—State Interest in Compulsory High School Attendance Outweighed by Resulting Burden on Free Exercise of Amish Religion*, 18 VILL. L. REV. 955, 967 (1973) [hereinafter cited as Note, *Balancing Test Employed*]. Cf. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 244-45 (1973); Note, *Freedom and Public Education: The Need for New Standards*, 50 NOTRE DAME LAW. 530, 540-44 (1975).

25. *Duro*, 712 F.2d at 97. The *Duro* court stated that the two issues in *Yoder* were "(1) whether a sincere religious belief exists, and (2) whether the state's interest in compulsory education is of sufficient magnitude to override the interest claimed by the parents." *Id.*

genuineness of Duro's religious beliefs, however, the court concluded that *Yoder* arose in "an entirely different factual context"²⁶ and therefore was not controlling. According to the court, it was the "unique facts and circumstances associated with the Amish community"²⁷ that mandated the *Yoder* result. In distinguishing *Duro* from *Yoder* the court stated:

The Duros, unlike their Amish counterparts, are not members of a community which has existed for three centuries and has a long history of being a successful, self-sufficient, segment of American society. Furthermore, in *Yoder*, the Amish children attended public school through the eighth grade and then obtained informal vocational training to enable them to assimilate into the self-contained Amish community.²⁸

The second part of the *Duro* opinion contained a disappointingly shallow discussion of the State's interest in education. The *Duro* court stressed the continuing, vital interest the State has in private schools and rejected the district court's conclusion that North Carolina had abdicated its interest in non-public education.²⁹ Without defining the nature or purposes of the State interest in education, the court noted evidence of the State interest's strength in state-required attendance records, standardized testing, and disease immunization requirements in private schools, as well as in fire, health, and safety standards.³⁰ These regulations demonstrated to the *Duro* court the compelling nature of North Carolina's interest in education.³¹ The court also mentioned that since "Duro [had] not demonstrated that home instruction [would] prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system,"³² the State's interest in education prevailed over Duro's interest in religion.³³

In a lengthy footnote, the *Duro* court explained that in addition to the mandates of *Yoder*, its chief consideration was the welfare of the children.³⁴ The State's interest in "[t]heir well-being, along with their state constitutional right to an education"³⁵ convinced the court that state sanctioned education was appropriate. The *Duro* court compared denying children an education to neglecting them, because both wrongs occur in environments injurious to their welfare.³⁶ The State's interest in the children's welfare indicated a sufficiently

26. *Id.* at 98.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* These requirements are contained in N.C. GEN. STAT. §§ 115C-548 to -558 (1983).

31. *Duro*, 712 F.2d at 99.

32. *Id.*

33. *Id.*

34. *Id.* at 99 n.3.

35. *Id.* The court also remarked that "Article 1, § 15 of the North Carolina Constitution expressly provides that, '[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right.'" *Id.*

36. *Id.* The *Duro* court borrowed this analogy from *Matter of McMillian*, 30 N.C. App. 235, 238, 226 S.E.2d 693, 695 (1976). *McMillian* involved parents who had been charged with neglect

strong State interest in compulsory education to override Duro's religious freedom claim.

Two factors in *Duro* suggest that the result was correct. First, in contrast to the facts in *Yoder*, Duro insisted on controlling all levels of instruction for his children. Obviously, the State interest in education becomes stronger when the child has not received even a basic education in approved schools.³⁷ Second, the *Duro* result seems justified in that Mr. Duro planned to send out his children at age eighteen to make their way in society. In contrast, the Amish children in *Yoder* were expected to lead simple, traditional agrarian lives; their vocational training adequately prepared them for their future. The prospect that Duro's children would reenter secular society heightened North Carolina's interest in directing their education.³⁸

Although it is apparent that *Duro*'s outcome was correct, the court's logic and reasoning are disturbing. First, *Duro* misinterpreted the nature of the right to religious freedom that was recognized in *Yoder*. Although the *Yoder* Court limited its discussion of religious expression to the peculiarities of the Amish community, it is a mistake to read that case as narrowly as the *Duro* court did. The *Duro* court found that the situation was sufficiently different from that of the Amish and, therefore, *Yoder* was not controlling.³⁹ Yet, in allowing the Amish an exemption from the Wisconsin statute, *Yoder* did not impose a new set of requirements that must be met before an individual's interest in religion can triumph over the state's education interest. *Yoder* did not hold that only Amish people will be allowed religious exemptions from compulsory education statutes; rather, the *Yoder* Court concluded that, in the particular case of the Amish, an exception was justified.⁴⁰ The fact that the Duros' religion and situation did not conform to those of the Amish should have been irrelevant to the court's analysis of Duro's first amendment claims. The first amendment protects individuals' freedom to practice any religion, not merely the freedom to be Amish.

The second problem with *Duro* is the court's inadequate discussion of North Carolina's interest in education. Surely there is stronger evidence of the State's interest in education than its health and fire regulations. Presumably,

of their children under N.C. GEN. STAT. § 7A-278(4) (1976) (repealed by Act of June 7, 1979, ch. 815, § 1, 1979 N.C. Sess. Laws 966).

37. The nature of the state's interest in educating its citizenry has not been articulated clearly. See Note, *Balancing Test Employed*, *supra* note 24, at 962. One commentator suggests that the state's interest in education is the selfish one of making each citizen more productive. See Kurland, *supra* note 24, at 215.

38. *Duro*, 712 F.2d at 99.

39. *Id.*

40. The Court's rationale for providing an exception to the Amish was that societal diversity should be respected:

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

Yoder, 406 U.S. at 223-24.

the State's legitimate interest in education is in having an informed electorate.⁴¹ By summarily concluding that Duro failed to show that he had prepared his children to be intelligent members of society, the court glossed over what should have been an important component of its analysis.

A third problem with the *Duro* court's rationale was its offhand pronouncement that the children's welfare was the primary issue in the case.⁴² Although this consideration could be the basis for compelling school attendance in another context,⁴³ in *Duro* it was entirely inconsistent with *Yoder*. In *Yoder* Justice Douglas' dissenting opinion argued that children's rights were determinative;⁴⁴ the *Yoder* majority, however, made clear that the relevant issue was the parents' right to direct freely their children's religious training. Thus, the question of the allowable extent of parents' religious control over their children is an unresolved and controversial issue.⁴⁵ The *Duro* court's quick reference to the children's welfare as a justification for its decision dodged the issue of the parents' right to direct their children's religious training.

The *Duro* decision is a deceptively simple opinion resting on questionable premises. The issue of whether a state may compel a child's education against the wishes of his parents was resolved only partially in *Yoder*. North Carolina's right to compel the *Duro* children's school attendance in contravention of their father's religious beliefs warranted a more convincing definition of the State's interest than the court offered in *Duro*.

CYNTHIA B. SMITH

41. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), expanded on the importance of education: "Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493. For a suggestion that *Yoder* is inconsistent with this aspect of *Brown*, see Note, *supra* note 20, at 307.

42. *Duro*, 712 F.2d at 99 n.3.

43. *Yoder* recognized that children's rights would be relevant if there was a conflict between the wishes of the parent and those of the child. *Yoder*, 406 U.S. at 231-32.

44. *Id.* at 241-46 (Douglas, J., dissenting). See also Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

45. Some of the most interesting cases on this point involve the Jehovah's Witnesses. For a collection of these cases, see Note, *Their Life is in the Blood: Jehovah's Witnesses, Blood Transfusions and the Courts*, 10 N. KY. L. REV. 281 (1983).

Statutory Preference for Straight-Ticket Voting in Counting Crossover Ballots—*Hendon v. North Carolina State Board of Elections*

The right to vote is a fundamental right.¹ Inherent in that right is the constitutional privilege of having one's vote counted in a manner consistent with the intent with which it was cast.² In determining how to count an ambiguous vote, "the object should be to ascertain and to carry into effect the intention of the voter, if it can be determined with reasonable certainty."³

In *Hendon v. North Carolina State Board of Elections*⁴ the United States Court of Appeals for the Fourth Circuit examined the constitutionality of a North Carolina statute declaring that a ballot marked in both a straight-party circle and in the individual circle of a competing candidate of another party was to be counted as a straight-party vote.⁵ The court of appeals determined that the statute was contrary to the equal protection clause of the fourteenth amendment,⁶ reversed the district court's decision,⁷ and remanded the case for a determination of a counting procedure that would reflect better the intent of crossover voters.⁸ The court, however, refused to order a recount of the ballots cast in the election,⁹ declaring its decision to be prospective only.¹⁰

The *Hendon* court implied that a counting procedure replacing the one held unconstitutional could count crossover votes cast for individuals as either "neutralizing" or "controlling" the straight-party vote for the candidate's opponent. This note examines the merits of each of these counting techniques and concludes by proposing a "striking" system of vote-counting that combines elements of both methods. The proposed striking system better ensures that the voter's intent will be counted accurately.

Hendon, an incumbent Republican representing North Carolina's eleventh district in the United States House of Representatives, lost a reelection bid in November 1982 to Clarke, a Democrat. The election was close, with Clarke receiving 85,410 votes, or 49.93 percent of the total votes cast, and Hen-

1. As the Supreme Court remarked in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), "No right is more precious in a free country, . . . other rights, even the most basic, are illusory if the right to vote is undermined."

2. The right to have one's vote counted correctly was afforded constitutional protection in *United States v. Mosley*, 238 U.S. 383 (1915).

3. G. MCCRARY, *AMERICAN LAW OF ELECTIONS* § 530, at 393-94 n.2 (4th ed. 1897).

4. 710 F.2d 177 (4th Cir. 1983).

5. N.C. GEN. STAT. §§ 163-151(5)(b), -170(6)(b) (1982 & Cum. Supp. 1983).

6. U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

7. The district court's decision in *Hendon* was not published, but can be found in the Record at 47.

8. *Hendon*, 710 F.2d at 183.

9. Hendon, an incumbent Republican, lost his seat in the House of Representatives during the November 1982 election in North Carolina's Eleventh Congressional District. The results are described in more detail *infra* notes 11-17 and accompanying text.

10. *Hendon*, 710 F.2d at 182.

don tallying 84,085, or 49.16 percent.¹¹ The number of ballots marked for both Hendon and the straight Democratic party ticket was significant.¹² Recognizing that a recount could swing the election if enough crossover ballots were counted differently,¹³ Hendon contested the election.

Four methods of voting had been used during the 1982 election in Hendon's district—paper ballots, mechanical lever machines, an electronic punch card system (CES), and an optically scanned paper ballot system (Airmac).¹⁴ The counting of the crossover ballots varied among the voting methods. No crossover ballots existed among the paper ballots because separate congressional ballots, unaffected by straight-party voting, were used. The mechanical lever machines counted votes in a manner contrary to the statutory requirement. The machines counted the specific vote over the general party vote and gave no readout indicating that a straight ticket ever was voted.¹⁵ Because neither of these voting methods adversely affected Hendon, they were not challenged. The CES and Airmac systems counted the straight-party vote over contrary individual votes; Hendon challenged the total in the five counties where they had been used.¹⁶ After being denied a recount, first by all five county boards of elections and then by the state board on appeal, Hendon filed

11. FEDERAL ELECTIONS 82: OFFICIAL ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 67 (1982) [hereinafter cited as FEDERAL ELECTIONS 82]; *Hendon*, 710 F.2d at 179. A Libertarian candidate received the other 1552 votes. A plurality vote is sufficient to win a general election for Congressman.

12. Although the total number of votes cast in the election was 171,047, FEDERAL ELECTIONS 82, *supra* note 11, at 67, the dual ballots would have to have been cast within the challenged areas of the five disputed counties to have affected the outcome (the total vote within these counties was 31,732 for Clarke, 33,096 for Hendon, and 537 for the Libertarian candidate). Nevertheless, evidence was presented from the Republican observer in one precinct (Boyd) in one of these counties (Transylvania) that he had "personally observed approximately 150" crossover votes for Hendon in the 500 ballots rejected by the machine. These ballots later were counted for Clarke when they were fed into a replacement machine. Record at 77, *Hendon*. Although no workers in other precincts observed Hendon crossover votes in numbers approaching 150, none experienced machine breakdowns as serious as in the Boyd precinct. The one-third ratio was not uncharacteristic of that found elsewhere. See, e.g., *id.* at 81 (12 of 33 observed ballots contained were Hendon crossovers in Brevard precinct, Transylvania County); *id.* at 82-83 (two of six were Hendon crossovers in Little River precinct). At least six precincts in Transylvania County alone had Hendon crossover votes observed among machine-rejected ballots. *Id.* at 105. Because a recount was denied by the court of appeals, however, it never will be known exactly how many dual ballots existed, or whether the counting method used in 1982 altered the election results. See also *infra* note 21.

13. Hendon would have had a plurality vote if 1326 dual ballots were declared void ("neutralized") or if 663 dual ballots were counted in his favor under an "individual vote controls" method of counting.

14. Each county in North Carolina is free to choose the method of voting to use. N.C. GEN. STAT. § 163-161 (1982); H. LEWIS, COUNTY GOVERNMENT IN NORTH CAROLINA 199 (1982). The CES method electronically counts votes punched in a card by the voter, while Airmac optically scans ballot marks made with a special pen. *Hendon*, 710 F.2d at 179. CES is examined in detail in Record at 139-40, 155-67, *Hendon*. Airmac is examined *id.* at 136, 143-48.

15. Defendant's Brief at 8, *Hendon*. If Hendon had been granted a recount, Clarke could have challenged the votes counted by mechanical lever machines as violative of his equal protection rights. If Clarke were successful, the number of votes voided from Hendon's tally in these counties could have offset the number Clarke lost in the CES and Airmac counties. Because the mechanical lever machine did not even indicate crossover ballots, however, such a recount would be impossible.

16. *Hendon*, 710 F.2d at 179.

1983 and 1985 actions¹⁷ in federal district court.

Hendon's claim¹⁸ challenged the constitutionality, both facially and as applied, of three sections of North Carolina's election statutes.¹⁹ The first section required that a ballot marked both generally for straight-party and specifically for individual opposing candidates be counted as if it were purely a straight-party ballot.²⁰ This "counting" statute was challenged as violative of the equal protection clause, because its "arbitrary" classifications allegedly served no legitimate state interest. Hendon argued that the section facially violated the equal protection rights of voters who did not intend their party vote to prevail over their individual vote for that particular office.²¹ He also noted that individual write-in votes for candidates on the ballot prevailed over conflicting straight-party votes, while marked votes for candidates on the ballot did not.²² Finally, Hendon argued that because the crossover ballots were counted differently in precincts using one type of machine than in precincts using a different type, the section violated the equal protection clause as applied to his supporters casting dual ballots in precincts using CES and Airmac systems.

The second section, which required that split-ticket voters mark each candidate individually,²³ also was challenged on equal protection grounds. Hendon argued that forcing a split-ticket voter to vote individually for every candidate he desired was facially unconstitutional because it was a statutory incentive against splitting tickets that unfairly discriminated against crossover voters, particularly in light of the statutory five minute maximum on voting when others are waiting.²⁴ He also argued that this voting procedure was inequitably applied in the 1982 elections. In precincts using CES and Airmac systems, each crossover voter had to vote individually up to fifty-four times to cast a single crossover vote and vote in every race.²⁵ In other precincts, however, crossover voters merely had to mark their ballot twice—once in the

17. *Id.* 42 U.S.C. §§ 1983, 1985 (1976).

18. Hendon was joined in his suit by his campaign committee and a registered voter from the eleventh district. The suit was filed against the various election boards and their members who had denied Hendon's recount requests. Clarke, the victorious Democratic candidate, later was allowed to intervene as a party defendant. Plaintiff's Brief at 2, *Hendon*.

19. A statute is facially unconstitutional if it is inherently inconsistent with constitutional tenets, whereas a statute is unconstitutional as applied if, while not facially unconstitutional, it violates the constitution as it is put into effect in a particular situation.

20. N.C. GEN. STAT. §§ 163-170(6)(a), -151(5)(b) (1982).

21. *Hendon*, 710 F.2d at 181.

22. The anomaly probably grew out of the traditional tendency to view ballots as written documents, with hand-written statements prevailing over print for purposes of determining intent. See G. McCrary, *supra* note 3, § 543, at 402-03. This distinction was removed after the *Hendon* case began; the statute was modified to allow straight-party votes to override all conflicting write-ins as well. N.C. GEN. STAT. § 163-170(5)(d)(2) (Cum. Supp. 1983). Another section, *id.* § 163-151(6)(d) (1982), reiterates this instruction as it applies to candidates already on the ballot whose names are written in. Both statutes were declared unconstitutional in *Hendon*, 710 F.2d at 182.

23. N.C. GEN. STAT. § 163-151(5)(a) (1982).

24. *Id.* § 163-150. The five minute time limit is discussed in greater detail *infra* notes 98-103 and accompanying text.

25. Plaintiff's Brief at 14, *Hendon*. The number of individual votes necessary to split a ticket and vote for all of the offices ranged from a low of 41 to a high of 54 in the disputed counties.

Democratic circle and once for Hendon. Hendon contended that no compelling state interest justified placing this additional burden on split-ticket voters.

Finally, Hendon alleged that violation of the technical requirements of North Carolina General Statutes section 163-140 amounted to a denial of due process.²⁶ The most notable violations were Haydon County's failure to publish a sample ballot prior to the election²⁷ and the absence of split-ticket instructions printed in "heavy black type" on the CES and Airmac ballots.²⁸ Hendon sought three remedies: a declaration that the statutes were unconstitutional; an injunction staying North Carolina's Board of Elections from certifying Clarke as the victorious candidate; and an order for a recount of the ballots in the regions challenged.²⁹

Although the district court in *Hendon* initially granted a temporary stay of certification,³⁰ it eventually dissolved the restraining order and dismissed the case, finding no constitutional infringement.³¹ In an unpublished opinion,³² the court agreed with Hendon that the right to have one's vote counted fairly is constitutionally protected.³³ Although the court stated that state laws have a "presumption of validity" against equal protection attacks,³⁴ it agreed with plaintiff's argument that the proper standard of review should be strict scrutiny and that encroachment on voting rights can be justified only when a compelling state interest exists.³⁵

Despite its agreement with plaintiff on the standards to be applied, the trial court disagreed with plaintiff as to their application. The court rejected plaintiff's equal protection arguments and applied the traditional three-part test, examining the character of the statutory classifications, the individual interests, and the governmental interests involved.³⁶ The court did not find the classifications in the first two statutes (counting and voting procedure) particularly invidious or discriminatory, either facially or as applied. The court sug-

26. See *Hendon*, 710 F.2d at 182. The fifth amendment provides: "No person shall be . . . deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment precludes such deprivation by states. U.S. CONST. amend. XIV.

27. Record at 85, *Hendon*.

28. Plaintiff's Brief at 16-17, *Hendon*.

29. *Hendon*, 710 F.2d at 180. Hendon did not assert the second desired form of relief—injunction against certification—beyond the district court level. *Id.* at 180 n.3. Hendon did not ask the courts to determine who had been elected. The Constitution confers that function on the House of Representatives. U.S. CONST. art. I, § 5, cl. 1.

30. Record at 36, *Hendon*.

31. The *Hendon* case moved quickly through the adjudicative system. The election was on November 2, 1982. After seeking a recount through the elections boards, Hendon received the temporary stay on November 22. It was dissolved, and Hendon's claim was dismissed by the district court on December 6. By January 11, 1983, oral arguments were being heard by the United States Court of Appeals for the Fourth Circuit; the decision, however, was not handed down until June. *Hendon*, 710 F.2d at 177.

32. *Hendon v. North Carolina State Bd. of Elections*, No. A-C-82-357 (W.D.N.C. filed Dec. 6, 1982), reprinted in Record at 47, *Hendon*, rev'd, 710 F.2d 177 (4th Cir. 1983).

33. *Id.*, slip op. at 9, reprinted in Record at 55, *Hendon*.

34. *Id.*, slip op. at 8, reprinted in Record at 54, *Hendon*.

35. *Id.*, slip op. at 11, reprinted in Record at 57, *Hendon*.

36. *Id.*, slip op. at 10-11, reprinted in Record at 56-57, *Hendon* (citing *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)).

gested that the challenged statutes were not unconstitutionally discriminatory because, in each separate precinct, the voters were treated alike.³⁷ Furthermore, all voters in the State were charged with a duty to become familiar with the ballot form and voting procedure before entering a voting booth.³⁸ Even if the classifications were discriminatory, the court found that a compelling state interest existed. North Carolina's desire to "permit the voters to vote without undue delay; to count the votes within a reasonable time and to prevent fraud and illegal procedures"³⁹ outweighed any infringement on the expression of voter intent. The district court rejected the due process argument asserted against the third statute because it believed that the technical violations in *Hendon* constituted "lesser legal wrongs" that did not amount to "patent and fundamental unfairness."⁴⁰ Although the trial court admitted that "valid arguments . . . against the wisdom of the present statutory rule" existed, and remarked that "if this Court were a member of the General Assembly serious consideration would be given to voting to repeal" the statute, it concluded that the statute could not be overturned on constitutional grounds.⁴¹

The court of appeals unanimously reversed the district court's decision. Although it agreed with the lower court's statement of the applicable standards of review,⁴² the court of appeals disagreed with its application of these standards. The appellate court first examined the North Carolina counting statute and declared its preference for straight-party candidates facially unconstitutional.⁴³ The court accepted as persuasive precedent two decisions from other jurisdictions declaring similar statutes unconstitutional.⁴⁴ The *Hendon* court approved the reasoning of the United States District Court for the Virgin Islands in *Melchoir v. Todman*⁴⁵ that such statutes exhibit a legislative preference unrelated to voter preference and discriminate unlawfully against independent candidates.⁴⁶ The *Hendon* court also cited with approval the following New Hampshire Supreme Court language in *Murchie v. Clifford*:⁴⁷ "The legislature may enact the method by which a man shall vote, but cannot direct how the ballot he casts shall be counted."⁴⁸ Stating that no case

37. "All voters in each individual precinct are treated alike, using the same voting methods under the same rules. The rules for casting and counting votes apply the same to each candidate in the individual precincts . . ." *Id.*, slip op. at 10, *reprinted in* Record at 56, *Hendon*.

38. "It is the duty of the individual voter to read and familiarize himself or herself with the ballot instructions prior to casting his or her ballot." *Id.*, slip op. at 15, *reprinted in* Record at 61, *Hendon*.

39. *Id.*, slip op. at 11, *reprinted in* Record at 57, *Hendon*.

40. *Id.*, slip op. at 14, *reprinted in* Record at 60, *Hendon*.

41. *Id.*, slip op. at 15, *reprinted in* Record at 61, *Hendon*.

42. Specifically, the court noted the constitutional right to have one's vote counted as cast, the strict scrutiny standard of review, and the compelling state interest requirement. *Hendon*, 710 F.2d at 180. *See supra* text accompanying notes 33-35.

43. *Id.* at 180-81.

44. *Melchoir v. Todman*, 296 F. Supp. 900 (D.V.I. 1968); *Murchie v. Clifford*, 76 N.H. 99, 79 A. 901 (1911).

45. 296 F. Supp. 900 (D.V.I. 1968).

46. *Id.* at 901-02, *cited in* *Hendon*, 710 F.2d at 180.

47. 76 N.H. 99, 79 A. 901 (1911).

48. *Id.* at 101, 79 A. at 903, *quoted in* *Hendon*, 710 F. 2d at 180-81.

"holding to the contrary has been called before our attention,"⁴⁹ *Hendon* declared the statute's classification discriminatory. Employing the district court's three-part equal protection test, the court of appeals found that the character of this discrimination, when combined with the strong individual interest in the voting process, outweighed any state interest.⁵⁰ Furthermore, the court found that the state's interest was not compelling, but "arbitrary."⁵¹ The court of appeals remanded the case to the district court to determine a counting procedure to replace the automatic straight-party vote and noted that either a rule voiding the vote on that office ("neutralization" method of counting) or a rule automatically giving the vote to the specifically voted individual candidate ("individual vote controls" method) would be constitutional.⁵²

The appellate court also examined the other two statutes challenged. The statute requiring voters seeking to split tickets to cast individual ballots for each candidate was found to be facially constitutional, but was remanded for a reexamination by the district court of its constitutional validity as applied.⁵³ Recognizing the equal protection problems of varying the difficulty of casting split-ticket votes with the type of machine used, the court of appeals declared that the statute would be unconstitutional as applied if the State were unable to show that the means used were the least burdensome to voters seeking to split their ticket or that some rational state interest justified an added burden.⁵⁴

The court then examined the violations of the technical requirements of the third statute.⁵⁵ Because the violations were caused by "simple negligence" rather than an intentional effort to erode the voting process and because there was "no evidence of confusion or deception," the failure to provide a sample ballot in one county and instructions in bold-face type in others did not amount to a denial of due process.⁵⁶

Thus, the court of appeals declared the first statute (counting) unconstitutional, reserved judgment on the constitutionality of the second (procedure for splitting tickets) as applied, and held the technical violations of the third statute insufficient to raise a constitutional question. The court refused to grant *Hendon* the injunctive relief desired, however, stating that limiting election remedies to prospective relief was justified because plaintiff had foregone an opportunity to challenge the constitutionality of the statutes before the election.⁵⁷ A contrary decision would "permit, if not encourage," every candidate to gamble on his election and challenge the statute only if he lost the

49. *Hendon*, 710 F.2d at 180.

50. *Id.* at 180-81. See *supra* note 36 and accompanying text.

51. *Hendon*, 710 F.2d at 180.

52. *Id.* at 183.

53. *Id.* at 181.

54. *Id.*

55. *Id.* at 182 (examining the application of N.C. GEN. STAT. § 163-140 (1983)).

56. *Id.*

57. *Id.*

election.⁵⁸

Despite the *Hendon* court's belief that the legislative branch should not control how ballots are counted,⁵⁹ it is evident that North Carolina's General Assembly has done so for at least fifty years.⁶⁰ The current statute, enacted in 1955,⁶¹ may have been enacted specifically to tighten the majority party's control in the representative bodies.⁶²

Election law is by its very nature political. Although some rules of election law are so self-evident that they may be politically neutral,⁶³ most voting regulations will either help or hinder certain candidates.⁶⁴ It should not be surprising that members of state legislatures vote out of self-interest when regulating election tabulations.

Adoption of the "straight-party-vote-controls" counting statute in 1955 appears to have been an example of self-interested voting by majority party legislators. North Carolina originally followed the common-law majority rule,⁶⁵ which "neutralized" votes for offices on which a ballot was marked both for one candidate through a straight-party vote and for a competing candidate individually.⁶⁶ The rule was codified in the early statutes governing elections.⁶⁷ In 1939, however, North Carolina amended its voting laws to provide that such dual votes would be counted for the individually marked candidate.⁶⁸ It is difficult to discern why the 1939 individual-vote-controls statute was passed, except perhaps to make it easier for voters to mark their individual choices.⁶⁹ The supremacy of the democratic party through the 1940s⁷⁰ no doubt helped downplay the statute's political significance.

It is less difficult to determine the reasons for the enactment of the current statute in 1955. The 1952 reelection of a Republican in North Carolina's Tenth Congressional District following a campaign in which he demonstrated the ease with which tickets could be split caused some consternation among Democrats and prompted the introduction of the straight-party-vote-controls

58. *Id.*

59. See *supra* text accompanying note 48.

60. See, e.g., Act of Mar. 20, 1933, ch. 165, § 23, 1933 N.C. Sess. Laws 145, 172-74.

61. Act of May 4, 1955, ch. 812, 1955 N.C. Sess. Laws 750.

62. See *infra* notes 71-74 and accompanying text.

63. See, e.g., G. McCrory, *supra* note 3, § 692, at 501 (describing the rapid passage of state secret ballot laws once the idea was imported from Australia in the 1880s).

64. Perhaps the most glaring example of election laws which help majority party candidates is the territorial lines drawn in redistricting plans. Legislators are acutely aware that these laws benefit the majority party, and voting on redistricting plans historically is split along party lines.

65. See G. McCrory, *supra* note 3, § 532, at 395.

66. Plaintiff's Brief at 6, *Hendon* (citing 1928 sample ballot).

67. Act of Mar. 20, 1933, ch. 165, § 23, 1933 N.C. Sess. Laws 145, 172-74.

68. Act of Mar. 16, 1939, ch. 116, § 2, 1939 N.C. Sess. Laws 131, 131-32.

69. Although one could argue that the passage of this act in a General Assembly controlled by the Democratic Party would contradict the idea that politicians vote on election laws out of self-interest, the partisan circumstances surrounding the passage of its replacement as soon as the law was seen to affect election results mitigates this argument.

70. Trilling & Harkins, *The Growth of Party Competition in North Carolina*, in *POLITICS AND POLICY IN NORTH CAROLINA* 82 (1975) (Republicans had no hope of directly influencing state politics through the 1940s).

bill.⁷¹ Although North Carolina does not maintain an official legislative history, newspaper accounts published in 1955 indicate the strong partisan nature of the bill's enactment.⁷² The bill was entitled, "An act to . . . simplify and clarify the procedure to be followed in voting a split ticket,"⁷³ but it did much more than simplify and clarify existing law. Passage of the bill reversed the existing law and made North Carolina's vote-counting procedures unique among the various state methods.⁷⁴

Despite the potential of voting and counting procedures to influence elections, legislatures have been able to retain control over these procedures because courts traditionally have refrained from reviewing election laws. Election law challenges have been considered political questions and, therefore, inappropriate for judicial review.⁷⁵ Placing the conclusory label "political" on an issue does not reduce its legal significance; the need for protection of minority political interests continues. Nevertheless, the political question rationale has been used "to prevent review of a multitude of political sins."⁷⁶ Such deference to self-interested legislative bodies is particularly surprising given the fundamental nature of the right to vote.⁷⁷

Unfortunately, the district court and the court of appeals continued to cling to the doctrine of judicial restraint and returned control over counting and voting procedures to the legislative branch. The district court used the political question rationale to support its statutory presumption of validity despite doubts concerning the statute's wisdom. Although the court of appeals declared unconstitutional the statute preferring straight-party counting, it did so in part because it had not been shown contrary precedent,⁷⁸ which did in fact exist.⁷⁹ If the court of appeals in *Hendon* had known about these contrary cases, it might have used their holdings to justify an exercise of judicial restraint, even though the cases generally were outdated. In addition, even

71. Charlotte Observer, May 3, 1955, at 8A, col. 2, reprinted in Record at 113, *Hendon*.

72. See, e.g., Charlotte Observer, May 3, 1955, at 8A, col. 2 (Republican representative criticizing bill as depriving voters of voting their intentions), reprinted in Record at 111, 113, *Hendon*; Raleigh News & Observer, Apr. 9, 1955, at 10, col. 5 (article titled "Democrats Act to Plug up Political Leak").

73. Act of May 4, 1955, ch. 812, 1955 N.C. Sess. Laws 750.

74. North Carolina is the only state that counts crossover votes for the straight-party candidate. According to a survey by the Council of State Governments, 21 states statutorily provide for straight party voting. THE BOOK OF THE STATES 1982-83 at 104. Of those states, all but North Carolina count the specific vote over the general party vote. See Plaintiff's Brief at 5, *Hendon* (statutes from all 20 other states digested). Other states that do not govern statutorily straight-party voting presumably follow the common-law "neutralization" counting method. See *supra* notes 65-66 and accompanying text.

75. See R. CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS 1 (1970) (from 1944 to 1969 the Supreme Court ruled on more election-related cases than it had in the previous century); Note, *Minority Party Access to the Ballot*, 1971 DUKE L.J. 451, 451.

76. Comment, *The Application of Constitutional Provisions to Political Parties*, 40 TENN. L. REV. 217, 228 (1973).

77. See *supra* note 1

78. See *supra* text accompanying note 49.

79. See, e.g., *Snowden v. Flanery*, 159 Ky. 568, 575-76, 167 S.W. 893, 897 (1914); *In re Mead Township Election*, 11 Pa. D. 451, 451 (1901); *Gainer v. Dunn*, 29 R.I. 239, 242-44, 69 A. 851, 852-53 (1908).

though it determined that North Carolina's counting statute was unconstitutional, the court suggested two alternate methods of counting crossover ballots. The court's failure to delineate a specific replacement counting method meant that the legislature's control over ballot counting had not been removed, but only limited. Although the choice of counting methods was remanded to the district court, the legislature could control its decision by enacting its preferred choice of the two alternatives.

The court of appeals also used the doctrine of judicial restraint in upholding the voting procedure statute, even though it imposed an added burden on split-ticket voters. The court stated that, even if the statute were discriminatory, it would be justified if a rational (rather than a compelling) state interest existed.⁸⁰ The court also noted that judicial restraint was a factor in its failure to order a recount despite the fact that the unconstitutional statute may have affected the election.⁸¹

The court's refusal to grant injunctive relief⁸² is most justifiable on grounds of judicial restraint, because "few remedial measures . . . cut quite as deeply to the core of both federalism and representative government" as federal court invalidation of state elections.⁸³ Although an unconstitutional statute's effect on an election's outcome has been suggested as the most appropriate instance for federal court intervention,⁸⁴ filing suit in a timely manner consistently has been a prerequisite to federal court consideration of invalidation as a remedy.⁸⁵ Had Hendon challenged the statute prior to the election, he probably would have been granted a recount.

The *Hendon* court's exercise of judicial restraint with regard to the constitutionality of the voting-procedure statute is less justifiable. The court remanded the case to the district court for a determination of the statute's constitutionality as applied, noting that the procedure least burdensome to voters should be used unless an overriding state interest exists.⁸⁶ The court qualified that standard in two ways. First, it noted that the least restrictive system would not be required if the State demonstrated a "rational" justification for an alternate system.⁸⁷ By requiring merely a "rational" rather than a "compelling" state interest, the court implied that the least restrictive system

80. Although a compelling state interest is required to meet the strict scrutiny standard of facial unconstitutionality, the voting procedure statute was upheld as facially constitutional. See *supra* text accompanying note 53. Thus, a rationality standard was found to be sufficient to prove the constitutionality of the statute as applied.

81. *Hendon*, 710 F.2d at 182.

82. *Id.*

83. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. Rev. 1092, 1095 (1974).

84. *Id.* at 1128.

85. *Id.* at 1111-14. Although admitting that strict adherence to the timeliness of the filing prerequisite "may seem incongruous or unduly harsh at first blush," Professor Starr believes that it is fair to deny plaintiffs injunctive relief when the only reason such an extraordinary remedy is necessary is because of a "lack of industry" by the plaintiff. *Id.* at 1113. Starr makes an exception when the illegality of the challenged provision cannot be determined prior to the election despite due diligence, *id.*, a situation not present in *Hendon*.

86. *Hendon*, 710 F.2d at 181.

87. *Id.*

generally would not be imposed on an uncooperative legislature.⁸⁸ Second, the court implied that, at most, the State might be required to alter its machines to count all votes in the same manner, but could not be required to alter them to count all votes in the manner least restrictive to split-ticket voters. The court, however, ignored the fact that the neutralization method of counting is inherently more burdensome to straight-ticket voters than the individual-vote-controls method, and suggested both as legitimate alternatives. The court's approval of the neutralization method of counting indicates that the voting procedure need not be the least burdensome system to split-ticket voters as long as the extra burdens are borne equally in each precinct.

The *Hendon* court not only declined to examine the differing burdens of the two proposed counting methods, but also left to the "sound discretion of the district court" the task of determining which method was preferable.⁸⁹ Both methods, however, are insufficient to protect the constitutional rights of candidates.

The general theory supporting the individual-vote-controls method of counting is that the specific intent enunciated by the voter should control over his general intent. This theory "would appear to recognize the intent of the voter,"⁹⁰ especially given the general principle that a ballot should be construed as effective to cast a valid vote whenever possible.⁹¹ The individual-vote-controls theory has been implemented without problems in other states⁹² and, perhaps most importantly, is the least burdensome method to split-ticket voters, who need only mark their exceptions to a straight-party vote to have all of their votes counted as intended.

This same advantage also makes the theory politically unpalatable. A system allowing stray marks to count for straight-party opponents invariably will be opposed by beneficiaries of straight-party votes. Just as the 1939 individual-vote-controls statute was replaced by Democrats in 1955 with a straight-party-vote-controls statute, judicial adoption of an individual-vote-controls method probably would invite Democratic challenge. This group would prefer a neutralization method of counting, which at least voids the stray votes for straight-party opponents. Because the neutralization method of counting apparently was declared constitutionally permissible by *Hendon*, its enactment by the legislature would prevent or override district court adoption of the individual-vote-controls method.

The theory underlying the neutralization method of counting is that the crossover voter has cast more votes than he was allowed for a particular office;

88. *Id.*

89. *Id.* at 183.

90. *Id.*

91. G. McCARY, *supra* note 3, § 530, at 393-94 n.2. Because the voter did not intend to vote for more than the allowed number of candidates, reconciliation of his conflicting marks should be attempted to discern his true intent. *See also* N.C. GEN. STAT. § 163-170 (1982): "No official ballot shall be rejected because of technical errors in marking unless it is impossible to determine the voter's choice." (emphasis added). By this analysis "neutralization" should be used only as a last resort.

92. *See supra* note 74.

therefore, his vote must be voided.⁹³ The cases followed by *Hendon* both implemented the neutralization counting method in place of the straight-party-vote-controls statutes declared unconstitutional.⁹⁴ The neutralization counting method has strong mathematical appeal because it favors neither candidate. Another argument favoring neutralization of ambiguous votes is that courts should not endeavor to determine voter intent when it cannot be known with any reasonable degree of certainty.⁹⁵

Unfortunately, the neutralization theory places an added burden on split-ticket voters.⁹⁶ The neutralization method of counting, like the straight-party-vote-controls method, allows split-tickets only if the voter makes a separate mark for each candidate.⁹⁷ When a large number of offices are included on the ballot, requiring individual votes for each candidate imposes an unnecessary burden on split-ticket voters and is a statutory incentive to vote a straight-party ticket.

This incentive is heightened by the five minute limit on time spent in the voting booth when others are waiting.⁹⁸ Statutes requiring individual votes for each candidate may be unduly burdensome because they "require the voter to deal with substantial numbers of partisan races . . . in addition to the non-partisan choices and other local votes in a maximum of 300 seconds."⁹⁹ Studies have confirmed that time limits discourage split-ticket voting when individual selection of candidates is required.¹⁰⁰ Facing "long and compli-

93. For example, by voting for the party candidate as well as a crossover individual, a voter would have cast too many votes in an election in which only one candidate was to be elected.

94. *Hendon*, 710 F.2d at 181 n.4.

95. This argument assumes that the voter's intent was just as likely to have been to cast his ballot for the straight-party candidate as for the separately aligned individual. Defendant's Brief at 5-6, *Hendon* (presumption should be that voter understood instructions).

96. *Hendon*, 710 F.2d at 181. The court noted that split-ticket voting was easy in counties using the mechanical lever machine and its individual-vote-controls method of counting, whereas it was quite difficult in Airmac and CES districts, where split-ticket voters had to vote individually from 41 to 54 times (depending on the county in which they resided). If all three machines were programmed to use the neutralization method of counting, the disparity between counties would disappear, but the disparity in the ease of voting between straight-party and split-ballot voters would persist.

The significance of this difference is illustrated by the *Hendon* election. Voters in Rutherford County who wished to vote for every Democrat except Hendon's opponent were forced to mark 54 spaces on the ballot (53 Democratic spaces and Hendon's space) because Rutherford County's CES machine counted ballots using the straight-party-controls method. Fifty-four marks would also have been required to get all votes counted if Rutherford County had used the neutralization method. Under the individual-vote-controls method of counting, however, the crossover voter would have had to make only two marks, one in the Democratic party circle and one beside Hendon. Thus, the latter clearly is the least restrictive method to split-ticket voters.

97. Under both the neutralization theory and the straight-party-vote-controls theory, once the voter marks the straight-party circle he has exhausted his right to vote for other candidates.

98. N.C. GEN. STAT. § 163-150 (1982). See Plaintiff's Brief at 16, *Hendon*. The "time factor" issue was excluded properly from consideration by the court of appeals, as it had not been raised at the district court level. Defendant's Brief at 8 n.1, *Hendon*. On remand, however, it may be possible for the district court to consider this interesting and important argument. The legislature should examine closely the time-factor issue's effect on split-ticket voting in drafting a replacement counting statute.

99. Plaintiff's Brief at 16, *Hendon*.

100. In the Ohio Democratic primary election of 1972, "[t]he option of individual voting [for delegates] was virtually ignored," with voters choosing slates of candidates. Even well-known

cated ballots, . . . the voter, under [general] state law, is often allowed no more than three minutes or so to record his decisions. Under these conditions, it is easy to understand why voters take the path of least resistance."¹⁰¹

In North Carolina, the five minute rule apparently is not being strictly enforced.¹⁰² Enforcement of the rule, however, is not the only burden placed on voters. The rule is listed in the North Carolina Precinct Manual¹⁰³ and its mere publication to voters by poll workers may have a chilling effect on their desire to vote individually. Just as important is the potential for abuse if the five minute rule were to be enforced more strictly.

Despite the clear incentive against split-ticket voting inherent in the neutralization counting method, *Hendon* affirmed its constitutionality. Thus, neutralization of crossover votes remains a viable alternative to the statute declared unconstitutional in *Hendon*. The best system of counting votes, however, would be a "striking" system, under which votes for crossover candidates are counted only if the voter affirmatively strikes through (votes against) the crossover candidate's straight-party opponent.¹⁰⁴ With more complex voting machines, on which striking through a name is impossible, additional levers or circles could be provided on the right side of a candidate's name for affirmative votes against the candidate. The striking procedure would use *both* counting methods proposed by the *Hendon* court, with the individual vote controlling if the straight-party vote were crossed out for that particular office, and the votes neutralized if it were not.

The proposed striking system would avoid the unduly burdensome requirements of individual split-ticket voting inherent in the neutralization method of counting, but would require a voter to demonstrate clearly his intent to depart from the straight-party ticket in individual races. The striking method of counting is only slightly more burdensome than the individual-vote-controls counting method and provides little room for arguing that a

political leaders failed to draw significant individual votes due to time restrictions. COUNCIL OF STATE GOV'TS, MODERNIZING ELECTION SYSTEMS 27 (1973) (quoting OFFICE OF FED. ELECTIONS, A STUDY OF ELECTION DIFFICULTIES IN REPRESENTATIVE AMERICAN JURISDICTIONS: FINAL REPORT (1973)).

101. *Id.* at 27.

102. Defendant's Brief at 17-18, *Hendon* (affidavit of Executive Secretary-Director of the North Carolina Board of Elections stated that he has "instructed all county elections officers that the five-minute voting time . . . shall not be strictly adhered to" and that it has not been imposed on a voter since a deliberate attempt to stall the voting process in 1968).

103. H. TURNBULL, PRECINCT MANUAL/1974 at 60 (1974).

104. Striking through a party candidate's name and voting for his opponent has been judicially determined to illustrate the voter's intent to vote for the latter, *see, e.g.*, Tuthill v. Rendleman, 387 Ill. 321, 56 N.E.2d 375 (1944) (opposing write-in candidate); Johnston v. Harrison, 114 Utah 94, 197 P.2d 470 (1948); Frantz v. Hansen, 104 Utah 412, 140 P.2d 631 (1943) (opposing party candidate). It, however, has not been codified or incorporated as a specific voting system, as is suggested by this note.

Even in the absence of formal adoption of the striking system, split-ticket voters in paper ballot districts are likely to be able to use the method to give effect to their crossover votes. Although paper ballot straight-party votes in 1982 did not negate crossover votes for *Hendon*, they did negate crossover votes for candidates for lower offices. Striking would ensure that these individual votes were counted. For other types of ballots, however, the striking system would be unavailable absent its express incorporation as a specific voting system.

crossover voter cast his individual votes unintentionally. Although not perfect,¹⁰⁵ the striking system could provide a workable compromise between the interests and concerns of majority and minority parties.

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105. The proposed striking system still would void crossover ballots lacking a strike through the straight party candidate who is opposing the individually marked candidate. This result may be contrary to voter intent. *See supra* notes 90-92 and accompanying text. *But see supra* notes 93-95 and accompanying text.

North Carolina's New Involuntary Servitude Statute: Inadequate Relief for Enslaved Migrant Laborers

Slavery, in its modern form, still exists in North Carolina. Since 1980, two federal courts have found several persons in North Carolina guilty of enslaving migrant laborers¹ in violation of the thirteenth amendment² and the 1866 Civil Rights Act.³ In 1983 the North Carolina General Assembly responded by enacting legislation making involuntary servitude a crime.⁴ The statute makes it a felony to knowingly and wilfully hold persons in involuntary servitude and a misdemeanor not to report violations to the local sheriff.⁵

Although the debate surrounding this statute should increase public awareness of the migrant laborers' situation, the Act is inadequate to end abuse of migrant workers. The General Assembly needed to change existing law significantly by enacting bold legislation making the farmers and growers more responsible for the migrant laborers. Instead, the present Act adds little to the already proven federal remedies. The General Assembly can justify the

1. *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981) (finding defendants guilty of kidnapping migrant laborers with the intent to hold them as slaves); *United States v. Warren*, 535 F. Supp. 1102 (E.D.N.C. 1982) (defendants guilty of holding migrant laborers in involuntary servitude and conspiring to violate the civil rights of a migrant laborer by forcing him to continue working when he was physically unable to do so; laborer died on the way back from the fields), *aff'd in part and rev'd in part sub nom. United States v. Harris*, 701 F.2d 1095 (4th Cir.), *cert. denied*, 103 S. Ct. 3554 (1983). See *infra* notes 27-39 and accompanying text.

2. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

3. The Civil Rights Act of 1866 enforces the thirteenth amendment's prohibition of slavery. Both courts upheld jury verdicts finding defendants guilty of violating 18 U.S.C. § 1583 (1982). *United States v. Booker*, 655 F.2d 562, 564 (4th Cir. 1981); *United States v. Warren*, 535 F. Supp. 1102, 1105 (E.D.N.C. 1982). 18 U.S.C. § 1583 provides:

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or

Whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both. The *Warren* court also upheld convictions of violating 18 U.S.C. § 241 (1982) and 18 U.S.C. § 1584 (1982). *Warren*, 535 F. Supp. at 1104-05. 18 U.S.C. § 241 (1982) provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . [t]hey shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Id. § 1584 provides:

Whoever knowingly and wilfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

4. Although North Carolina did not have a statute outlawing slavery, a constitutional provision expressly prohibits it. "Slavery is forever prohibited. Involuntary servitude, except as punishment for crimes whereof the parties have been adjudged guilty, is forever prohibited." N.C. CONST. art. I, § 17.

5. N.C. GEN. STAT. § 14-43.2 (Cum. Supp. 1983). The statute provides:

involuntary servitude statute only by recognizing it as a step toward improving and humanizing the migrant laborers' conditions and not as the final solution.

Migrant laborers perform an essential food production function in North Carolina.⁶ Generally, farmers secure laborers by contracting directly with migrant laborers who travel in groups looking for work,⁷ or through the Rural Manpower Division.⁸ The Rural Manpower Division facilitates matching farmers with farm labor contractors, or crew leaders, who recruit and transport migrant laborers to North Carolina. The Rural Manpower Division works only with crew leaders registered under the Farm Labor Registration Act⁹ and inspects the labor camps before helping the farmer find migrant laborers.¹⁰

A crew leader generally is in charge of the labor camp. Farmers often give exclusive control of the harvesting to the crew leader,¹¹ who will hire a few other people to help him manage the labor camp. Once the farmer delegates the harvesting to the crew leader, the farmer does not guarantee the fairness of the prices charged and the wages paid. Crew leaders are free to

(a) As used in this section, "involuntary servitude" means the unlawful holding of a person against his will:

(1) For the performance of labor, whether or not for compensation, or whether or not for the satisfaction of a debt, and

(2) By coercion or intimidation using violence or the threat of violence, or by any other means of coercion or intimidation.

(b) It is unlawful to knowingly and willfully:

(1) Hold another in involuntary servitude, or

(2) Entice, persuade or induce another to go to another place with the intent that the other be held in involuntary servitude.

A person violating this subsection shall be guilty of a Class I felony.

(c) Nothing in this section shall be construed to affect the laws governing the relationship between an unemancipated minor and his parents or legal guardian.

(d) If any person reports a violation of subsection (b) of this section, which violation arises out of any contract for labor, to any party to the contract, the party shall immediately report the violation to the sheriff of the county in which the violation is alleged to have occurred, for appropriate action. A person violating this subsection shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

See also N.C. GEN. STAT. § 14-39(a)(4) (Cum. Supp. 1983). Section 14-39(a)(4) makes it a crime to kidnap a person to hold in involuntary servitude.

6. LEGISLATIVE RESEARCH COMMISSION, MIGRANT WORKERS REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA 8 (1983) [hereinafter cited as MIGRANT WORKERS REPORT]. The Commission estimated that North Carolina farmworkers, including 35,000 migrant laborers, harvest nearly one billion dollars worth of agricultural products each year.

7. *Id.* at 10. These groups are known as "freewheelers."

8. The Rural Manpower Division is part of the North Carolina Employment Security Commission. *Id.* at 9.

9. 29 U.S.C. § 1811 (1982). The Farm Labor Registration Act requires crew leaders who transport migrant laborers more than 25 miles to register with the United States Secretary of Labor. Registration requires proof of insurance on the transporting vehicle, disclosure to the laborer of the employment conditions, and a guarantee that federal minimum wage and housing standards will be followed. This system does identify many crew leaders, but the Migrant Workers Report conceded that "much of the [migrant laborers'] housing . . . was dilapidated, unsanitary and grim." MIGRANT WORKERS REPORT, *supra* note 6, at 22. "It is difficult to write about migrant housing without seeming to be melodramatic. One can approach the subject with the most modest expectations and be unprepared for the realities." *Id.*

10. MIGRANT WORKERS REPORT, *supra* note 6, at 29.

11. The farmer usually will pay the crew leader a fixed sum, and the crew leader will allocate it among wages, food, and lodging for the migrant laborers and himself.

allocate only a small amount for the laborers and to keep much of the money as salary.¹² In the spring a crew leader managing a North Carolina farm usually will travel to Florida to recruit migrant laborers.¹³ Most of the laborers are black or Puerto Rican,¹⁴ and the crew leader may be the only person who speaks English.¹⁵ Because the crew leader controls the transportation and the labor camps,¹⁶ migrant laborers depend on him to meet their needs. Crew leaders frequently capitalize on the laborers' dependence by forcing them to purchase meals, liquor, and retail items from them at inflated prices.¹⁷ In addition, the migrant laborers often must pay to rent a small room and linens at the camp;¹⁸ the crew leader simply deducts these charges from their pay.¹⁹

Most modern social legislation does not protect migrant laborers. North Carolina explicitly exempts agricultural workers from coverage by workers' compensation,²⁰ child labor,²¹ minimum wage, overtime, and youth employment statutes.²² In addition, migrant laborers rarely qualify for unemployment compensation.²³ Communities seldom feel responsible for ensuring the laborers' health and welfare,²⁴ since they spend only a few weeks in each community and live in labor camps apart from much of the population.²⁵ The migrant laborers' transient lifestyle also makes continuing education and health care almost impossible, especially when the laborer does not speak English.²⁶ Migrant laborers are extremely vulnerable; they have little legal protection or community support.

The plight of migrant laborers recently gained public attention in North Carolina. The United States Department of Justice brought suit against a number of North Carolina crew leaders for violating federal statutes. In

12. Although the Fair Labor Standards Act, 29 U.S.C. § 213(a)(6) (1982), provides that migrant laborers who cross state lines to do agricultural work and those who work for a farmer who uses no less than 500 man days of farm labor in any quarter of the preceding year must receive the federal minimum hourly wage and overtime, crew leaders can avoid the requirements by paying migrant laborers on a piece work basis. The Legislative Research Commission found that less than one-half of the North Carolina farmworkers, including both migrant and resident laborers, receive the federal minimum wage. *MIGRANT WORKERS REPORT*, *supra* note 6, at 13.

13. The migrant laborers who work in North Carolina are part of the "East Coast" stream. They work their way up the Atlantic coast in the spring planting and harvesting, and return to Florida after harvesting the fall crops, such as apples. During the off-season, they harvest or do odd jobs in Florida. The other major identifiable patterns or streams of migrant labor are the "midcontinental" and "West Coast" streams. *MIGRANT WORKERS REPORT*, *supra* note 6, at 9.

14. *Id.* at 8.

15. *Id.* at 11.

16. *Id.* at 10-11.

17. *Id.*

18. *Id.* at 22.

19. *Id.* at 11.

20. N.C. GEN. STAT. § 97-13(b) (1979).

21. *Id.* § 95-25.5(k) (Cum. Supp. 1983). Migrant children may work legally at 10 years of age. *MIGRANT WORKERS REPORT*, *supra* note 6, at 31.

22. N.C. GEN. STAT. § 95-25.14(a)(2) (Cum. Supp. 1983).

23. *MIGRANT WORKERS REPORT*, *supra* note 6, at 9.

24. *Id.* Migrant laborers "are viewed and treated as 'outsiders' by many local residents." *Id.*

25. *Id.*

26. *See id.* at 28. Migrant laborers tend to have larger families, so all the children can help earn the family's income. *See id.* at 27.

*United States v. Booker*²⁷ crew leaders were found guilty of kidnapping two migrant laborers with the intent to hold them as slaves.²⁸ The crew leaders had recruited the migrant laborers with promises of free transportation to the work site and steady employment once they arrived.²⁹ Both promises proved false, and the laborers quickly discovered that they "owed" the crew leaders not only for the transportation, but for all their meals and other expenses. The crew leaders threatened the laborers with death and beat them when they tried to leave before paying their "debts."³⁰ In one instance, two laborers left the camp against the crew leaders' orders. When the crew leaders found the laborers, they choked them, beat them repeatedly with their fists and with an ax handle, forced them back to the labor camp, and threatened beatings or death if they tried to escape again.³¹ The court held that the "climate of fear"³² created by the crew leaders brutally beating the laborers to force payment of illusory debts violated federal statutes outlawing slavery³³ and kidnapping with the intent to hold persons as slaves.³⁴

Soon after *Booker*, the United States Court of Appeals for the Fourth Circuit found crew leaders guilty of holding migrant laborers in involuntary servitude and of conspiring to violate the civil rights of one laborer. In *United States v. Harris*³⁵ the labor camp functioned more like a prison camp. Crew leaders guarded the laborers at night to prevent escape; those caught attempting to escape were banished to a house known as the "jail."³⁶ Laborers who did not work as quickly as the crew leaders desired were beaten with rubber hoses and threatened with death. Only two days after one laborer began work, he died from the intense work, beatings, and absence of medical care. The laborer, Robert Anderson, apparently was sick when he arrived at the camp. Because he was weak, he could not pick potatoes for long without resting. The crew leaders forced him to continue picking each time he tried to stop. That night and the following day, Mr. Anderson vomited blood; the crew leaders, however, refused to take him to the hospital. Instead, they forced him back to the potato fields and beat him when he tried to rest. Mr. Anderson finally collapsed in the fields and died within minutes, apparently of heat stroke.³⁷ The crew leaders' "reign of physical terror at the farm"³⁸ was slavery in a modern form.³⁹

27. 655 F.2d 562 (4th Cir. 1981).

28. *Id.* at 567.

29. *Id.* at 563.

30. *Id.*

31. *Id.* at 563-64.

32. *Id.* at 566.

33. 18 U.S.C. § 1584 (1982).

34. *Id.* § 1583.

35. 701 F.2d 1095 (4th Cir.), *cert. denied*, 103 S. Ct. 3554 (1983).

36. *Id.* at 1098.

37. *Id.* at 1101-02.

38. *Id.* at 1100.

39. In *United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978), the court held that a "defendant is guilty of holding a person to involuntary servitude if the defendant has placed him in such fear of physical harm that the victim is afraid to leave, regard-

After the federal slavery convictions, the North Carolina General Assembly created the Legislative Research Commission to "study the role of the state with respect to migrant farmworkers."⁴⁰ The Commission studied several past reports about migrant laborers in North Carolina,⁴¹ and visited labor camps in Sampson County, North Carolina.⁴² It conceded that "[m]ost of our programs treat only the symptoms of farmworkers' problems,"⁴³ and made recommendations to address the problems more effectively. Although the General Assembly enacted legislation making both farmers and crew leaders jointly responsible for migrant housing,⁴⁴ it failed to address the majority of the migrant laborers' problems fully. The first major legislative act merely makes it criminal to hold persons in involuntary servitude;⁴⁵ the second merely establishes a farmworkers' council.⁴⁶ Because the acts do not alter existing remedies and programs substantively, they cannot provide solutions to migrant labor exploitation.

Even though the General Assembly did not attack aggressively the situation, its actions may have some positive effects. The publicity surrounding *Booker, Harris*, and the involuntary servitude legislation should make people more sensitive to the exploitation of migrant labor in their communities. If farmers realize that crew leaders are subjugating migrant workers and beating them if they try to escape, they may take steps to protect the laborers. Farmers may retain some control over harvesting and be more selective in hiring crew leaders. Increased sensitivity may also induce local law enforcement personnel to work more actively to curb or prevent violence in the labor camps.⁴⁷

Despite these potential advantages of the involuntary servitude statute, it adds very little to the already proven federal remedies. The Civil Rights Act of 1866 generally provides for prison terms up to five or ten years and fines

less of the victim's opportunities for escape." *Id.* at 1168. This case involved a crew leader who worked in North Carolina as well as Florida. He forced the migrant laborers to rent space in the housing he provided and to buy meals and liquor from him, all at exorbitant prices. He also charged for necessities such as electricity and work gloves. Laborers often found that their "expenses" outweighed their weekly earnings. Furthermore, the crew leader threatened and beat laborers who attempted escape.

40. MIGRANT WORKERS REPORT, *supra* note 6, at 3.

41. *Id.* at 18. Because the migrant laborers' problems have been studied often, the General Assembly's failure to act on the problems until after the successful federal prosecutions indicates that embarrassment over the slavery cases prompted the action.

42. *Id.* at 21.

43. *Id.* at 20.

44. N.C. GEN. STAT. §§ 130A-238 to -244 (Cum. Supp. 1983).

45. *Id.* § 14-43.2.

46. *Id.* § 143B-426.25 to .26.

47. The Legislative Research Commission noted that alcohol consumption added to the violence in the labor camps. Enforcing the Alcoholic Beverage Control laws, the Commission believed, would reduce some of the fights and injuries. MIGRANT WORKERS REPORT, *supra* note 6, at 21, 27. Migrant laborers often are required to buy their beer and liquor from the crew leaders at unreasonable prices. See *supra* text accompanying note 17.

The Legislative Research Commission thought that a statute outlawing involuntary servitude "would probably be a deterrent to incidents of slavery, servitude and peonage. If incidents were reported, enforcement of a state law should be easier and less time consuming than to rely on federal law." MIGRANT WORKERS REPORT, *supra* note 6, at 39.

violators up to \$5000 or \$10,000, with increased penalties if death results.⁴⁸ The North Carolina law makes involuntary servitude a Class I felony with a presumptive sentence of two years.⁴⁹ Although the presumptive sentence appears to guarantee that a convicted defendant will serve time in prison, the sentencing judge has complete discretion to impose an active sentence or merely probation.⁵⁰ Unless actively enforced, the Act loses its effectiveness as a deterrent and means of punishment.

It is questionable whether the slight difference between the existing federal and state remedies justifies creating a state statute. Unfortunately, the General Assembly rejected part of the Legislative Research Commission's recommendation that would have made the state remedies substantially stronger than the federal remedies. The recommended version would have defined involuntary servitude as employing a person with the knowledge that the person holds others in involuntary servitude.⁵¹ This provision would have forced farmers to take responsibility for the abuses occurring on their farms, and be more cautious in hiring crew leaders. The enacted version, however, makes it only a misdemeanor if the farmer or another party to the labor contract receives reports of violations, and does not report them to the local sheriff.⁵²

Another weakness with the North Carolina statute is that it prohibits only the knowing and willful imposition of involuntary servitude.⁵³ Applying a similar standard, the court in *Harris* indicated that unless the farmer were active in the harvesting process, he could not be convicted under the federal statute.⁵⁴ Thus, a farmer probably will be found guilty under the North Carolina Act only if he participates in the day-to-day operations of harvesting.⁵⁵ The General Assembly's omission of the recommended provision holding a farmer responsible for hiring persons whom he knows hold others in involuntary servitude weakens the statute.⁵⁶ Without proving the farmer's daily involvement, it will be difficult to prove he knowingly and willfully held others

48. See *supra* note 3. In *United States v. Warren*, 535 F. Supp. 1102 (E.D.N.C. 1982), *aff'd in part and rev'd in part sub nom. United States v. Harris*, 701 F.2d 1095 (4th Cir.), *cert. denied*, 103 S. Ct. 3554 (1983), defendant Harris received a life sentence on the conspiracy count and five-year sentences on three counts of involuntary servitude to run consecutively; defendant Dennis Warren received a twenty-year sentence for conspiracy and two five-year sentences for involuntary servitude to run concurrently; and defendant Richard Warren received concurrent split sentences on the conspiracy and false imprisonment counts of six months in prison and five years probation.

49. N.C. GEN. STAT. § 15A-1340.4(f)(7) (1983).

50. *Id.* § 15A-1340.4(a).

51. MIGRANT WORKERS REPORT, *supra* note 6, at app. E.

52. N.C. GEN. STAT. § 14-43.2(d) (Cum. Supp. 1983). The extent of punishment upon conviction lies within the court's discretion.

53. *Id.* § 14-43.2(b).

54. *Harris*, 701 F.2d at 1099.

55. Similarly, farmers generally are not liable for the crew leader's torts, since the crew leader is an independent contractor. "[A]n independent contractor [is] one who exercises an independent employment and contracts to do certain work according to his own judgment and method without being subject to his employer except as a result of his work." *Cooper v. Asheville Citizen-Times Publishing Co.*, 258 N.C. 578, 586-87, 129 S.E.2d 107, 113 (1963). Farmers usually give the crew leader a certain sum of money, and the crew leader uses it for food, lodging and wages, as needed. See *supra* notes 11-12 and accompanying text.

56. See *supra* note 51 and accompanying text.

in involuntary servitude.⁵⁷

Enforcement will be another problem with the involuntary servitude statute. The Legislative Research Commission recognized that "there seems to be an accepting indifference of the local law enforcement agencies"⁵⁸ towards migrant labor exploitation. In addition to recognizing that violence was common in labor camps,⁵⁹ the Commission noted regular violations of food stamp regulations, wage and hour laws, and liquor laws.⁶⁰ The Commission proposed to authorize the State Bureau of Investigation to investigate violations of the involuntary servitude statute without waiting for local law officers to request its help.⁶¹ Although this proposal would have made the involuntary servitude statute stronger and more likely to be enforced, it was rejected by the General Assembly. Thus, the involuntary servitude statute will be no more effective than existing federal remedies. If local law enforcement officers hesitate to investigate assaults and Alcoholic Beverage Control violations, they probably will not investigate abuses of the new involuntary servitude statute on their own initiative. Furthermore, if local officers do not investigate migrant labor abuses on their own, they will be reluctant to ask state detectives to intervene. The involuntary servitude statute is a superficial remedy that demonstrates that North Carolina is not committed to providing adequate security and health standards for migrant laborers in the state.

The second major legislative act, establishing the North Carolina Farmworker Council,⁶² is no more potent a weapon than the involuntary servitude statute. The Council's purpose is to study the migrant laborer's situation to determine how to prevent overlapping services, and to recommend legislative changes.⁶³ Migrant labor problems in North Carolina, however, already are well documented. The problems deserve active solutions, not further study.⁶⁴

There are a number of effective remedies available to the state. Requiring farmers to carry Workers' Compensation insurance for the migrant laborers would guarantee income to laborers unable to work after a job-related injury.⁶⁵ Granting migrant laborers the right to form and join unions and pro-

57. In *Harris* crew leaders were found guilty of illegally recruiting and kidnapping migrant laborers, of beating them, and of killing one laborer. See *supra* text accompanying notes 35-39. The court recognized that the farmer could not be implicated in the crimes, because he was not involved with the farm's daily operations. See *Harris*, 701 F.2d at 1099. Although the farmer's crew leaders were beating and killing people, the farmer "knew" nothing about it. As long as farmers can remove themselves from liability by distancing themselves from the migrant laborers, they will have no incentive to make the labor camps secure and sanitary.

58. MIGRANT WORKERS REPORT, *supra* note 6, at 32.

59. See *supra* note 47 and accompanying text.

60. MIGRANT WORKERS REPORT, *supra* note 6, at 23.

61. *Id.* at app. E.

62. N.C. GEN. STAT. § 143B-426.25 to .26 (Cum. Supp. 1983). The Council will work with problems facing both resident and migrant laborers.

63. *Id.*

64. See *supra* note 41 and accompanying text.

65. The Legislative Research Commission refused to recommend bringing agricultural workers within the Workers' Compensation Act. The paperwork and cost, the Commission feared, would be prohibitive to small farmers. It did propose legislation requiring farmers who meet

viding a board to mediate disputes would give the migrant laborers independence from the crew leaders and some control over their working conditions.⁶⁶ Also, certain existing organizations that help migrant laborers deserve guaranteed funding. Farm Workers' Legal Services, which aided the migrant laborers in *Booker*, and the East Coast Migrant Head Start Program, which allows many migrant children to attend regular day-care centers,⁶⁷ are two such organizations. Unless the Farmworker Council has the power to implement and enforce effective protections such as these, it cannot address fully the migrant laborers' problems. Creating the Farmworker Council without giving it the ability to make significant changes is an illusory solution.

Although slavery was abolished over a century ago, it has taken on a twentieth century⁶⁸ form in North Carolina; the General Assembly's relief has not. The General Assembly had an excellent opportunity to make substantive changes while the public still was sensitive to the federal slavery prosecutions. Instead, it studied migrant laborers' problems and made involuntary servitude a crime, adding nothing to the federal remedies that have existed for over one hundred years. The General Assembly must recognize that migrant laborer problems will worsen⁶⁹ unless farmers and growers are liable for the abuses at their labor camps. Farmers should not be able to avoid responsibility by delegating harvesting to crew leaders who subjugate and beat migrant laborers. The Farmworker Council and the involuntary servitude statute are not solutions to the laborers' situation. They may be effective as steps towards a solution. The final result must be a system that respects the essential function migrant laborers perform in producing food, and gives them the status and environment commensurate with their function.

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certain qualifying standards to purchase liability insurance. MIGRANT WORKERS REPORT, *supra* note 6, at 37. The proposal was not adopted.

66. California does allow migrant laborers to join labor unions and provides a labor dispute board. See CAL. LAB. CODE §§ 1152-1155.7 (West Supp. 1983).

67. MIGRANT WORKERS REPORT, *supra* note 6, at 28.

68. See *Booker*, 655 F.2d at 566.

69. The Legislative Research Commission reported that North Carolina is eleventh in the nation in its use of migrant labor. It estimated that North Carolina employed 10,000 migrant laborers in 1975, and 35,000 in 1981. MIGRANT WORKERS REPORT, *supra* note 6, at 27.

A Preliminary Analysis of the North Carolina Crime Victims Compensation Act

In 1982 more than twenty-six thousand North Carolinians were victims of violent crime.¹ Traditionally, the only means for a victim to recoup his losses was to institute a civil suit against the offender.² Two major practical problems, however, may destroy the usefulness of a civil suit: a civil suit requires that the offender be both apprehended,³ and wealthy enough to make the civil suit economically feasible. To aid the uninsured innocent victim, a majority of states have enacted crime victims reparations programs.⁴ In 1983 the North Carolina General Assembly joined this trend by enacting North Carolina General Statutes chapter 15B, the North Carolina Crime Victims Compensation Act.⁵

The purpose of the Act is simple: to compensate victims for losses caused by violent crimes. The Act, however, does not purport to compensate for every crime. Section 15B-4 requires that a victim have been injured by "criminally injurious conduct."⁶ This is defined as conduct that "by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death."⁷ The focus is solely on the perpetrator's conduct; the victim of the crime is compensated by the Act even if the perpetrator lacked the legal capacity to commit the crime.⁸ Because injury or death arising from the operation of a motor vehicle is expressly excluded from the Act,⁹ a victim will be unable to recover under the Act if his injuries are caused by one who,

1. CRIME IN NORTH CAROLINA, 1982 UNIFORM CRIME REPORTS 57. The Uniform Crime Report defines "violent crime" to include murder, rape, robbery, and aggravated assault. *Id.*

2. North Carolina, like many other states, affords its citizen-victims another avenue for compensation. A court can, as a condition to an inmate's probation, require him to make monetary restitution to his victim. See N.C. GEN. STAT. § 15A-1343(d) (1983). This remedy, however, is mostly illusory. First, it assumes that someone has been convicted of the crime. Second, the statute requires the court to consider the offender's financial status before awarding restitution. *Id.* These drawbacks severely hamper the remedy.

3. Of the 26,000 violent crimes reported in this state in 1982, only 17,000 arrests were made. CRIME IN NORTH CAROLINA, *supra* note 1, at 163. Thus, the civil remedy was available to, at best, ⅔ of the victims.

4. For a survey of 27 such programs, see Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485 (1980). At least five justifications have been posited for these programs: (1) the state has assumed the responsibility for protecting its citizens, and when one is victimized, the state has breached that obligation; (2) the programs are a result of a moral duty to secure the public welfare; (3) the programs spread the risk of loss among all of society; (4) the programs prevent victims from being alienated by society; and (5) most civil remedies are inadequate. See Clark & Webster, *Indiana's Victim Compensation Act: A Comparative Perspective*, 14 IND. L. REV. 751, 753-54 (1981).

5. N.C. GEN. STAT. §§ 15B-1 to -22 (1983). Attorney General Rufus Edmisten urged the General Assembly to enact the program. Telephone interview with Representative Thomas C. Womble, D-Forsyth (Feb. 27, 1984).

6. N.C. GEN. STAT. § 15B-4 (1983).

7. *Id.* § 15B-2(5). The injurious conduct must have taken place within the state.

8. *Id.* Thus, even if the offender was legally insane when the crime was committed, the victim still can recover.

9. *Id.*

for example, intentionally assaults him with an automobile.¹⁰

Eligibility under the Act is governed by section 15B-2(2). To be eligible for recovery, a person must be a victim or a dependent of a deceased victim.¹¹ "Victim" is defined as one who "suffers personal injury or death proximately caused by criminally injurious conduct."¹² A perpetrator or his accomplice may not recover¹³ and a claim will be denied if it would benefit unjustly either one.¹⁴ The Act further provides that unless "the interests of justice require," a spouse, parent, child, sibling, or housemate of the offender or accomplice may not recover.¹⁵

Recovery under the Act is limited to out-of-pocket "economic loss arising from criminally injurious conduct."¹⁶ Economic loss includes any reasonable medical and burial expenses.¹⁷ Economic loss also includes any loss of income the victim suffers,¹⁸ as well as any expense the victim incurs hiring someone to perform the services he usually performs for his own or his dependents' benefit.¹⁹ If the victim dies as a result of the crime, economic loss also includes any monetary loss the dependents suffer as a result of the victim's death,²⁰ including any expense the dependents incur in hiring someone to perform the services the victim usually performed for their benefit.²¹

Recovery for "pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage," however, is excluded specifically.²² This limitation is consonant with the spirit of the Act—to compensate only for out-of-pocket economic loss. The Act does recognize, however, that such emotional damage may cause compensable economic harm.²³ The Act also excludes compensation for property losses, no matter how catastrophic they may be.²⁴

10. This aspect of the North Carolina Act differs from the Uniform Crime Victims Reparations Act. The latter excludes injuries arising out of the operation of motor vehicles unless the conduct was "intended to cause personal injury or death." See UNIF. CRIME VICTIMS REPARATIONS ACT, 11 U.L.A. 33 (1974) [hereinafter cited as UNIF. ACT]. See also *infra* notes 55-59 and accompanying text.

11. N.C. GEN. STAT. § 15B-2(2) (1983).

12. *Id.* § 15B-2(13). The North Carolina Act and Uniform Act also differ on this point. In North Carolina the injury or death must be "proximately caused" by the criminal conduct. *Id.* The Uniform Act, however, compensates those who suffer injury or death as a result of a crime, a good faith effort to prevent a crime, or a good faith effort to apprehend a suspect. See UNIF. ACT, *supra* note 10, § 1(i), at 37. See also *infra* notes 46-52 and accompanying text.

13. N.C. GEN. STAT. § 15B-2(2) (1983).

14. *Id.* § 15B-11(a)(3).

15. *Id.*

16. *Id.* § 15B-4.

17. *Id.* § 15B-2(10). The Act labels these expenses "allowable expense[s]." A maximum of \$2000 is recoverable for burial expenses. *Id.* § 15B-2(1).

18. *Id.* § 15B-2(14) ("work loss").

19. *Id.* § 15B-2(12) ("replacement services loss").

20. *Id.* § 15B-2(7) ("dependent's economic loss").

21. *Id.* § 15B-2(8) ("dependent's replacement service loss").

22. *Id.* § 15B-2(10), (11).

23. *Id.* § 15B-2(10). Thus, although a victim cannot recover for pain and suffering per se, he may recover any lost wages that the pain and suffering cause him.

24. Exclusion of property losses is the overwhelming trend among the states. See Hoelzel, *supra* note 4, at 485. Louisiana, however, allows recovery for "catastrophic property loss," which is limited to "loss of abode." See LA. REV. STAT. ANN. § 46:1802(8)(c) (West 1982).

This exclusion is based primarily on the assumption that allowing compensation for property losses would be too costly,²⁵ and is a prime example of the Act's goal of compensating solely for personal injury.

The dollar limits of the Act are straightforward.²⁶ A maximum of 2000 dollars is allowed for burial expenses.²⁷ All other economic loss is compensable up to a maximum of 200 dollars per week,²⁸ and the maximum total compensation payable to any victim or his dependents is 20,000 dollars.²⁹ Furthermore, no compensation can be awarded if the victim's economic loss totals less than 100 dollars.³⁰

Compensation can be reduced or denied for several reasons. A claim must be denied if the claimant failed to file his application for compensation within two years of his injury.³¹ In addition, it is within the Commission's discretion to deny a claim if the victim failed to report the criminal act to police within three days of its occurrence.³²

A claim can be reduced in three situations. If a victim's misconduct contributed to his injury or death, the Commission may reduce the claim.³³ If a claimant failed to cooperate properly with any law enforcement agency, the claim may be reduced or denied.³⁴ Most importantly, the claimant's award is reduced by any amount he recoups from collateral sources.³⁵ This provision is designed to prevent double recovery.³⁶

To administer the Act, the Crime Victims Compensation Commission

25. See Note, *The Minnesota Crime Victims Reparations Act: A Preliminary Analysis*, 2 WM. MITCHELL L. REV. 187, 219-20 (1976).

26. These dollar limits illustrate the tension inherent in any compensation program. There is a strong philanthropic desire to aid the injured victim, but, financial reality places a limit on state largesse. As a result, the dollar limits represent a compromise of these competing interests.

27. N.C. GEN. STAT. § 15B-2(1) (1983).

28. *Id.* § 15B-11(f).

29. *Id.* § 15B-11(g).

30. *Id.* § 15B-11(e). The minimum loss provision has been justified on the ground that it "costs more to process [small] claims than the claim itself is worth." See Hoelzel, *supra* note 4, at 489.

31. N.C. GEN. STAT. § 15B-11(a)(1) (1983).

32. *Id.* § 15B-11(a)(2). The Commission can waive this requirement upon a showing of "good cause." *Id.* Presumably, the Commission can waive this requirement, and not the two-year statute of limitations of section 15B-11(a)(1), because of the relative shortness of a three-day period.

33. *Id.* § 15B-11(b).

34. *Id.* § 15B-11(c). This recovery requirement will encourage citizen interest in law enforcement. If a victim wishes to to be aided by the State, he must cooperate with the police. See Hoelzel, *supra* note 4, at 487. It should be noted that the Act does not mention the necessity for cooperation with the state prosecutor. Presumably, however, a court could construe "law enforcement agency" to include a prosecutor.

35. N.C. GEN. STAT. § 15B-11(d) (1983). A collateral source is defined as a readily available source of benefits from, *inter alia*, the offender, any government agency, social security, medicare, medicaid, workers' compensation, or insurance. *Id.* § 15B-2(3).

36. See Hoelzel, *supra* note 4, at 488. The prevention of a double recovery is the antithesis of the tort concept known as the collateral source rule. Under this rule, courts generally hold that cash or in-kind benefits received by an injured plaintiff from a source collateral to and independent of the tortfeasor will not be set off against the plaintiff's recovery from the tortfeasor. Most courts reach this result to prevent awarding a "windfall" to the defendant. See, e.g., *Thompson v. Milam*, 115 Ga. App. 396, 397, 154 S.E.2d 721, 722 (1967) ("A tortfeasor can not diminish the

was created and granted broad powers.³⁷ The administrative machinery is set in motion when a victim files an application for compensation with the Commission.³⁸ Each claim is assigned to an investigator, who conducts an initial investigation.³⁹ Based on the application and the investigator's report, the Commission director makes an initial decision on the claim. To be awarded compensation, the claimant must prove by a preponderance of the evidence that the Act's requirements have been met.⁴⁰ The perpetrator need not be convicted for the claim to be successful; proof of conviction, however, is conclusive evidence that the crime was committed.⁴¹

If the claimant is satisfied with the initial decision, the claim is submitted to the Commission for its approval. If dissatisfied with the director's decision, the claimant can appeal to the Commission for a full hearing.⁴² The claimant may obtain judicial review of the Commission's decision in superior court.⁴³ Thereafter, appeals are taken to the court of appeals "under rules of procedure applicable in other civil cases."⁴⁴ If compensation ultimately is awarded, the State is subrogated to the claimant's rights to the extent of the compensation paid.⁴⁵

The General Assembly relied heavily on the Uniform Crime Victims Reparations Act.⁴⁶ In its final form, however, the North Carolina Act differs from its model in a number of significant ways. A "victim" is defined in the North Carolina Act as one "who suffers personal injury or death proximately caused by" the crime.⁴⁷ The Uniform Act, however, has a more comprehensive definition of "victim." Under that Act, a "victim" is one who suffers injury or death as a result of the crime, a good faith effort to prevent the crime, or a good faith effort to apprehend one suspected of the crime.⁴⁸ Thus, a key question is whether the North Carolina Act is to be construed so that the

amount of his liability by pleading payments made to the plaintiff under the terms of a contract between the plaintiff and a third party who was not a joint tortfeasor.").

In the compensation programs, however, there is no need to be concerned about a windfall for the offender; the victim and the state are the only interested parties. Since the aim of the program is to aid a victim whose losses will come out of his own pocket, the program limits recovery to those losses not covered by a collateral source.

37. N.C. GEN. STAT. §§ 15B-3, -6 (1983). The Commission consists of five members: three appointed by the Governor, one appointed by the Senate, and one appointed by the House. *Id.* § 15B-3(a).

38. The application includes information relating to the criminal act, the injury, and the victim's economic loss. *See id.* § 15B-7. The Commission can waive the \$10 application fee for claims brought by indigent victims. *Id.* § 15B-7(a).

39. *Id.* § 15B-10(a).

40. *Id.* § 15B-4.

41. *Id.* § 15B-14(a). Of course, the victim still must prove the other requirements of the Act.

42. *Id.* § 15B-10(b) to (d).

43. *Id.* §§ 15B-9, 150A-45.

44. *Id.* § 150A-52.

45. *Id.* § 15B-18(a). The State would have a civil remedy against the offender in the amount of compensation paid to the victim.

46. UNIF. ACT, *supra* note 10.

47. N.C. GEN. STAT. § 15B-2(13) (1983).

48. UNIF. ACT, *supra* note 10, § 1(i), at 37.

"proximately caused" language includes persons injured as a result of trying to prevent a crime or apprehend a suspected criminal.

Because the purpose of the Act is to compensate innocent victims of crime, it is irrational not to compensate "good samaritans" who are injured. Thus, the "proximately caused" language of the Act should be interpreted to include good faith intervenors.⁴⁹ In *Sutton v. Duke*⁵⁰ the North Carolina Supreme Court stated that for an act to be the proximate cause of a negligently-caused injury, all that is required is "that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result*, was probable under the facts as they existed."⁵¹ Since it is entirely foreseeable that a good samaritan might be injured while coming to a victim's aid, the North Carolina Act should be construed to allow compensation to good faith intervenors.⁵²

The North Carolina Act also differs from the Uniform Act by denying compensation to a victim whose injury occurred while he was confined in prison or jail.⁵³ This provision is practically meaningless. Since only economic loss is compensable, an inmate-victim ordinarily would recover only his lost wages and out-of-pocket medical expenses. The State already provides free medical care to inmates,⁵⁴ and few inmates earn a significant wage. Thus, even without the limitation found in section 15B-11, there is little chance an inmate would receive compensation.

The North Carolina and Uniform Acts also differ substantially regarding compensation for injuries arising out of the operation of motor vehicles. The North Carolina Act bars compensation for all injuries or deaths "arising out of the ownership, maintenance, or use of a motor vehicle."⁵⁵ The Uniform Act provides a similar limitation unless the crime was "intended to cause personal

49. The Act's sponsor, Representative Thomas C. Womble, stated that although the North Carolina Act is not as explicit as the Uniform Act, "victim" is to be interpreted to include injured good faith intervenors. Telephone interview with Representative Thomas C. Womble, D-Forsyth (Feb. 27, 1984).

The term "proximate cause" is borrowed from the law of negligence. Countless pages have been written on this complex and confusing subject. See, e.g., Agnihotri, *Too Much Ado About Something: Fate of Proximate Cause in Louisiana*, 3 S.U.L. REV. 1 (1976); Reynolds, *Limits on Negligence Liability: Palsgraf at 50*, 32 OKLA. L. REV. 63 (1979); Comment, *Civil Liability For Suicide: An Analysis of the Causation Issue*, 1978 ARIZ. ST. L.J. 573; Comment, *House v. Kellerman: Judge, Jury, and Intervening Cause in Kentucky Negligence Law*, 64 KY. L.J. 889 (1976).

50. 277 N.C. 94, 176 S.E.2d 161 (1970).

51. *Id.* at 107, 176 S.E.2d at 169.

52. The North Carolina Supreme Court has held that a person cannot be charged with contributory negligence if he acts neither rashly nor recklessly in coming to the aid of a victim of negligence. The tortfeasor's negligent act is seen as the proximate cause of the rescuer's injury. See *Caldwell v. Deese*, 288 N.C. 375, 380, 218 S.E.2d 379, 382 (1975).

53. N.C. GEN. STAT. § 15B-11(a)(4) (1983). Representative Womble noted that this limitation was enacted because it is not the intention of the Act to compensate an inmate injured, for example, in a prison riot. One state that did not have this limitation was deluged with applications from inmates so injured. Telephone interview with Representative Thomas C. Womble, D-Forsyth (Feb. 27, 1984).

54. See N.C. GEN. STAT. § 148-19 (1983).

55. See *id.* § 15B-2(5).

injury or death."⁵⁶ North Carolina should amend its Act to conform with the Uniform Act and allow compensation for intentional automobile-related injuries.⁵⁷ Otherwise, the Act creates the anomaly that a person can recover if someone shoots him, but not if someone intentionally strikes him with a car. A literal reading of section 15B-2(5) also might preclude recovery for a victim of a car bomb, since the injury arose "out of the . . . use of a motor vehicle." Although cost reduction is the usual justification for barring recovery when an automobile is involved,⁵⁸ the Uniform Act's approach—by allowing recovery for only *intentionally* inflicted injuries—would reduce costs while still compensating the handful of victims who are assaulted intentionally with an automobile.⁵⁹

The Uniform Act contains a controversial optional provision that North Carolina wisely did not adopt. The optional provision premises a victim's recovery on his financial situation; a claimant may recover only if he will suffer "financial stress" as a result of his economic losses. "Financial stress" is defined as an inability to maintain one's "customary level of health, safety, and education" for oneself and one's dependents "without undue financial hardship."⁶⁰ The purpose of this provision is to limit costs by not compensating those who can take care of themselves.⁶¹ This justification has three major faults. First, the financial stress test "reads a welfare concept into a program not related to welfare."⁶² The purpose of the Act is to compensate all innocent victims, not just those below a certain income level. Second, the program already has a large cost-reduction provision that disallows recovery to the extent the economic loss is recouped from collateral sources.⁶³ Third, it has been suggested that it may be as costly to require the Commission to evaluate the victim's financial need as it is to compensate all victims regardless of financial stress. Thus, any savings made by disallowing recovery by wealthy victims would be offset by the increased administrative costs.⁶⁴ Since the justification for the financial stress test is weak, North Carolina was wise not to adopt it.

56. UNIF. ACT, *supra* note 10, § 1(e), at 36. Texas follows the Uniform Act on this point. See TEX. REV. CIV. STAT. ANN. art. 8309-1, § 3(4)(D) (Vernon Supp. 1984).

57. Four reasons for disallowing recovery for victims of automobile-related crimes have been suggested. First, automobile liability insurance provides an adequate remedy for the injured victim. Second, it may be too difficult to prove that the injury was intentionally inflicted. Third, compensating these victims would be too costly. Fourth, "[m]otor offenses are 'not the type of offense about which the public is concern[ed].'" Lamborn, *The Scope of Programs For Governmental Compensation of Victims of Crime*, 1973 U. ILL. L.F. 21, 30-32.

58. See Hoelzel, *supra* note 4, at 492.

59. See CRIME IN NORTH CAROLINA, *supra* note 1, at 21, 57.

Rep. Womble stated that the reason for total exclusion for motor-vehicle-related injuries is because the State should not become an automobile insurance company. Telephone interview with Representative Thomas C. Womble, D-Forsyth (Feb. 27, 1984).

60. UNIF. ACT, *supra* note 10, § 5(g)(1), at 41. Texas decided to adopt this optional financial stress test. See TEX. REV. CIV. STAT. ANN. art. 8309-1, § 6(b) (Vernon Supp. 1984).

61. See UNIF. ACT, *supra* note 10, at 42 (Commissioners' Comment).

62. *Id.*

63. See N.C. GEN. STAT. § 15B-11(d) (1983); UNIF. ACT, *supra* note 10, § 5(f)(1), at 41.

64. UNIF. ACT, *supra* note 10, at 42 (Commissioners' Comment). Thirty percent of the average program's expenses is consumed by administrative costs. Hoelzel, *supra* note 4, at 488. In all likelihood, this percentage is even greater in "financial stress" states.

In addition to the departures from the Uniform Act, there will be other problems in interpreting the North Carolina Act. In approaching the Act, one must decide whether to construe the Act liberally to facilitate recovery, or construe the Act strictly to save money. On the one hand, it is likely that any funding by the General Assembly will be inadequate to compensate all victims.⁶⁵ If the Commission or courts feel that the program is underfunded, they may construe the Act strictly to preserve funds. On the other hand, most programs with a humanitarian or social goal are construed liberally to facilitate recovery.⁶⁶ Because the program is designed to aid innocent crime victims, any ambiguity in the Act should be resolved in favor of the victim.

One such interpretation problem will be the Act's definition of "criminally injurious conduct." It is defined as conduct "which by its nature poses a substantial threat of personal injury or death."⁶⁷ This definition does not identify adequately the compensable crimes. If a crime is covered only if it intrinsically poses a "substantial threat" of injury, murder and assault clearly are covered; burglary, however, is not. The better view would be to determine if the criminal conduct poses a substantial threat of injury in light of the particular circumstances. This view is preferable because the words "substantial threat" modify the word "conduct." The emphasis is on the dangerousness of the conduct, not on the dangerousness of the underlying crime.⁶⁸ Thus, if the crime was dangerous as carried out, as opposed to dangerous as defined in the criminal code, the victim would be able to receive compensation.⁶⁹

Another interpretation problem is the definition of work loss. Compensable work loss is defined in part as "loss of income from work that the injured person would have performed if he had not been injured."⁷⁰ It has been argued that any loss of income caused by the crime should be covered under the program. Proponents of this view favor compensating the injured victim for wages lost because of a need to appear in court and testify against the offender. The Supreme Court of North Dakota, in *Hughes v. North Dakota Crime Victims Reparations Board*,⁷¹ held that such lost wages were not covered. The

65. For example, the future of Indiana's program looked gloomy from its inception in 1978 until 1980 because of funding woes. The Indiana Commission stopped processing claims for six months when the administrative funding was exhausted. See Clark & Webster, *supra* note 4, at 755-56.

66. See Note, *supra* note 25, at 199 ("[T]he Act is remedial in nature and thus should be accorded a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefit of the statute."). See also *Ames v. Texas*, 656 S.W.2d 235, 238 (Tex. App. 1983) (Burdock, J., dissenting) (Act should be construed liberally in favor of victim). But cf. *Hughes v. North Dakota Crime Victim Reparations Bd.*, 246 N.W.2d 774, 776-77 (N.D. 1976) (when court feels Act is unambiguous, it will not be given liberal construction).

67. N.C. GEN. STAT. § 15B-2(5) (1983).

68. See Note, *supra* note 25, at 211.

69. See *id.* The "dangerous as carried out" approach has been adopted by the Minnesota Commission. *Id.* at 211 n.155. North Dakota avoided this interpretation problem by defining "criminally injurious conduct" as criminal conduct that "results in bodily injury or death." See N.D. CENT. CODE § 65-13-03(4) (Supp. 1983). Thus, in North Dakota the risk of injury or death attendant to a particular crime is unimportant.

70. See N.C. GEN. STAT. § 15B-2(14) (1983).

71. 246 N.W.2d 774 (N.D. 1976).

Hughes decision represents the proper interpretation. The statute clearly is aimed at compensating the victim for wage loss caused by the injury he suffered. In *Hughes* the victim's lost wages were not the result, directly or indirectly, of his injury. Even if the victim had not been injured, he still would have been required to testify against the offender.⁷² Section 15B-2(14) clearly states that the loss must be attributable to the injury, and not just to the crime.⁷³

North Carolina General Statutes section 15B-11(a)(3) also may present an interpretation problem. That section denies recovery if an award unjustly would benefit the offender or his accomplice. Furthermore, unless "the interests of justice require," an award may not be made to a spouse, parent, child, sibling, or housemate of the offender or his accomplice.⁷⁴ These two requirements must be interpreted together.⁷⁵ Thus, the interests of justice would require compensating an offender's innocent spouse unless the award would benefit unjustly the offender himself. If, for example, the offender and his victim are estranged spouses with no hope of reconciliation, an award would be proper since it would not benefit the offender unjustly. Similarly, an emancipated son who is assaulted by his father should recover. In this respect, North Carolina was wise to reject the approach taken by Maryland. Under the Maryland program, a victim cannot recover if he is a member of the offender's family.⁷⁶ This rule is too inflexible because it disallows recovery merely because of a legal, blood, or social relationship with the offender. The North Carolina approach, which emphasizes the unjust enrichment of the offender, represents a view more in keeping with the policies underlying the Act.

In addition to problems of interpretation, two problems may arise in implementing the North Carolina program. If the program is funded inadequately by the General Assembly, its effectiveness will be diminished severely. As originally drafted, the program was to be funded by increased criminal court costs.⁷⁷ This proposal was defeated.⁷⁸ Instead, the program will be funded with general state revenues through the Department of Crime Control

72. *Id.* at 777 n.1.

73. See N.C. GEN. STAT. § 15B-2(14) (1983).

74. See *id.* § 15B-11(a)(3).

75. Maryland, unlike North Carolina, has made no conscious effort to emphasize the unjust enrichment of the offender. See MD. ANN. CODE art. 26A, § 5(b) (1981). North Carolina's provisions were included so that an offender could not be benefited by an award. Assuming that a victim meets every other requirement of the Act, the logical conclusion is that "justice requires" compensating the victim if the award will not benefit the offender.

76. MD. ANN. CODE art. 26A, § 5(b) (1981). "Family" is defined as a person within the third degree of consanguinity or affinity, a sexual partner, or a housemate. *Id.* § 2(d).

77. See N.C. House Bill 177 (1983) (as originally introduced). The rationale behind this method of funding is to let the criminals pay for a program that is aimed at victims. Texas, for example, funds its compensation program in this manner. See TEX. REV. CIV. STAT. ANN. art. 8309-1, § 14 (Vernon Supp. 1984).

78. This proposed method of funding was defeated for two principal reasons. First, the majority of criminal cases are traffic offenses, and thus the increased court costs really would not be borne by "criminals." Second, the purpose of court costs is to pay the court's administrative expenses, not to fund other programs. Interview with James Drennan, Associate Professor, North Carolina Institute of Government (Feb. 27, 1984).

and Public Safety.⁷⁹ To date, no funds have been appropriated for the program. To operate effectively, the program must receive adequate funds. The Indiana program "had a precarious existence" from its inception in 1978 until 1980 because of inadequate funding.⁸⁰ This should not be allowed to happen in North Carolina.

The drafters of the Act attempted to protect against funding deficiencies. The Act expressly states that if compensation is awarded when there are insufficient funds to pay the award, it nevertheless will be paid as soon as funds become available.⁸¹ The Commission, however, probably would cease processing claims if its administrative expenses could not be paid.⁸² A backlog of unpaid claims would result. Thus, proper funding is imperative if the program is to have a meaningful existence.

If the Act is to be effective, it is necessary that the victims it was intended to benefit be made aware of the program. Even a properly funded program is ineffective unless crime victims know it exists.⁸³ The North Carolina Act encourages victim awareness by requiring law enforcement agencies to use "reasonable efforts" to introduce the program to injured victims.⁸⁴ Although this is a step in the right direction, it may not be enough. The Act does not provide for enforcement against an agency that is derelict in notifying victims. Such a provision should be considered by the legislature if it is serious about full implementation of the Act. Pursuant to its own power to publicize the program,⁸⁵ the Commission also could implement a comprehensive plan to educate the public. Although any publicity drive will be restricted by limited funds, the program could be featured in radio and television public service announcements.⁸⁶

By enacting the North Carolina Crime Victims Compensation Act, the

79. 1983 N.C. Adv. Legis. Serv. ch. 832, § 6. The majority of the states fund their programs with general state revenues. Hoelzel, *supra* note 4, at 492.

80. See Clark & Webster, *supra* note 4, at 755-56.

81. See N.C. GEN. STAT. § 15B-22 (1983).

82. In Indiana the Commission stopped processing claims when its administrative coffers were emptied. Clark & Webster, *supra* note 4, at 755.

83. "A major shortcoming of every program is that most of its customers, victims of violent crime, are not aware of it." H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 281 (1974). The best gauge of public ignorance is the percentage of victims who use the programs. In California, for example, 200,000 people were victims of violent crime. Only 12,000—a mere 6%—applied for compensation. CRIM. JUST. NEWSLETTER, Nov. 7, 1983, at 1. Similarly, in 1974 only 3% of Alaska's, 12% of Hawaii's, 5% of Maryland's, and 2% of New York's eligible victims applied for compensation. See Note, *supra* note 25, at 230 n.261.

Incredible as it may seem, some state legislatures have been reluctant to publicize their programs. The Nebraska legislature, for example, would allow no money to be spent on publicity during the first year of the program (to limit the number of claims). Likewise, the Washington legislature was "distracted" about the widespread publicity of that state's program. Hoelzel, *supra* note 4, at 495.

84. See N.C. GEN. STAT. § 15B-20 (1983).

85. See *id.* § 15B-6(3).

86. Minnesota has a simple and relatively inexpensive program for informing potential claimants. When the police investigate a crime, they give the victim a card that tells the victim how to contact the compensation board. See Hoelzel, *supra* note 4, at 492.

Since the North Carolina Act allows compensation for reasonable attorneys' fees regardless of a claimant's success, see N.C. GEN. STAT. § 15B-15(a) (1983), it is likely that a large number of

General Assembly created a humanitarian program designed to aid injured crime victims. If the program is to serve this benevolent purpose, three considerations must be remembered. First, any ambiguities in the statute should be construed in favor of the victim; the adequacy or inadequacy of appropriation should not affect the construction given the Act. Second, it is imperative that the program be funded adequately. The General Assembly should look to other states to determine the level of funding a successful compensation program demands. Third, it is crucial that the program be publicized widely. Only if victims are aware of the program can it effectively serve both the citizens of the State and the policies it was intended to promote.

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victims will be made aware of the program by their attorneys. *See also* Hcelzel, *supra* note 4, at 495.

***State v. Neal*—Are North Carolina Criminal Defendants Adequately Protected from Judicial Comments on Verdicts?**

As a general rule, the presiding judge in a criminal trial is prohibited from commenting on a verdict rendered in that session if his comments can be heard by prospective jurors for that session.¹ This rule is intended to prevent prejudice to defendants tried before those jurors,² and to ensure the protection of the defendant's sixth amendment right to a fair and impartial trial.³ Although the defendant has a right to be tried before jurors unbiased by comment from the bench, it is unclear what remedy a defendant should have in the event that members of the jury are exposed to such judicial comment. The North Carolina legislature has enacted two statutes that address this issue. The first is North Carolina General Statutes section 1-180.1, enacted in 1955, which prohibits judicial comment on any verdict before jurors or prospective jurors⁴ and has been interpreted as providing that a motion for continuance is a defendant's sole remedy for such comment.⁵ The second is section 15A-1239, enacted in 1977 as part of the Trial Stage and Appellate Procedure Act,⁶ which contains similar language prohibiting comment on a verdict.⁷ This latter statute, however, does not contain the restrictive language of section 1-180.1 that has been interpreted to limit a defendant's remedy to a motion for a continuance. Thus, the question arises whether the absence of this restrictive language in the recently adopted section 15A-1239 is to be interpreted as repealing by implication the older statute, or whether these two statutes are to be

1. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975); *State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

2. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975).

3. U.S. CONST. amend VI. The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

4. N.C. GEN. STAT. § 1-180.1 (1983) states:

In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment.

5. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975); *State v. Neal*, 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

6. Act of June 23, 1977, ch. 711, 1977 N.C. Sess. Laws 853, 863 (codified at N.C. GEN. STAT. § 15A-1239 (1983)).

7. N.C. GEN. STAT. § 15A-1239 (1983) states:

The trial judge may not comment upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel. If he does so, any defendant whose case is calendared for that session of court is entitled, upon motion, to a continuance of his case to a time when all members of the entire jury panel are no longer serving.

read in conjunction with one another, so that a motion for continuance still is a defendant's "exclusive remedy" for judicial comment on the verdict.⁸ The North Carolina Court of Appeals addressed this issue for the first time in *State v. Neal*⁹ and concluded that section 1-180.1 had not been repealed by implication, but was still in effect. Thus, a defendant's sole remedy for prejudicial comment on a verdict from the bench remains a motion for continuance.¹⁰

This note questions the ruling in *Neal*, focusing particularly on the policy implications of the court's interpretation of the relevant statutes. In addition, the note questions the court's rejection of defendant's argument that he was entitled to a new trial under another statute, North Carolina General Statutes section 15A-1414(b)(3), which provides for a new trial if "[f]or any other cause the defendant did not receive a fair and impartial trial."¹¹ The note concludes that, although sections 1-180.1 and 15A-1239 might be reconcilable logically, a better result, and one more in keeping with the general philosophy of the Trial Stage and Appellate Procedure Act, is to eliminate the restrictive language of section 1-180.1.

In *State v. Neal*¹² defendant was charged with the misdemeanor of assault upon a female.¹³ Defendant's trial was set in Forsyth Superior Court during the criminal jury session beginning on March 15, 1982.¹⁴ On the first day of the session, the case of *State v. Wilson* was heard and the jury found Wilson not guilty.¹⁵ Following that trial, the presiding judge addressed the jury, admonishing them to pay close attention to what future witnesses might say, and reminding them of their vital role as the triers of fact.¹⁶ Neither defendant Neal nor his attorney was present at the time these comments were made. On the following day defendant's trial began before three of the same jurors. On March 17, 1982, defendant was convicted and sentenced to two years in

8. This was one of the issues raised by defendant in *State v. Neal*, 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

9. 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

10. *Id.* at 353, 299 S.E.2d at 656 (1983).

11. N.C. GEN. STAT. § 15A-1414(b)(3) (1978).

12. 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

13. *Id.* at 351, 299 S.E.2d at 654.

14. *Id.*

15. *Id.* at 352, 299 S.E.2d at 655.

16. *Id.* The trial record reveals the judge's admonitions upon the return of the verdict:

COURT: All right, I'm going to let you folks go until tomorrow. Let me say this. In view of this question, I don't believe you were listening carefully to the evidence in this case and I caution you that if you're called on another jury, do listen to what the witnesses say because you are the triers of facts. I ask you to please do that. Because if you don't listen—these cases are right important cases.

Now, as I recall the evidence there which would have been improper for me to give you my recollection of it because I'm not the trier of fact, but as I recall the evidence in this case, the officer said that when he came up there, the defendant put his hand in his pocket, that he told him—he put his hand on his shoulder or arm, and said take your hands out and he took his hands out and the substance dropped to the ground underneath him. But it would have been improper for me to tell you that. That's the way I heard the evidence.

I say this simply to you, you're going to be on the jury the rest of the week. Do listen carefully. It's important that you do (jury excused).

Id. at 351-52, 299 S.E.2d at 655.

prison.¹⁷

On March 24, 1982, defendant filed a motion for appropriate relief, in which he alleged that "he did not discover that the presiding judge . . . had made the comments listed above, until after [the] verdict in . . . [his] case."¹⁸ The relief sought was "for a new trial because the comments of the trial judge were made in contravention of N.C.G.S. 15A-1239, the VI Amendment of the Constitution of the United States, and Article 1, Section 24 of the Constitution of North Carolina."¹⁹ This motion was denied.²⁰ In the court of appeals, defendant relied on one argument—that his motion for a new trial should have been granted because of the trial judge's indiscretion in commenting on the verdict of a prior trial. The court of appeals held that defendant's motion for a new trial was denied correctly because neither of the statutes that deal with judicial comment on the verdict provide for a new trial as a remedy; instead, they provide, as an exclusive remedy, continuance.²¹ The court of appeals further held that defendant's failure to make a motion for continuance prior to trial resulted in a waiver of that right, and finally, that the trial court had not abused its discretion in denying defendant's motion for a new trial.²²

A brief overview of sections 1-180.1 and 15A-1239, including a consideration of the policy concerns underlying these statutes, is helpful in understanding the issues in *Neal*. Section 1-180.1 states that "[i]n criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court."²³ Prior to the enactment of section 1-180.1, there was no statute that dealt specifically with the matter of judicial comment on the verdict. A previously enacted statute, North Carolina General Statutes section 1-180,²⁴ commanded that the judge, in making his charge to the jury, explain the law, but offer no opinion on the facts of the case. In *State v. Canipe*²⁵ the North Carolina Supreme Court held that the expression of an opinion of the facts of a particular case by a trial judge constituted a violation of section 1-180, even though made to prospective jurors during the selection process.²⁶ Despite this expansive reading of section 1-180, the General Assembly enacted section 1-180.1 to "supplement [section 1-180 and] . . . to further prevent the trial judge from invading the province of the jury."²⁷

On July 1, 1978, the Trial Stage and Appellate Procedure Act went into

17. *Id.* at 351, 299 S.E.2d at 654.

18. *Id.* at 352, 299 S.E.2d at 655.

19. *Id.*

20. *Id.* at 351, 299 S.E.2d at 654.

21. *Id.* at 352-53, 299 S.E.2d at 655-56.

22. *Id.* at 353-54, 299 S.E.2d at 656-57.

23. N.C. GEN. STAT. § 1-180.1 (1983). See *supra* note 4.

24. N.C. GEN. STAT. § 1-180 (1983).

25. 240 N.C. 60, 81 S.E.2d 173 (1954).

26. *Id.* at 64, 81 S.E.2d at 176-77.

27. *State v. Carriker*, 287 N.C. 530, 534, 215 S.E.2d 134, 138 (1975).

effect.²⁸ This Act, which was drafted by the Criminal Code Commission, is essentially a "codification of the [criminal] procedures developed by case law and an attempt to make them uniform."²⁹ The expansive scope of the Act encompasses the procedure from the outset of trial through the exhaustion of all appeals.³⁰ Section 15A-1239 was enacted in 1978 as part of the Trial Stage and Appellate Procedure Act. This statute, like section 1-180.1, deals with judicial comment on the verdict, and states in language similar to that of its older counterpart that "[t]he trial judge may not comment upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel."³¹ There is certain language in section 1-180.1, however, that, either by design or oversight, was omitted from section 15A-1239. This language is the restrictive provision at the end of section 1-180.1, which states that "[t]he provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment."³²

The underlying purpose of these two statutes is the protection of the criminal defendant from potentially prejudicial remarks made by the judge in the presence of prospective jurors. One of the fundamental rights of a criminal defendant is the right to a fair trial—one free from bias or prejudice on the part of the judge or the jurors. An aspect of this right is the assurance that the judge, "the embodiment of even and exact justice,"³³ will say or do nothing that might prejudice the rights of the defendant. This basic principle is stated as follows:

[T]he rule appears to be that the practice of addressing the prospective jurors does not of itself constitute reversible error, although suggestions or statements which are likely to influence the decisions of the jurors when called upon later to sit in a given case may constitute error and should be avoided, as should misstatements of the law or remarks disparaging legitimate defenses that may be made in cases to be tried, as well as references made directly or by innuendo to particular cases which might come before the jurors.³⁴

This principle was expressed by the Supreme Court of North Carolina in *State v. Carriker*:³⁵ "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged."³⁶

28. 1977 N.C. Sess. Laws 853 (codified at N.C. GEN. STAT. § 15A-1239 (1983)).

29. Bailey, *Trial Stage and Appellate Procedure Act: An Overview*, 14 WAKE FOREST L. REV. 899, 900 (1978).

30. *Id.*

31. N.C. GEN. STAT. § 15A-1239 (1983).

32. *Id.* § 1-180.1.

33. Withers v. Lane, 144 N.C. 184, 191, 56 S.E. 855, 857 (1907).

34. Annot., 89 A.L.R.2d 197, 234 (1963).

35. 287 N.C. 530, 215 S.E.2d 134 (1975).

36. *Id.* at 534, 215 S.E.2d at 138 (quoting Withers v. Lane, 144 N.C. 184, 192, 56 S.E. 855, 857 (1907)).

When analyzing the comments of a judge to determine whether section 1-180.1 has been violated, the courts have focused on "whether or not the language complained of might have so affected the prospective jury panel that it was likely defendant would be deprived of a fair and impartial trial."³⁷ Comments that might have prejudiced a jury are prohibited by section 1-180.1 regardless of the judge's motive in making those comments.³⁸ Recent cases have given some indication of the nature of judicial comments on a verdict that will trigger that statute. Remarks by a judge containing opinions regarding the use of marijuana,³⁹ expressions of contempt for those charged with its use or sale,⁴⁰ and statements regarding the undesirability of drug use⁴¹ made to a jury panel prior to the trial of a defendant in a drug case, have been held to entitle the defendant to a motion for a continuance under section 1-180.1. Remarks or comments such as these need not have been made immediately prior to the trial of a particular defendant for that defendant to invoke the protec-

37. *Id.* at 535, 215 S.E.2d at 138.

38. *See id.*

39. Defendant in *Carriker* was charged with "the willful and felonious distribution of a controlled substance, marijuana, to a minor." *Id.* at 530, 215 S.E.2d at 135. Defendant appealed this guilty verdict, alleging that the trial court had erred in denying a motion for continuance under § 1-180.1. Defendant argued for a continuance because of certain remarks made by the presiding judge before the jury panel—remarks which "prejudiced his right to a fair trial." These remarks were made by the trial judge before passing sentence in *State v. Bell*, the case preceding *Carriker's* case. In *Bell* defendant had entered a plea of guilty to possession of marijuana charges. The remarks that follow were those made by the trial judge and Mr. Lea, *Carriker's* attorney, shortly after judgement was imposed in *Bell*:

Mr. Lea: We make a Motion to continue on the basis of certain remarks made by the Presiding Judge in the sentencing of Roger Paul Bell, these remarks which I think—

The Court: —What remarks? I don't care about your opinion.

Mr. Lea: The first one was that marijuana was a habit-forming drug. The second remark—

The Court: —I didn't say that.

Mr. Lea: That is what I understood you to say.

The Court: I said when they got hooked on marijuana that my experience was that anything went, and I have tried them for robbery; they get desperate for money and anything goes, robbery or anything else.

Mr. Lea: I think that is close to what you said; and further, as the defendant in a previous case left the Courtroom, the Presiding Judge looked at the Jury and stated substantially as follows: That they all get religion when they come into the Courtroom. Is this a fair statement, Your Honor?

The Court: I don't know that I said they all do. I said a lot of them get religion when they come in the Courtroom.

Mr. Lea: Is it necessary for me to give the reasons for this?

The Court: I don't care anything about the reasons. You can take it up if you want to and tell the Court up there why you took it up. All I said in front of the Jury is what you get from the papers everyday, on the radio or on television anytime you want to turn it on, and those people sitting on the Jury are grown men and women. The Motion is DENIED.

Id. at 531-32, 215 S.E.2d at 136.

40. *Id.* at 535, 215 S.E.2d at 138.

41. *See State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976). The basis for defendant's motion, as in *Carriker*, was the utterance by the trial judge of comments concerning the undesirability of drug use. These comments were made with all prospective jurors present, immediately prior to defendant's arraignment on charges of "felonious sale and delivery of the controlled substance [LSD]." The court of appeals, following the holding of the supreme court in *Carriker*, held that the trial judge had erred in denying defendant's motion for continuance. *Id.* at 392-94, 224 S.E.2d at 206-08.

tion of section 1-180.1.⁴² In *State v. Brown*⁴³ the North Carolina Court of Appeals, emphasizing the reach of the statute, stated that "[u]nder G.S. § 1-180.1, if a judge comments on a *verdict* in a criminal case, all other defendants whose cases remain for trial during that week are entitled to continuance as a matter of right."⁴⁴ In this way the statute guards against the possible long-range or cumulative effects of prejudicial remarks upon prospective jurors, and affords a safeguard to all defendants who might be prejudiced by those remarks.

Although these provisions demonstrate the legislature's resolve to ensure that the criminal defendant be given every opportunity to receive a fair and impartial trial, the remedy for infringement of this right is limited. Section 1-180.1 expressly provides that "[t]he provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgement."⁴⁵ The Supreme Court of North Carolina has interpreted this to mean that the exclusive remedy for judicial comment on the verdict is a motion for continuance.⁴⁶

Despite the restrictive language in section 1-180.1—limiting the remedies available to a defendant in the event of judicial comment on the verdict—there is no equivalent language in its more current counterpart, section 15A-1239.⁴⁷ Curiously, section 15A-1239, while omitting the restrictive language of section 1-180.1, adds nothing substantive to the latter statute. The question that inevitably arises from the coexistence of these two otherwise identical statutes, is whether section 15A-1239, by virtue of the absence of restrictive language, might be interpreted to repeal section 1-180.1. A comprehensive list of the statutes repealed and replaced by the Trial Stage and Appellate Procedure Act is enumerated in section 33, chapter 711 of the 1977 Session Laws. Section 1-180.1, however, is not included in that list. *State v. Neal*⁴⁸ represents the court of appeals' first attempt to address the question whether section 1-180.1 was repealed by implication.

The question presented in this case was, in part, one of legislative intent: Did the legislature intend the two statutes to be read in conjunction with one another, thereby providing that a motion for continuance is the exclusive remedy for judicial comment on the verdict under section 1-180.1? *Neal* answered this question in the affirmative, holding that the two statutes were reconcilable, and that section 1-180.1 had not been repealed by implication.⁴⁹ Indeed, there is authority to support the court's determination. In *State ex rel Commis-*

42. See *id.* at 394, 224 S.E.2d at 207.

43. 29 N.C. App. 391, 224 S.E.2d 206 (1976).

44. *Id.* at 394, 224 S.E.2d at 207.

45. N.C. GEN. STAT. § 1-180.1 (1983).

46. *Carriker*, 287 N.C. at 535, 215 S.E.2d at 138. The court in *Carriker* stated: "Hence, in order to obtain the benefit of the statute a defendant must, as defendant did in this case, move for a continuance." *Id.*

47. See N.C. GEN. STAT. § 15A-1239 (1983). See *supra* note 7.

48. 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

49. *Id.* at 353, 299 S.E.2d at 656.

sioner of Insurance v. North Carolina Automobile Administrative Rate Office⁵⁰ the North Carolina Supreme Court stated that "[p]arts of the same statute dealing with the same subject matter must be considered and interpreted as a whole"⁵¹ and "statutes dealing with the same subject matter [should] be reconciled and effect [should be] given to all unless some are irreconcilable with others."⁵² In light of the court's conclusion in *Automobile Administrative Rate Office*, the *Neal* court would have been challenged to find that section 15A-1239, simply by virtue of the absence of certain restrictive language, overruled section 1-180.1 by implication.

Although the court might logically find, as it did, that the statutes are reconcilable, this determination presents unsettling implications. If the statutes are to stand together, then the sole remedy available to the defendant, whose right to a fair trial at the hands of an impartial jury has been impaired by comments of the presiding judge, is a motion for continuance.⁵³ In most situations, such a remedy, which delays the trial until twelve impartial jurors can be found, is adequate.⁵⁴ If the defendant and his attorney are absent from the court at the time such comments are made, and remain oblivious to the fact that potentially prejudicial and damaging comments were made, however, no pre-trial motion for continuance could be made as required.⁵⁵ Such was the situation in *Neal*. Under the court's reading of the statute, Neal was precluded from making "motions for a new trial, motions to set aside the verdict of [the] jury, or a motion made in arrest of judgement."⁵⁶ Under such a reading, the chance presence or absence of a criminal defendant when the judge utters potentially damaging or prejudicial remarks to future or prospective jurors might be determinative of whether that defendant receives a fair and impartial trial.

How, then, might the statutes accommodate a defendant like Neal, who, at some point during trial or soon thereafter, learns of remarks made by the judge that might have had a prejudicial effect? One possible answer, and one that the court in *Neal* rejected, is provided by section 15A-1414(b)(3).⁵⁷ This statute, which "regulates the post-trial correction of errors,"⁵⁸ provides that the defendant may make a motion for a new trial based on any cause other than the causes expressly specified in the statute for which defendant did not receive a fair and impartial trial.⁵⁹ *Neal*, however, rejected defendant's argument that his motion for a new trial be permitted under this statute. The court reasoned that because the ground for defendant's motion for a new trial under

50. 294 N.C. 60, 241 S.E.2d 324 (1978).

51. *Id.* at 66, 241 S.E.2d at 328.

52. *Id.* at 67, 241 S.E.2d at 329.

53. See N.C. GEN. STAT. §§ 1-180.1, 15A-1239 (1983).

54. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975); *State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

55. See *Neal*, 60 N.C. App. at 351-52, 299 S.E.2d at 655.

56. N.C. GEN. STAT. § 1-180.1 (1983). See *Neal*, 60 N.C. App. at 353, 299 S.E.2d at 655-56.

57. N.C. GEN. STAT. § 15A-1414(b)(3) (1983).

58. Bailey, *supra* note 29, at 905.

59. See N.C. GEN. STAT. § 15A-1414(b)(3) (1983).

section 15A-1414(b)(3) was comment on the verdict by a judge, and because the statute governing that matter disallows motions for a new trial,⁶⁰ such a motion was unavailable to defendant.⁶¹ Such reasoning restricts the scope of section 15A-1414(b)(3) in two ways. First, it refuses to consider the possibility that section 15A-1414(b)(3) might function in one capacity as a "safety net" for situations that the legislature could not have anticipated, and without which defendant might otherwise be denied a fair trial. Second, such reasoning places too narrow a construction on the "[f]or any other cause" language⁶² of the statute.

Thus, the court in *Neal*, although constrained to deny defendant's motion under section 15A-1239 by the holding in *Automobile Administrative Rate Of fice*,⁶³ nevertheless might have construed section 15A-1414(b)(3) to cover a situation like that presented. Neal's right to receive a fair trial was jeopardized by the presiding judge's comments on the verdict rendered prior to his case. These comments constituted valid grounds, as a matter of right, for the continuance of his case.⁶⁴ By virtue of his absence from the courtroom at that point, however, he was unaware of the need to make such a motion. The court stated: "Ignorance of a factual basis on which to move for a continuance affords no relief once the trial has begun."⁶⁵ Although this might be so, it must be questioned whether the court was overly hasty in dismissing defendant's motion for a new trial pursuant to section 15A-1414(b)(3), and making a ruling that seems more in keeping with the "letter" than the "spirit" of the law.

As long as both sections 1-180.1 and 15A-1239 remain in effect, the sole remedy for judicial comment will be the motion for continuance provided in section 1-180.1. Although this remedy is usually sufficient to counter the effects of the judge's disparaging or prejudicial remarks, in situations in which the defendant is unaware of the utterance of such remarks, their effect on the jury will go unremedied. For that reason, courts need an alternative means to ensure that the defendant, who is absent from the courtroom when such remarks are made, is afforded the same opportunity to receive a fair and impartial trial as the defendant who happens to hear the judge's comments. Section 15A-1414(b)(3) provides that alternative means. This statute, however, will remain ineffective to remedy judicial comment on the verdict so long as courts interpret section 1-180.1 to preclude any remedies other than a motion for continuance. As there is every indication that the courts will continue to do so, it remains in the hands of the legislature to remedy this situation by repealing section 1-180.1 and its restrictive language. In this way, the right of the crimi-

60. *Id.* § 1-180.1.

61. *Neal*, 60 N.C. App. at 352-53, 299 S.E.2d at 656.

62. N.C. GEN. STAT. § 15A-1414(b)(3) (1983).

63. 294 N.C. 60, 241 S.E.2d 324 (1978).

64. N.C. GEN. STAT. § 1-180.1 (1983).

65. *Neal*, 60 N.C. App. at 353, 299 S.E.2d at 656.

nal defendant to receive a fair and impartial trial, though not ensured, will be secured more completely.

MICHAEL COLLIER CONNELL

Qualifying Jurors in Capital Trials: Are Sixth Amendment Rights Adequately Protected in North Carolina?

The North Carolina judicial system heartily embraces the practice of death qualification in capital trials.¹ A jury is deemed death-qualified when it is purged of all resolute opposition to capital punishment. In North Carolina, as in all states with capital crimes, the prosecutor may challenge for cause all prospective jurors who express unequivocally that they would never impose the death penalty.² The rationale for allowing death qualification of a jury is twofold. First, the prosecution wants to eliminate all jurors who would refuse to find a defendant guilty of a capital offense, regardless of the evidence, because of the threat of capital punishment.³ Second, the prosecution desires a jury willing to impose the death penalty in statutorily defined situations.⁴ Constitutional objections to death qualification, grounded in the sixth amendment, are based on defendants' claims that a death-qualified jury is conviction-prone⁵ and that a death-qualified jury does not represent a fair cross-section of the community.⁶ In *Witherspoon v. Illinois*⁷ the United States Supreme Court attempted to balance the state's interest in securing a jury capable of following the law with the criminal defendant's constitutionally guaranteed right to an impartial jury composed of a fair cross-section of the community.⁸ The Supreme Court held that a death qualification exclusion was acceptable only when it was unequivocally clear that the excluded prospective juror automatically would vote against the death penalty regardless of the evidence, and that the attitude of that prospective juror toward capital punishment would make it impossible for him to follow impartially the law in determining a defendant's guilt.⁹ Exclusion for less would result in a reversal of the death sentence.¹⁰

Although the conclusion of the Supreme Court is clear, several issues remain unsettled and attacks on death qualification continue. First, the

1. See, e.g., *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Hill*, 308 N.C. 382, 302 S.E.2d 202 (1983); *State v. Ladd*, 308 N.C. 272, 302 S.E.2d 164 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982); *State v. Oliver*, 302 N.C. 28, 272 S.E.2d 183 (1981); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980).

2. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968); White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 354-55 (1980).

3. White *supra* note 2, at 354.

4. *Id.* at 355.

5. *Id.* at 356.

6. See Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595, 596 (1982).

7. 391 U.S. 510 (1968).

8. *Id.* at 518-21.

9. *Id.* at 522 n.21.

10. *Id.* In *Witherspoon* the Court limited its reversal to defendant's death sentence. "Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case." *Id.* at 523 n.21.

Supreme Court never has defined specifically the situation in which a *Witherspoon* violation warrants reversal of the death penalty.¹¹ Second, it is not clear when a prospective juror has expressed an unequivocal inability to follow and apply the law.¹² Finally, the Court left unanswered the question whether the sixth amendment rights of a defendant are protected adequately by the death qualification procedure as limited by *Witherspoon*.¹³

North Carolina consistently has resolved all of these issues against the capital defendant.¹⁴ In 1983 the North Carolina Supreme Court perfunctorily dismissed the allegations of five defendants attacking the death qualification procedure.¹⁵ This note analyzes the practice of death qualification in North Carolina by examining the background of Supreme Court death qualification treatment, the application of death qualification in North Carolina capital trials, the North Carolina Supreme Court's treatment of attacks on the state's death qualification practice, and the available alternatives to the present death qualification system. The note concludes that death qualification as presently practiced in North Carolina unnecessarily violates a capital defendant's guaranteed right to a fair trial under the sixth amendment.

The practice of death qualification began at a time when conviction for a capital offense resulted in an automatic death sentence.¹⁶ Consequently, a juror opposed to the death penalty might refuse to find a defendant guilty to avoid imposition of capital punishment. To promote the impanelling of juries capable of finding a capital defendant guilty, prosecutors were permitted to exclude from capital cases jurors who had serious objections to the death penalty.¹⁷ Because the death penalty is no longer mandatory,¹⁸ however, the necessity of impanelling a death-qualified jury is not readily apparent. Furthermore, all states that have retained capital punishment provide for a bifurcated proceeding in which the guilt and sentencing phases are separate.¹⁹

11. Subsequent Supreme Court decisions, however, have tended to clarify the *Witherspoon* holding. See *infra* notes 31-38 and accompanying text.

12. North Carolina examines death qualification "contextually." See *infra* notes 44-46 and accompanying text. The United States Supreme Court has not specified whether the unequivocal refusal to apply the death penalty must be ascertainable from the record. A juror's response of "I think so" to the question of whether he would refuse to impose the death penalty, however, was held less than unequivocal. *Maxwell v. Bishop*, 398 U.S. 262, 264-66 (1970). The Supreme Court has also held that a conviction by a guilt-phase jury chosen in violation of *Witherspoon* cannot stand simply because the totality of the record evidences no violation of the spirit of *Witherspoon*. See *Mathis v. New Jersey*, 403 U.S. 946 (1971) (mem.), *rev'g* 52 N.J. 238, 245 A.2d 20 (1968). Nor does the fact that a trial judge has the opportunity to observe and listen to a juror prevent reversal when the juror's responses on record are equivocal. See *Aiken v. Washington*, 403 U.S. 946 (1971) (mem.), *rev'g* 75 Wash. 2d 421, 452 P.2d 232 (1971).

13. *Witherspoon*, 391 U.S. at 520 n.18.

14. See *infra* notes 39-48, 108-10, and accompanying text.

15. See *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Hill*, 308 N.C. 382, 302 S.E.2d 202 (1983); *State v. Ladd*, 308 N.C. 272, 302 S.E.2d 164 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983).

16. See *White*, *supra* note 2, at 354-56.

17. *Id.* at 354-55.

18. See, e.g., N.C. GEN. STAT. § 15A-2000(b) (1983).

19. See *White*, *supra* note 2, at 353 n.2. See also N.C. GEN. STAT. § 15A-2000 (1983). The bifurcated system has been in response to the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). The Supreme Court has approved the bifurcated system. See,

Although the concern that jurors, to avoid the death penalty, would not convict a defendant arguably diminishes in the wake of discretionary capital punishment and bifurcated capital trials, the majority of jurisdictions still allow prosecutors to excuse for cause jurors opposed to the death penalty.²⁰

Counterbalancing the prosecution's desire to impanel a jury willing to convict and impose the death penalty is the sixth amendment guarantee of the criminal defendant's right to a fair trial.²¹ This right guarantees the defendant a trial before an impartial jury.²² Any verdict rendered by a less than impartial jury cannot stand, regardless of whether actual prejudice to the defendant is shown.²³ To meet the requirement of an impartial jury, the United States Supreme Court has held that a jury must be chosen from a venire representing a fair cross-section of the community.²⁴ Although the sixth amendment does not guarantee that each jury must have a representative from each class in the community, absent a justifiable state interest, systematic exclusion of any class from jury service is constitutionally unacceptable.²⁵ This constitutional right to a fair trial by an impartial jury is extended to state proceedings by the fourteenth amendment.²⁶ Thus, any sixth amendment issues arising out of the North Carolina death qualification practice must conform to the Supreme Court's interpretation.

In *Witherspoon* the Supreme Court attempted to balance the need to impanel a jury able to properly follow the law with the need to protect sixth amendment guarantees to a fair trial. Prior to this decision, jurors routinely were excluded for cause from capital juries when expressing any opposition to the death penalty.²⁷ The Court rejected such comprehensive exclusions and limited the sweep of the death qualification procedure, holding that prospective jurors could be excused for cause only when they unequivocally state that they would never impose the death penalty, and when jurors state that their views concerning the death penalty would make it impossible for them to determine guilt impartially.²⁸ Absent one of these exceptions, a juror cannot be

e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (validating a Georgia statute providing for bifurcated proceedings in capital cases); *Proffitt v. Florida*, 428 U.S. 242 (1976) (validating a similar Florida statute).

20. See Colussi, *supra* note 6, at 598 n.12. This power to excuse, however, was limited by the Supreme Court in *Witherspoon* and later decisions. See *infra* notes 27-38 and accompanying text.

21. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" U.S. CONST. amend. VI.

22. See *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

23. See, *e.g.*, *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

24. See *Williams v. Florida*, 399 U.S. 78, 100 (1970) (criminal trial jury should consist of laymen representative of cross-section of the community).

25. The Court reached this conclusion in *Taylor v. Louisiana*, 419 U.S. 522, 534-35 (1975). The requirements for establishing a systematic exclusion were established in *Duren v. Mississippi*, 439 U.S. 357, 364 (1979). See also *infra* notes 93-100 and accompanying text.

26. *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968).

27. See, *e.g.*, *Spence v. State*, 274 N.C. 536, 164 S.E.2d 593 (1968) (79 of 150 jurors excused for cause due to belief that death penalty was wrong). See also Colussi, *supra* note 6, at 598 n.12 (outlining history of practice of excluding jurors because of opposition to death penalty).

28. *Witherspoon*, 391 U.S. at 522-23 & n.21.

excluded for cause. If veniremen are excluded on any broader basis, the death penalty cannot be imposed.²⁹ The *Witherspoon* Court reversed the death penalty sentence imposed by a jury from which prospective jurors had been excused on a broader basis.³⁰

Several Supreme Court decisions have clarified the holding in *Witherspoon*. In *Adams v. Texas*³¹ the Court held that the fact that a juror's deliberations merely would be "affected" by death penalty attitudes was not sufficient for an excusal. The Court found it natural for a juror to take more seriously a decision concerning a person's life.³² In *Adams* a death penalty sentence was overturned because jurors were excused for cause on a broader basis than that permitted under *Witherspoon*.³³

In *Davis v. Georgia*³⁴ the Court held that a death qualification exclusion was proper only if, prior to trial, a venireman is committed unequivocally to voting against the death penalty regardless of the evidence. The Court held that improper exclusion of even one juror would invalidate any death sentence imposed.³⁵ Thus, it was not necessary to establish systematic exclusion in violation of *Witherspoon* to warrant a sentence reversal.

The Supreme Court further clarified the *Witherspoon* test in *Boulden v. Holman*,³⁶ in which it addressed the question of how prospective jurors may be examined during the death qualification *voir dire*. The Court affirmed the assertion in *Witherspoon* that "[t]he critical question . . . is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors."³⁷ The Court held that the questions asked prospective jurors during death qualification must be phrased so that laymen can understand what is asked and the response can be interpreted properly. This holding reaffirmed the statement in *Witherspoon* that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be

29. *Id.*

30. *Id.* at 521-23. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the *Witherspoon* criteria were met because prospective jurors who stated that their death penalty views would make it impossible for them to follow the law and the instructions of the trial judge were excluded. See also *Keeten v. Garrison*, 578 F. Supp. 1164, 1170 (W.D.N.C. 1984) (upholding state's right to exclude from both phases of trial jurors whose opposition to death penalty would color their consideration of the evidence).

31. 448 U.S. 38 (1980).

32. *Id.* at 49-50. The Texas statute permitted prospective jurors to be excused for cause when their death penalty attitudes would "affect" their deliberations. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974). The State argued that the statute and *Witherspoon* offered alternate grounds for excusal. The Supreme Court rejected this suggestion, holding that *Witherspoon* was limiting and therefore excusal on broader statutory grounds was error. *Adams*, 448 U.S. at 48-49.

33. *Adams*, 448 U.S. at 49.

34. 429 U.S. 122 (1976) (per curiam).

35. *Id.* at 123.

36. 394 U.S. 478 (1969).

37. *Id.* at 481-82 (quoting *Witherspoon*, 391 U.S. at 516 n.9).

assumed that that is his position."³⁸ If a juror cannot understand the questions put forward during *voir dire*, it is impossible to determine if his answers are unambiguous and unequivocal.

In summary, to conform with Supreme Court decisions, death qualification can exclude only those jurors who would vote automatically against the imposition of the death penalty or who are unable impartially to determine guilt because of death penalty attitudes. *Voir dire* questions should be asked in such a way that veniremen understand the questions and the significance of their responses. Finally, the improper exclusion of even one prospective juror is sufficient to mandate reversal of a death sentence. North Carolina practice must be analyzed in light of these limitations.

There is no explicit death qualification statute in North Carolina.³⁹ The basis for death qualification is implied from a North Carolina statute authorizing challenge for cause of certain jurors.⁴⁰ Despite the absence of a specific statutory authorization, the practice of death qualification is accepted throughout North Carolina.

Because there are no definite statutory guidelines, there is little uniformity in death qualification procedures in North Carolina. The basic procedure, however, is similar to that found in other jurisdictions. Death qualification takes place during *voir dire* of the jury with the entire jury panel present.⁴¹ Typically, the prosecutor or trial judge questions prospective jurors concerning their death penalty attitudes. Often, the questions used by the court or prosecutor are unclear and not framed according to *Witherspoon* limitations.⁴² If,

38. *Witherspoon*, 391 U.S. at 516 n.9. See also *Maxwell v. Bishop*, 398 U.S. 262 (1970) (per curiam) (remanding for further consideration of *Witherspoon* issue).

39. Some states have had statutory authorization for death qualification. See, e.g., *Adams v. Texas*, 448 U.S. 38 (1980) (Texas death-qualification statute invalidated); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (Illinois death-qualification statute invalidated).

40. N.C. GEN. STAT. § 15A-1212(b)(9) (1983) provides in pertinent part:

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

....

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict.

41. See *State v. Jackson*, 309 N.C. 26, 34, 305 S.E.2d 703, 710 (1983) (whether to allow sequestration and individual *voir dire* of prospective jurors is a matter for trial court's discretion). Allowing prospective jurors to be present is unwise for two reasons. First, prospective jurors are able to hear and see the *voir dire* of other jurors. This allows them to determine what is necessary for an excusal for cause. Although jury duty is a responsibility shared by all citizens, many avoid it if they can find a way. See Brief for Appellant Moore at 33, *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981) (prospective juror expressed unwillingness to impose death penalty when he realized he could be excused for doing so). Second, the process tends to prejudice prospective jurors against the defendant. The constant talk of guilt and capital punishment may convince prospective jurors prior to trial of the defendant's guilt. See *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) (holding that any portion of *voir dire* concerning death qualification must be conducted individually and in sequestration); Haney, *The Biasing Effect of the Death Qualification Process* (1979 prepublication draft) (study indicating that when *voir dire* is not conducted on an individual basis, out of the hearing of other potential jurors, bias against defendant develops).

42. The North Carolina Supreme Court has recognized this as a problem. See, e.g., *State v.*

after this preliminary questioning, a juror expresses disfavor of capital punishment, there is further inquiry in accordance with *Witherspoon* and *Adams*.⁴³

Prospective jurors often are excused for cause based on such ambiguous responses as "I don't think so" or "I don't believe so," when asked whether they could vote to impose the death penalty.⁴⁴ Courts in North Carolina have uniformly found that although the specific answers are equivocal, the context of the responses indicates an unwillingness to impose the death penalty.⁴⁵ Even in cases in which a juror has been excluded improperly, the North Carolina Supreme Court has held that there was no reversible error because a systematic exclusion in violation of *Witherspoon* was not evident from the record.⁴⁶

The North Carolina Supreme Court has adopted a very narrow interpretation of *Witherspoon*. The court has never analyzed fully the state's death qualification practice in light of the *Witherspoon* decision, yet insists that the North Carolina practice comports with Supreme Court limitations.⁴⁷ Post-*Witherspoon* Supreme Court decisions dealing with death qualification have been ignored by the North Carolina Supreme Court. The North Carolina courts analyze death qualification "contextually," meaning that the trial judge

Pinch, 306 N.C. 1, 56, 292 S.E.2d 203, 240 (Exum, J., dissenting) (questions asked by trial judge ambiguous—excused juror could not have known meaning), *cert. denied*, 103 S. Ct. 474 (1982); *State v. Bernard*, 288 N.C. 321, 327, 218 S.E.2d 327, 331 (1975) ("[M]any of the problems growing out of prospective jurors' attitudes toward the death penalty could be avoided if district attorneys would prepare and use in the *voir dire* examination of prospective jurors questions framed according to the clear language of *Witherspoon*.").

43. See, e.g., *State v. Pinch*, 306 N.C. 1, 53-56, 292 S.E.2d 203, 236-40, *cert. denied*, 103 S. Ct. 474 (1982); *State v. Avery*, 299 N.C. 126, 135-37, 261 S.E.2d 803, 809-10 (1980).

44. See, e.g., *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983). In *Kirkley* a juror was excused for the following answers:

Q: If you were satisfied beyond a reasonable doubt of the things the law requires you to be satisfied about then would you recommend, in accordance with the law, recommend [sic] a sentence of death, or do you have such strong feelings about the death penalty that even though you were satisfied beyond a reasonable doubt as to those things, you would not vote for the death penalty?

MRS. MCKEE [prospective juror]: I don't feel like I would.

Q: You feel that even though the state had satisfied you of the three elements of the presence of an aggravating circumstance, that it was sufficiently substantial to call for the imposition of the death penalty, and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances, you still feel that you could not vote for the death penalty, even though you were convinced of those things?

MRS. MCKEE: I don't think I could.

Examination by defense attorney, Mr. Chapman.

Q: Could you tell us what your personal views are on the death penalty?

MRS. MCKEE: I'm not sure I know exactly how I feel about it definitely. Given a certain set of personal circumstances, I might have had one feeling one way and another feeling the other way.

Id. at 206-07, 302 S.E.2d 144, 150. See also *State v. Pinch*, 306 N.C. 1, 53-56, 292 S.E.2d 203, 239-40 (Exum, J., dissenting), *cert. denied*, 103 S. Ct. 474 (1982); *State v. Avery*, 299 N.C. 126, 136-37, 261 S.E.2d 803, 809 (1980).

45. See *State v. Kirkley*, 308 N.C. 196, 207, 302 S.E.2d 144, 150-51 (1983); *State v. Williams*, 305 N.C. 656, 664-68, 292 S.E.2d 243, 249-52, *cert. denied*, 103 S. Ct. 474 (1982).

46. See *State v. Bernard*, 288 N.C. 321, 325-27, 218 S.E.2d 327, 330-31 (1975).

47. *Id.* at 325-26, 218 S.E.2d at 330-31. See also *State v. Kirkley*, 308 N.C. 196, 205-06, 302 S.E.2d 144, 149-50.

must determine from the words and manner of a prospective juror how the juror feels about the death penalty and how those feelings would affect deliberations.⁴⁸

Justice Exum of the North Carolina Supreme Court has written strong dissents in several death qualification cases.⁴⁹ In these dissents, he analyzes the *Witherspoon* decision and subsequent Supreme Court decisions affecting the death qualification issue. One such dissent is found in *State v. Pinch*.⁵⁰ In *Pinch* defendant was charged with two counts of first degree murder. The jury found defendant guilty of both offenses and recommended imposition of the death penalty. The court accepted the jury's recommendation and sentenced defendant to death.⁵¹ Prior to the guilt determination phase of the *Pinch* trial, however, the trial court had excused eight veniremen for cause because of their opposition to the death penalty. Defendant argued that he was deprived of the "constitutional rights of due process and trial by jury."⁵²

The majority opinion in *Pinch* routinely dismissed defendant's contentions. The *Witherspoon* holding was mentioned briefly as the "applicable constitutional standard."⁵³ The majority found that seven of the eight excused jurors had expressed unequivocally that they could never impose the death penalty and that their excusal was proper in light of *Witherspoon*.⁵⁴ Although the statements of the eighth juror concerning the death penalty were equivocal, the majority concluded that "[c]onsidering her answers contextually, we find that [the putative juror] expressed a sufficient refusal to follow the law."⁵⁵

48. See *supra* text accompanying note 45.

49. See, e.g., *State v. Pinch*, 306 N.C. 1, 38-61, 292 S.E.2d 203, 230-43 (Exum, J., dissenting), *cert. denied*, 103 S. Ct. 474 (1982); *State v. Avery*, 299 N.C. 126, 139-50, 261 S.E.2d 803, 811-18 (1980) (Exum, J., dissenting).

50. 306 N.C. 1, 38, 49-56, 292 S.E.2d 203, 230, 236-40 (Exum, J., dissenting), *cert. denied*, 103 S. Ct. 474 (1982).

51. *Id.* at 7, 292 S.E.2d at 212.

52. *Id.* at 9, 292 S.E.2d at 213.

53. *Id.*

54. *Id.*

55. *Id.* One excused juror had responded to some of the district attorney's questions as follows:

Q: I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, Ma'am that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence?

A: I don't know. I guess if it was proven to me, I guess I could.

Q: If what was proven to you?

A: I would have to be—I would have to absolute [sic] know for sure, I mean no doubt whatsoever.

...

Q: You could not impose the death penalty regardless of what the evidence is?

A: I don't believe so.

MR. WANNAMAKER [district attorney]: If your Honor please, we challenge for cause. THE COURT: I understand, Mrs. Neal. I know this is very difficult for you, but it's necessary to have your candid and frank answers and I thank you for them. Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL [prospective juror]: No, I just don't think so.

Id. at 54-55, 292 S.E.2d at 239 (Exum, J., dissenting).

Justice Exum's dissent in *Pinch* analyzed the *Witherspoon* decision and subsequent Supreme Court decisions that aid in the evaluation of death-qualification practices.⁵⁶ He concluded that at least two prospective jurors had been excluded improperly for cause.⁵⁷ Although the majority thought the proper standard was whether it was established that a potential juror "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case,"⁵⁸ Justice Exum determined that *Witherspoon* had been more explicit in its guidance. Quoting extensively from *Witherspoon*, Justice Exum identified key language in that decision.⁵⁹ According to Justice Exum's interpretation of *Witherspoon*, the prospective juror must make it "unmistakably clear" that he is "irrevocably committed, before the trial has begun, to vote against [the penalty of death] regardless of the facts and circumstances" that might emerge in the course of the proceedings, before excusal for cause is proper.⁶⁰ This interpretation is consistent with several subsequent Supreme Court decisions that Justice Exum also discussed.⁶¹

56. *Id.* at 49-56, 292 S.E.2d at 236-40 (Exum, J., dissenting).

57. *Id.* at 49, 292 S.E.2d at 236-37 (Exum, J., dissenting).

58. *Id.* at 9, 292 S.E.2d at 213 (Exum, J., dissenting) (quoting *Witherspoon*, 391 U.S. at 522 n.21).

59. *Id.* at 49-50, 292 S.E.2d at 237 (Exum, J., dissenting).

"A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death [A] jury composed exclusively of . . . people [who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for [those who believe in the death penalty]."

"If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die."

Id. at 49-50, 292 S.E.2d at 237 (Exum, J., dissenting) (quoting *Witherspoon*, 391 U.S. at 519-21) (emphasis added in *Pinch*).

Justice Exum added:

"[A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that the veniremen were excluded on any broader basis than this, the death sentence cannot be carried out"

Id. at 50-51, 292 S.E.2d at 237 (quoting *Witherspoon*, 391 U.S. at 522 n.21).

60. *Id.* at 51, 292 S.E.2d at 237-38 (Exum, J., dissenting).

61. *Id.* at 51-53, 292 S.E.2d at 237-39 (Exum, J., dissenting). See *Adams v. Texas*, 448 U.S. 38 (1980) (juror may not be excused simply because deliberations "affected" by death penalty attitudes); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam) (if even one juror is excused in violation of *Witherspoon*, death sentence cannot stand); *Boulden v. Holman*, 394 U.S. 478, 483-84

later decision, *Duren v. Missouri*,⁹⁶ the Court placed the burden upon defendant to prove that a jury was not representative.⁹⁷ Once a defendant establishes the prima facie case of an unrepresentative jury, the state must justify the practice causing systematic exclusion.⁹⁸ If systematic exclusion is shown, it is presumed that the defendant was prejudiced.⁹⁹

These arguments—that death qualification results in a conviction-prone jury and that death qualification denies a defendant his right to a representative jury—call into question the conviction, as well as the death penalty sentence of a capital defendant. Several courts have analyzed the studies on death qualification and have considered the fair cross-section argument as it affects the validity of the defendant's conviction.¹⁰⁰ Until recently, both arguments have been rejected.¹⁰¹

In 1983 and 1984, however, two federal district courts accepted both arguments and held that death qualification prior to the guilt phase of the capital trial is unconstitutional and a conviction rendered by a death-qualified jury must be reversed.¹⁰² One of these decisions, *Keeten v. Garrison*,¹⁰³ was rendered by Judge McMillan of the United States District Court for the Western District of North Carolina. Several studies were presented to the court in *Keeten*. Judge McMillan held that these studies clearly established that death qualification yielded a conviction-prone jury.¹⁰⁴ In addition, Judge McMil-

district. *Id.* at 531. The result in *Taylor* is consistent with Justice Douglas's opinion that death qualification should be forbidden because it results in the "systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment." *Witherspoon*, 391 U.S. 510, 528 (Douglas, J., dissenting). Previous Supreme Court decisions had forbidden the exclusion of various classes from a jury. *See* *Peters v. Kiff*, 407 U.S. 493 (1972) (systematic exclusion of blacks violated due process); *Hernandez v. Texas*, 347 U.S. 475 (1954) (systematic exclusion of Mexican-Americans violated due process); *Ballard v. United States*, 329 U.S. 187 (1946) (systematic exclusion of women violated due process); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (jury selection system which systematically excluded daily wage earners invalid); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (statute which effectively denied blacks the right to serve as jurors unconstitutional).

96. 439 U.S. 357 (1979).

97. The Court declared that:

In order to establish a prima facie violation of the fair-cross-section requirement, the 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. *See also* *United States v. Espinoza*, 641 F.2d 153, 168 (4th Cir. 1981) ("Systematic exclusion must be proven; it will not be presumed.").

98. The state must prove that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. at 267-68.

99. *See* *Peters v. Kiff*, 407 U.S. 493, 503-05 (1972).

100. *See, e.g.*, *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

101. *See supra* note 100.

102. *See Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C. 1984); *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983).

103. 578 F. Supp. 1164 (W.D.N.C. 1984).

104. *Id.* at 1181-82. Judge McMillan analyzed the results of twelve different studies. These studies consistently revealed that death qualification resulted in prosecution-prone juries. The

lan, analyzing death qualification in North Carolina in light of *Duren*, concluded that defendants had established a prima facie case of systematic exclusion of a distinct group and that the state interests could be advanced equally by using a bifurcated jury system as suggested in the *Witherspoon* footnote.¹⁰⁵ The studies presented on the conviction-prone issue also applied to the cross-section issue, establishing that those who would never impose the death penalty were a "distinctive group" for *Duren* purposes.¹⁰⁶ *Keeten* granted habeas corpus relief to three North Carolina defendants who had been denied relief by the North Carolina Supreme Court.¹⁰⁷

The North Carolina Supreme Court has been presented with some of the same studies as those that were before the *Keeten* court.¹⁰⁸ All contentions that death qualification violates the defendant's rights to a representative jury or results in a conviction-prone jury, however, have been rejected. The supreme court has based its holdings on language in *Witherspoon* that rejected the studies presented in that case.¹⁰⁹ The majority of the court, however, has totally ignored the *Witherspoon* footnote suggesting that a future case might establish prejudice due to death qualification.¹¹⁰ The *Witherspoon* footnote has been discussed by Justice Exum in dissent. In his dissent in *State v. Avery*,¹¹¹ Justice Exum concluded that defendant had proved both the fair cross-section and conviction-prone jury arguments. Justice Exum analyzed the data before the supreme court and concluded that defendant had met the stronger

court found a consensus among trial judges and academic authorities that the most critical factor in a juror's determination of guilt or innocence is the weight of the evidence. Consequently, the exclusion of those unwilling to impose the death penalty becomes most significant in close cases. The court concluded that: "It is in these close cases that criminal defendants most need the protection of the Sixth Amendment." *Id.* at 1185. Based on the studies examined and expert testimony, Judge McMillan found that there is as much as a 10% higher conviction rate in close cases when juries are death-qualified. *Id.*

105. *Id.* at 1181, 1186-87.

106. Judge McMillan found that those unwilling to impose the death penalty shared common attitudes toward the criminal justice system that separated them from other groups, even those generally opposed to the death penalty, and that those attitudes favored the defense. *Id.* at 1181. If these persons are excluded from jury service, "[n]o one else will represent their strong viewpoint on the jury in their absence." *Id.* at 1182 (quoting *Grigsby v. Mabry*, 569 F. Supp. 1273, 1283 (E.D. Ark. 1983)). In addition to finding that those unwilling to impose the death penalty shared common views and attitudes, the studies showed that a disproportionate number of blacks and women are excluded due to death qualification. *Id.* See also *Grigsby v. Mabry*, 569 F. Supp. 1273, 1283 (E.D. Ark. 1983); *State v. Avery*, 299 N.C. 126, 144-45, 261 S.E.2d 803, 814-15 (1980) (Exum, J., dissenting). Thus the group excluded by death qualification is distinct and identifiable, in attitude, composition, and size.

107. *Keeten*, at 1187.

108. In his dissent in *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980), Justice Exum analyzed several studies. Among them were Boehm, *supra* note 86; Harris—1971, *supra* note 86; Jurow, *supra* note 86; Ziesel, *supra* note 86. Professor Ziesel has appeared before the North Carolina Supreme Court. See 299 N.C. at 143-45, 261 S.E.2d 813-14 (Exum, J., dissenting).

109. The court has insisted on quoting the following *Witherspoon* language: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Witherspoon*, 391 U.S. at 517-18. See, e.g., *State v. Avery*, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980).

110. See *supra* notes 82-86 and accompanying text.

111. 299 N.C. 126, 139-40, 147, 261 S.E.2d 803, 811, 816 (1980) (Exum, J., dissenting).

evidentiary showing suggested by the *Witherspoon* court.¹¹² Justice Exum applied the *Duren* reversal requirements and concluded that those who would never impose the death penalty do form a distinct, identifiable group and that death qualification results in the systematic exclusion of that group.¹¹³ In addition, Justice Exum found that the data indicated that those not opposing the death penalty did favor the prosecution.¹¹⁴ The evidence was more persuasive than that available to the Supreme Court in *Witherspoon*;¹¹⁵ death qualification resulted in a conviction-prone jury that was not impartial as required by the sixth amendment.¹¹⁶

Is *Witherspoon* adequate protection for capital defendants? To determine the adequacy of *Witherspoon* there must be two levels of analysis, the adequacy of protection at the guilt stage and the adequacy of protection at the sentencing stage of the capital trial.

Witherspoon and the subsequent Supreme Court decisions afford a capital defendant adequate protection at the sentencing stage of trial. It is accepted that those who automatically would vote against the death penalty in any case should be excluded from sentencing because they are unable to apply the law impartially.¹¹⁷ Supreme Court limitations forbid the exclusion of those with less than unequivocal resolution never to impose the death penalty. If death qualification practices truly conformed with the Supreme Court standards, the constitutional rights of capital defendants would be protected at the sentencing phase of their trials. North Carolina practice, however, does not conform with those Supreme Court limitations.

Witherspoon does not, however, afford adequate protection at the guilt phase of a capital trial. The Court in *Witherspoon* left open the possibility that defendants might establish prejudice from death qualification at the guilt phase of trial.¹¹⁸ Although at the time *Witherspoon* was decided a single jury decided guilt and fixed the sentence, the Court recognized two separate jury functions.¹¹⁹ Presently, all states that retain capital punishment provide for a bifurcated jury system in capital trials.¹²⁰ The *Witherspoon* Court suggested that a bifurcated trial, in which separate juries determine guilt and sentence, would adequately protect a capital defendant should death qualification ever be proved to result in a less than impartial jury at the guilt phase.¹²¹ Because

112. *Id.* at 147, 261 S.E.2d at 816 (Exum, J., dissenting).

113. *Id.* at 145, 261 S.E.2d at 815 (Exum, J., dissenting).

114. *Id.* at 143-47, 261 S.E.2d at 813-16 (Exum, J., dissenting).

115. *Id.* at 147, 261 S.E.2d at 816 (Exum, J., dissenting).

116. Justice Exum based his dissent on the fact that death qualifying resulted in an unrepresentative jury, depriving defendant of his right to a jury of a fair cross-section of the community. Justice Exum concluded, however, that "studies and data presented in this case do consistently and forcefully suggest that a jury culled of those who would not vote for the death penalty is in fact a jury prone to convict on the guilt phase." *Id.* at 147, 261 S.E.2d at 816 (Exum, J., dissenting).

117. *See Keeten* at 1183.

118. *See supra* notes 82-86 and accompanying text.

119. *Witherspoon*, 391 U.S. at 518.

120. *See supra* note 19 and accompanying text.

121. *See supra* note 84 and accompanying text.

state courts probably are unwilling to use separate juries absent a mandate from the United States Supreme Court,¹²² the Supreme Court should mandate one of two procedures. The more extreme and costly option would be to require entirely separate juries to determine guilt and the appropriate sentence. The more practical option is to forbid death qualification at the guilt phase, but allow excusal of those who would refuse automatically to impose the death penalty at the sentencing stage. Those excused could be replaced by alternate jurors. The North Carolina death penalty statute could be read to provide for this second option,¹²³ but the North Carolina Supreme Court has interpreted the statute to require a single jury. Therefore, the guidance of the United States Supreme Court is necessary to force the steps to protect adequately the rights of capital defendants. It is likely that the Supreme Court will have the opportunity to render such guidance as *Keeten* and *Grigsby v. Mabry*,¹²⁴ a second case reversing defendant's conviction on death qualification grounds, are appealed.

Until the North Carolina Supreme Court properly applies the standards established in *Witherspoon* and the United States Supreme Court provides ad-

122. See, e.g., *State v. Taylor*, 304 N.C. 249, 260, 283 S.E.2d 761, 769 (1981), *cert. denied*, 103 S. Ct. 3552 (1983) ("[I]t is intended that the same jury should hear both phases of the trial unless the original jury is 'unable to reconvene.'" (quoting N.C. GEN. STAT. § 15A-2000(a)(2) (1983)).

123. N.C. GEN. STAT. § 15A-2000 (1983):

(a) Separate Proceedings on Issue of Penalty.—

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled

Three provisions in the statute seem to indicate that the legislature did not intend an absolute "same jury" requirement. First, the statute allows for an alternate juror to become part of the sentencing jury if any of the convicting jurors are "disqualified" or "discharged for any reason." This would permit substitution for those unwilling to impose the death penalty who served on the guilt phase jury. Second, "[i]f the trial jury is unable to reconvene for a hearing on the issue of penalty . . . , the trial judge shall impanel a new jury to determine the issue of punishment." Finally, the legislature made provision for a second presentation of evidence in the event a new jury is impanelled for sentencing.

The only argument made against bifurcated trials by the State in *Keeten* was that the cost "would be too much of a burden . . . on the taxpayers." *Keeten*, 578 F. Supp. at 1186. The argument was dismissed summarily by the court. "Such costs, if any, are trivial compared with the human rights and constitutional issues at stake." *Id.* at 1167-68. "North Carolina can afford the few extra dollars, if any, that it might cost to provide fair trials to persons accused of capital felonies." *Id.* at 1187.

124. 569 F. Supp. 1273 (E.D. Ark. 1983).

equate guidelines eliminating death qualification at the guilt phase of capital trials, it appears that the rights of North Carolina capital defendants will continue to be violated. The existing law in North Carolina provides for adequate protection of capital defendants' sixth amendment rights. This law, however, has been thwarted by the North Carolina Supreme Court's limited interpretation.¹²⁵

A criminal defendant has a guaranteed right to be tried by a jury of his peers. This jury must be impartial and composed of a representative cross-section of the community. Anything less violates a defendant's sixth and fourteenth amendment rights. Death qualification prior to a determination of guilt threatens not only the liberty of North Carolina defendants, but the very life that both the United States and North Carolina Constitutions have long sought to protect and preserve.

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125. In 1983 five North Carolina defendants appealed their convictions and death penalty sentences. In each case, the North Carolina Supreme Court rejected any attacks on death qualification and refused to reexamine its position. This position will continue to allow the sixth amendment rights of capital defendants to be violated in North Carolina.

The Safe Roads Act: The Constitutionality of the Roadblock and Chemical Test Affidavit Sections

In 1983 the North Carolina General Assembly passed the Safe Roads Act.¹ Enacted in response to the growing public concern over drinking and driving, the Act brings about many changes in the state's driving-while-intoxicated (DWI) laws. This note examines the constitutionality of section 22 of the Act,² which authorizes the use of roadblocks as an enforcement tool against drunken driving, and section 26 of the Act,³ which governs procedure for chemical testing for intoxication and the use of test results at trial. The note concludes that the roadblock provision has minor constitutional flaws that can be remedied easily, and that the chemical testing statute, while raising more serious constitutional issues, probably will also withstand constitutional attack.

Section 22 of the Act⁴ authorizes law enforcement agencies to conduct impaired driving checks (better known as roadblocks) to enforce the DWI laws. While many states have resorted to the roadblock as a method of detecting DWI offenders,⁵ North Carolina is the first state to enact a law expressly sanctioning the use of this technique. The law establishes three prerequisites for a valid DWI check. First, the police must develop a "systematic plan in advance that takes into account the likelihood of detecting impaired drivers, traffic conditions, number of vehicles to be stopped, and the convenience of the motoring public."⁶ Second, the police must designate in advance "the pattern both for stopping vehicles and for requesting drivers that are stopped to submit to alcohol screening tests."⁷ Contingency plans may be developed that permit deviation from the pattern upon the occurrence of specified conditions, but no individual officer may be given discretion regarding which vehicle is stopped or which driver is subjected to an alcohol screening test.⁸ Finally, the police must mark "the area in which checks are conducted to advise the public that an authorized impaired driving check is being made."⁹

Any roadblock stop made pursuant to section 20-16.3A is a "seizure" within the meaning of the fourth amendment to the United States Constitu-

1. Safe Roads Act of 1983, 1983 N.C. Adv. Legis. Serv. ch. 435.

2. *Id.* § 22 (codified at N.C. GEN. STAT. § 20-16.3A (1983)).

3. *Id.* § 26 (codified at N.C. GEN. STAT. § 20-139.1 (1983)).

4. *Id.* § 22 (codified at N.C. GEN. STAT. § 20-16.3A (1983)).

5. See Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1460 n.16 (1983).

6. N.C. GEN. STAT. § 20-16.3A(1) (1983).

7. *Id.* § 20-16.3A(2).

8. *Id.* Notwithstanding the limits placed on the exercise of discretion by individual officers, the section also provides that any officer may request a screening test of a driver if he has independent adequate grounds under the general preliminary test statute, *id.* § 20-16.3.

9. *Id.* § 20-16.3A(3).

tion.¹⁰ The fourth amendment¹¹ protects citizens against searches and seizures that are unreasonable; therefore, the North Carolina statute must satisfy a fourth amendment analysis to be constitutional.

The United States Supreme Court's decision in *Delaware v. Prouse*¹² provides the proper framework for analyzing the constitutionality of North Carolina's roadblock statute. In *Prouse* the Court considered the constitutionality of Delaware's practice of randomly stopping motorists for license and registration checks. The Court stated that the "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."¹³ Applying this test, the Court held that the intrusiveness of the stop outweighed the state's interest in promoting safety on its roads. In striking down the Delaware practice, the Court relied heavily on its prior decision in *United States v. Brignoni-Ponce*.¹⁴ In that case the Court had considered the constitutionality of roving border patrols that stopped cars at random to search for evidence of illegal aliens. The Court held that the intrusiveness of the stop, which created substantial anxiety for the detained motorist, interfered with his freedom of movement, presented the opportunity for abuse of discretion by individual officers, and outweighed the strong state interest in policing the border.¹⁵ The Court held that such an intrusion could be justified only by a showing of reasonable suspicion.¹⁶ The *Prouse* Court found Delaware's practice equally intrusive, and further questioned whether randomly stopping cars advanced the state's safety interest any more than did the more conventional practice of stopping cars based on observed violations.¹⁷ Finally, noting that the same potential for abuse of discretion was present in *Prouse* as in *Brignoni-Ponce*, the Court held Delaware's practice unconstitutional in the absence of some reasonable, articulable suspicion that the driver in question should be stopped.¹⁸

Despite holding Delaware's practice unconstitutional, the Court implied in dicta that a checkpoint stop at which all oncoming traffic was questioned would be constitutional even without reasonable suspicion.¹⁹ This conclusion

10. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

11. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV

12. 440 U.S. 648 (1979).

13. *Id.* at 654 (footnote omitted). Cf. *Terry v. Ohio*, 392 U.S. 1 (1968) (warrantless "stop and frisk" for weapons constitutional if based on reasonable articulable suspicion of criminal activity). Reasonable suspicion permits the officer to make a brief investigatory stop, but a full search or seizure is unconstitutional unless based upon probable cause, which requires a higher quantum of proof.

14. 422 U.S. 873 (1975).

15. *Id.* at 882, 884.

16. *Id.*

17. *Prouse*, 440 U.S. at 657-60.

18. *Id.* at 661, 663.

19. *See id.* at 663. Justice Blackmun suggested that a nonrandom stop at which less than

was based on the Court's prior holding in *United States v. Martinez-Fuerte*.²⁰ In that case a permanent border checkpoint at which all motorists on an interstate highway were required to slow for inspection for signs of illegal aliens was upheld as constitutional. The permanent checkpoint in *Martinez-Fuerte* was distinguished from the roving patrols disapproved of in *Brignoni-Ponce* because it involved a lesser degree of intrusion and a lesser risk of officer abuse of discretion.²¹ A roadblock at which all cars are stopped briefly would be more akin to the permanent stop upheld in *Martinez-Fuerte* than to the discretionary stop disapproved in *Brignoni-Ponce*. Thus, such a roadblock would be constitutional even if conducted without reasonable suspicion.

Although the Supreme Court has not yet considered a case specifically involving a DWI roadblock, the Court would apply a test similar to that used in *Prouse*. Lower courts considering the constitutionality of roadblocks for drunken-drivers have applied the *Prouse* test, weighing the intrusiveness of the stop in question against the state interest advanced by the police practice.²² Courts generally have upheld stops that conformed with the procedure suggested in the *Prouse* dicta, emphasizing the lesser degree of intrusion involved in such a stop and the important state interest in reducing the incidence of drunken driving.²³ For example, in *State v. Cocomo*²⁴ a New Jersey superior court upheld a roadblock at which every fifth car was stopped for license and registration checks, during the course of which the officer looked for signs of intoxication.

Not all state DWI roadblocks have been upheld under the standards established in *Prouse*. Courts that have struck down DWI roadblocks have done so primarily on three grounds: (1) too much discretion vested in the officers conducting the roadblocks, due to the lack of specific directions or guidelines

100% of the cars were stopped (for example, every tenth car) also would be constitutional. *Id.* at 664 (Blackmun, J., concurring). This reasoning has been adopted by some state courts. *See, e.g., State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980) (every fifth car stopped by police).

20. 428 U.S. 543 (1976).

21. *Id.* at 560. Because all motorists were required to slow, the subjective intrusiveness of the stop was lesser than in *Brignoni-Ponce*. The checkpoint stop was not as unsettling to the motorist as the individual stop by a roving border patrol. A final factor distinguishing *Martinez-Fuerte* was the presence of signs on the highway notifying motorists of the immigration checkpoint, thus informing them that the stop was a valid exercise of the police power of the state and reducing the level of anxiety generated by the stop.

22. *See State ex rel. Ekstrom v. Justice Court of Ariz.*, 136 Ariz. 1, 663 P.2d 992 (1983); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983); *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980); *see also State v. Cline* (unreported Maryland trial court opinion), discussed in Note, *supra* note 5, at 1471.

23. The Supreme Court recently has acknowledged the national importance of the drunken driving problem. *See South Dakota v. Neville*, 103 S. Ct. 916, 920 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation."). In *Neville* the Supreme Court held that the introduction into evidence of a defendant's refusal to submit to chemical testing did not violate defendant's fifth amendment right against self-incrimination. The Court reasoned that the privilege did not attach to the refusal because the refusal had not been "coerced." The North Carolina Court of Appeals has reached the same conclusion, though by different reasoning, regarding N.C. GEN. STAT. § 20-139.1(f) (1983), which expressly provides that defendant's refusal to submit to testing shall be admissible in a criminal proceeding against him. *See State v. Flannery*, 31 N.C. App. 617, 230 S.E.2d 603 (1976) (physical test results not "testimonial" in nature and thus not within scope of fifth amendment).

24. 177 N.J. Super. 575, 427 A.2d 131 (1980).

from higher authorities on the exact procedure to be followed;²⁵ (2) inadequate notice to drivers that they were being stopped pursuant to a valid DWI roadblock;²⁶ and (3) lack of proof that the roadblock technique is any more effective in detecting drunk drivers than the routine practice of stopping cars based on observed driving irregularities.²⁷ Applying the balancing test of *Prouse*, these courts have found that the state interest promoted by the stopping of motorists was insufficient to justify the intrusiveness of the roadblocks in question.

Although North Carolina's new roadblock statute has constitutional problems of its own, it avoids these potential problems.²⁸ The problem of lack of specific guidelines from higher authorities is avoided by the requirement that the law enforcement agency develop a "systematic plan in advance" for conducting an impaired driving check.²⁹ Officer discretion regarding which cars are stopped is limited by the provision requiring designation in advance of the pattern both for stopping vehicles and for requesting alcohol screening tests.³⁰ The problem of inadequate notice to drivers about the reason for the stop is avoided by section 20-16.3A(3), which requires that the area in which cars are being stopped be marked to notify the public that a statutory impaired driving check is being conducted.³¹ If the procedure established by the new statute is followed by the police, the practice almost surely will withstand the constitutional challenges that have invalidated other roadblocks.

While North Carolina's statute avoids the problems presented by prior roadblocks, it may be subject to constitutional challenge on other grounds. The legislature properly was concerned with unbridled officer discretion, and thus required that the roadblocks be conducted according to a predetermined pattern.³² The statute fails, however, to delineate the procedures that may be employed once a vehicle has been stopped.³³ It speaks of "the pattern both for stopping vehicles *and* for requesting drivers . . . to submit to alcohol screening tests."³⁴ This use of the word "pattern" suggests that the North Carolina

25. See *State ex rel Ekstrom v. Justice Court of Ariz.*, 136 Ariz. 1, 4-5, 663 P.2d 992, 996 (1983); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983).

26. See *State ex rel Ekstrom v. Justice Court of Ariz.*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983).

27. *Id.* at 5, 663 P.2d at 996. The State argued that despite the intrusiveness of the roadblocks, the procedure was justified by the state's strong interest in apprehending drunk drivers. The court acknowledged that interest, but questioned whether the roadblock technique advanced the state interest any more than did less intrusive procedures.

28. The statute was drafted carefully. It is essentially a codification of constitutional law precedent in the roadblock field.

29. N.C. GEN. STAT. § 20-16.3A(1) (1983). See *supra* text accompanying note 6.

30. N.C. GEN. STAT. § 20-16.3A(2) (1983). See *supra* text accompanying note 7.

31. N.C. GEN. STAT. § 20-16.3A(3) (1983). See *supra* text accompanying note 9.

32. N.C. GEN. STAT. § 20-16.3A(2) (1983).

33. The term "impaired driving check" is used as a term of art in the statute, yet it is not defined in the definitional section of the motor vehicle chapter, *id.* § 20-4.01. Section 20-16.3A states that it does not limit "the authority of a law enforcement officer or agency to conduct a license check independently or in conjunction with the impaired driving check." The language implies that the "impaired driving check" is something more than just a license check, though the exact extent of the stop contemplated by the legislature is unclear.

34. *Id.* § 20-16.3A(2) (emphasis added).

statute would permit a scheme whereby drivers, once stopped, are required to submit to sobriety tests according to a pattern. For instance, every car is stopped for a routine check and every tenth driver is required to submit to an alcohol screening test. The fact that the roadblock statute authorizes the police to require a driver to submit to an alcohol screening test based on a random pattern rather than on reasonable suspicion gives rise to the best constitutional challenge to the statute.

The constitutionality of a police practice must be determined by weighing its intrusiveness against the state interest it advances. Even if a stop involves no officer discretion, it still may be unconstitutional because it intrudes too greatly on an individual's privacy. Most roadblocks consist of a brief stop, during which the motorist is required to produce his license and registration while the officer looks for signs of intoxication.³⁵ The stop is only minimally intrusive, and thus is constitutional. More intrusive subsequent measures, such as roadside sobriety tests, may be permissible, but generally only upon reasonable and articulable suspicion as described in *Prouse*.³⁶ The language of section 20-16.3A suggests, however, that alcohol screening tests could be administered even in the absence of reasonable suspicion. Under the Supreme Court's balancing tests developed in *Prouse* and the border search cases, requiring a driver to submit to further tests, if based neither on probable cause nor reasonable suspicion, is unconstitutional.³⁷ Subjecting a motorist to extended roadside testing entails a much greater intrusion, both in time delay and invasion of privacy, into the individual's fourth amendment rights than does the usual license and registration check. Such an extensive intrusion should be permitted only if based on reasonable, articulable suspicion that the driver is intoxicated.³⁸

35. See Note, *supra* note 5, at 1463.

36. See, e.g., *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980). In *Cocomo* defendant was stopped according to a policy of stopping every fifth vehicle. Defendant was asked to produce his license, registration, and insurance card. When the officer noticed that defendant had bloodshot eyes and alcohol on his breath, he requested defendant to get out of the car. Defendant failed two roadside sobriety tests and was arrested. The officer's initial observations concerning defendant's breath and eyes provided reasonable suspicion to justify the further tests.

37. A stop requiring a motorist to submit to an alcohol screening test is a far greater intrusion than the warrantless and suspicionless stops authorized by the Supreme Court in *Martinez-Fuerte* and *Prouse*. In *Martinez-Fuerte* the average length of the stop, even for those referred to the secondary inspection area, was 3 to 5 minutes, and inquiry was limited to questioning about citizenship and immigration status. *Martinez-Fuerte*, 428 U.S. at 546. The detention implicitly approved by dicta in *Prouse* similarly was limited both in duration and scope of inquiry. *Prouse*, 440 U.S. at 663. Neither case can be read as approving a warrantless and suspicionless intrusion as extensive as a roadside sobriety test. Under N.C. GEN. STAT. § 20-16.3(a)(1) (1983), preliminary testing may be performed upon a reasonable belief that the driver has consumed alcohol and has committed a moving violation. The same "reasonable belief" standard also should apply to roadside tests administered in the context of an impaired driving check.

38. See Note, *supra* note 5, at 1485-86 (arguing that "articulable suspicion" should be required before extended DWI investigation may be performed). The commentator argues that imposing such a requirement does not hinder the advancement of the state's interest in apprehending drunk drivers. A recent case, *People v. Carlson*, 52 U.S.L.W. 2465 (Colo. Feb. 28, 1984), imposed an even higher standard, requiring that probable cause be found before roadside sobriety tests may be performed. Probable cause requires a higher quantum of proof than reasonable, articulable suspicion. See *supra* note 13.

This potential constitutional problem could be remedied by a short amendment to the statute. The legislature need only add a statement that alcohol screening tests may not be administered according to a pattern, but must be based on reasonable suspicion.³⁹ Such a clarification would limit police inquiry at a roadblock to license and registration checks, clearly within the constitutional limits set by the Supreme Court in *Prouse*.

Section 26 of the Act⁴⁰ deals with chemical analysis for intoxication and admissibility of chemical test results. This section also raises important constitutional questions. Of particular significance is North Carolina General Statutes section 20-139.1(e1),⁴¹ which allows admission of an affidavit certifying blood alcohol test results without requiring the analyst who performed the test to appear in court and testify. The analyst still may be required to appear, but only if subpoenaed by the defendant.⁴² The results of blood alcohol concentration (BAC) tests are of great importance in any DWI proceeding,⁴³ and the new law exempting the chemical analyst from testifying raises serious questions about the criminal defendant's sixth amendment right to confront the witnesses against him.⁴⁴

39. Alternatively, the statute could be amended to provide that alcohol screening tests may be administered only in accordance with the requirements of N.C. GEN. STAT. § 20-16.3 (1983), the general preliminary test statute. See *supra* note 37. The problem also could be remedied by a judicial reading of the "pattern" for requiring drivers to submit to screening tests to mean that further testing may only be required if certain predetermined factors indicating possible intoxication are present. Such an interpretation would be a strained reading of the statutory language, however, and an amendment expressly establishing a reasonable suspicion standard would be preferable.

40. Safe Roads Act of 1983, 1983 N.C. Adv. Legis. Serv. 435 § 26 (codified at N.C. GEN. STAT. § 20-139.1 (1983)). Section 26 of the Act rewrote the old § 20-139.1, adding new subsections while changing some language in the sections already in existence.

41. N.C. GEN. STAT. § 20-139.1(e1) (1983).

42. *Id.*

43. Although results of BAC tests in some states give rise to specified presumptions regarding defendant's guilt or innocence, see, e.g., KAN. STAT. ANN. § 8-1005 (1982), North Carolina makes driving with a BAC of .10% or greater a separate offense. See N.C. GEN. STAT. § 20-138.1(a)(2) (1983). The new law also allows for a 10 day pretrial license revocation if defendant has a BAC of .10% or more within a relevant time after driving. See *id.* § 20-16.5(b)(4)(a). Given the potential ramifications of an unfavorable test, the results of chemical analysis are of utmost importance to defendant.

The criminalization of a .10% blood alcohol level is another aspect of the drunk driving law that may be subject to constitutional attack. Although the statute has been upheld against an arbitrariness challenge as a constitutional exercise of the police power of the state, see *State v. Basinger*, 30 N.C. App. 45, 226 S.E.2d 216 (1976), one commentator has suggested that such statutes may be unconstitutionally vague. See Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301, 335 (1983). The premise of this argument is that the driver has no way of knowing his precise BAC, and thus cannot conform his behavior to the statutory norm. While North Carolina courts have not yet addressed this argument, the courts of other states have rejected it. See *Roberts v. State*, 329 So. 2d 296 (Fla. 1976); *Greaves v. State*, 528 P.2d 805 (Utah 1974). Given the increasing public concern over drunken driving, it is unlikely that a North Carolina court would invalidate so integral a provision of the statute.

44. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. The confrontation clause is applicable to the states by incorporation into the due process requirements of the fourteenth amendment. See *Pointer v. Texas*, 380 U.S. 400 (1965). The North Carolina Constitution has a provision analogous to the sixth amendment. See N.C. CONST. art. I, § 23.

The constitutional issue raised by the new version of section 20-139.1 is best understood by comparing it to its predecessor. Under the prior statutory scheme, the validity of a chemical analysis hinged on whether it had been performed in compliance with the requirements of the State Commission for Health Services, and whether it had been performed by a person possessing a valid permit issued by the Department of Human Resources.⁴⁵ Any failure to comply with these requirements rendered the test inadmissible, and the State had the burden of proving the validity of the chemical analysis.⁴⁶ For instance, in *State v. Gray*⁴⁷ the North Carolina Court of Appeals found prejudicial error in the state's failure to "lay the foundation" for the introduction of breathalyzer test results and granted defendant a new trial.⁴⁸

The new section 20-139.1 preserves the valid procedure and valid permit requirements, and adds a further admissibility requirement that the instrument used to measure defendant's BAC must have had an up-to-date preventive maintenance record, according to regulations prescribed by the Commission for Health Services.⁴⁹ The important change is in the procedure for introducing the test results into evidence. Section 20-139.1(e1) provides that a properly executed affidavit of a chemical analyst is admissible, without further authentication, as evidence of: (1) defendant's blood alcohol level, (2) the time of the sample, (3) the type of analysis administered and procedure followed, (4) the type and status of the analyst's permit, and (5) the preventive maintenance record of the breath-testing instrument, if that is the method used, as reflected by its maintenance records.⁵⁰ This amendment obviates the need for any foundation-laying by the State, provided the analyst has executed a proper, sworn statement, because such a statement is automatically admissible.

An argument may be made that the admission into evidence of the chemical analyst's affidavit, without his live testimony, violates a defendant's sixth amendment right to confrontation. The North Carolina Supreme Court has held that the admission into evidence of a death certificate containing a hearsay and conclusory statement about a victim's cause of death violates an accused's right to confront the witnesses against him.⁵¹ If the analyst's affidavit is analogized to the death certificate, it follows that admission of the affidavit

45. See N.C. GEN. STAT. § 20-139.1(b) (1983) (substantially preserving requirements of predecessor section). The requirements apply to testing of both breath and blood samples.

46. See *State v. Powell*, 279 N.C. 608, 184 S.E.2d 243 (1971); *State v. Gray*, 28 N.C. App. 506, 221 S.E.2d 765 (1976); *State v. Warf*, 16 N.C. App. 431, 192 S.E.2d 37 (1972); *State v. Caviness*, 7 N.C. App. 541, 173 S.E.2d 12 (1970).

47. 28 N.C. App. 506, 221 S.E.2d 765 (1976).

48. *Id.* at 507, 221 S.E.2d at 766.

49. N.C. GEN. STAT. § 20-139.1(b2) (1983). The burden is on the defendant both to object to the evidence and to demonstrate that the required preventive maintenance procedures had not been performed.

50. *Id.* § 20-139.1(e1). The analyst is not required to swear to an affidavit, but may choose to do so for his own convenience. The analyst is required to record defendant's alcohol concentration and the time of collection of the sample, and to furnish a copy of this record to defendant or his attorney. See *id.* § 20-139.1(e).

51. See *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972).

also is unconstitutional. The supreme court has indicated that the admission of chemical test results to prove the identity of a drug in a drug prosecution does not violate the right to confront.⁵² This case, however, is distinguishable. The identity of a drug in a drug prosecution is seldom the ultimate issue in the case; more often the circumstances surrounding defendant's connection with the drug are being disputed. By contrast, in a DWI proceeding defendant's blood alcohol content is often the dispositive issue in the case, for a blood-alcohol level of .10 percent is a per se criminal violation in North Carolina.⁵³ Thus, it may be argued that convenience to the State, in not having to produce the chemical analyst, is outweighed by defendant's overriding interest in examining the analyst, whose report may be dispositive on the question of defendant's guilt or innocence, and that admission without the appearance of the analyst is unconstitutional.

Although this argument is persuasive, it overlooks the statute's provision that defendant may require the analyst to appear at trial by subpoenaing him as an adverse witness.⁵⁴ This provision would seem to satisfy the constitutional confrontation requirement, but two plausible arguments can be made that it does not. First, it may be unconstitutional to shift to defendant the burden of producing the analyst.⁵⁵ Second, the opportunity for direct examination as an adverse witness may be an inadequate substitute for cross-examination. The Supreme Court has recognized that cross-examination is an essential element of the sixth amendment's safeguards.⁵⁶ On conventional cross-examination defendant's counsel may impeach the testimony of the witness based on the statements he has made on direct, but this type of impeachment is not possible when the witness is subject only to direct examination, even as an adverse witness. Thus, it may be argued that giving a defendant the right to subpoena a chemical analyst under section 20-139.1(e1) is insufficient to guarantee an accused his constitutional right to confront the witnesses against him.

The best argument in favor of the statute's constitutionality is that defendant's sixth amendment rights are protected by his right to a new trial at the superior court level if he is convicted in district court.⁵⁷ Section 20-139.1(e1) provides that the analyst's affidavit is admissible without authentication in district court proceedings; therefore, the analyst would have to appear at trial in superior court. The right to a new trial guarantees the defendant an

52. See *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977).

53. See N.C. GEN. STAT. § 20-138.1(a)(2) (1983).

54. See *supra* text accompanying note 42.

55. In *In re Winship*, 397 U.S. 358 (1970), the Supreme Court held that the due process clause of the fourteenth amendment requires the state to prove a criminal defendant's guilt beyond a reasonable doubt. Because the chemical analyst is so important to the state's case, it may be argued that shifting to defendant the burden of producing this witness is unconstitutional under the general principles enunciated in *Winship*. See e.g., *Davis v. United States*, 160 U.S. 469, 487 (1895) (burden of proof on the prosecution to prove defendant's guilt applies to every necessary element of offense).

56. See *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

57. See N.C. GEN. STAT. § 15A-1431(b) (1983).

opportunity to cross-examine the analyst. It may be argued that the added time and expense required for a new trial in superior court place an unconstitutional burden on the defendant's exercise of his constitutional rights, but the Supreme Court has rejected this contention with regard to the criminal defendant's right to trial by jury.⁵⁸ Unless a court were to draw a distinction between the constitutional right to confront witnesses and the constitutional right to a trial by jury in a criminal case, an argument in favor of the statute based on the defendant's right to a new trial probably will be sufficient to overcome a sixth amendment challenge to the statute.

Precedent from other states also suggests that the statute is constitutional. The Virginia Code provides that when a blood sample is tested for alcohol content a certificate is to be executed stating the procedure and results of the test.⁵⁹ The certificate, when duly attested, is deemed admissible in any civil or criminal proceeding as evidence of the facts stated therein.⁶⁰ In *Kay v. United States*⁶¹ the United States Court of Appeals for the Fourth Circuit considered a sixth amendment challenge to a prior version of the Virginia statute. The court upheld the constitutionality of the statute, stating that the sixth amendment was not intended "to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule."⁶² The court further emphasized that the receipt of the certificate into evidence did not foreclose inquiry into the conduct of the test, but that such inquiries went to the weight of the evidence, and not to its admissibility.⁶³

The certificate held constitutional in *Kay* is analogous to the affidavit executed by the chemical analyst under section 20-139.1(e1). The *Kay* decision, although not binding on North Carolina courts, is highly persuasive. It is unlikely that a North Carolina court would hold the provision unconstitutional in light of the decision in *Kay*. *Kay* may be distinguishable on the ground that Virginia's statute did not criminalize a .10 percent BAC, while North Carolina's DWI law does, and thus defendant's interest in cross-examining the analyst is greater in North Carolina. Although this distinction might lessen the importance a North Carolina court would give to the *Kay* holding, the case probably still would be given substantial weight. Taken together, an argument based on defendant's right to subpoena the analyst, his right to a new trial in superior court at which the analyst must appear, and the practice in other states as represented by *Kay* with respect to admission of blood test results in DWI cases, would be sufficient to uphold section 20-139.1(e1) against constitutional attack.

In conclusion, both statutes suffer from some constitutional defects. Section 20-16.3A (section 22 of the Safe Roads Act) seems to authorize an uncon-

58. See *Ludwig v. Massachusetts*, 427 U.S. 618, 626 (1976).

59. See VA. CODE § 18.2-268(e) (Supp. 1983).

60. *Id.* § 18.2-268(f). See also D.C. CODE ANN. § 40-717.2 (Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 10-306 (1984).

61. 255 F.2d 476 (4th Cir.), cert. denied, 358 U.S. 825 (1958).

62. *Id.* at 480.

63. *Id.*

stitutional intrusion into fourth amendment rights, but this problem can be eliminated by a short amendment without upsetting the basic thrust of the roadblock statute. Section 20-139.1(e1) (section 26 of the Safe Roads Act) on its face seems to deprive a defendant of his sixth amendment right to confront the witnesses against him. Other statutory provisions, however, such as the right to a new trial in a higher court at which the chemical analyst must appear, are sufficient to satisfy the requirements of the sixth amendment.

DAVID THOMAS GRUDBERG

***State v. Jackson*: Police Use of Trickery, Threats, and Deception—What Price Confession?**

For a criminal confession to be admissible, it must have been given voluntarily.¹ Involuntary confessions are excluded because such statements are unreliable as evidence, and because of the belief that coercive techniques should not be countenanced by a civilized society, regardless of the importance of the information they may yield.² In determining whether a confession was rendered voluntarily, courts have applied a "totality of circumstances" test.³ Under this test a court examines the totality of the circumstances surrounding a confession and then decides whether it was given voluntarily or whether the defendant's will was "overborne."⁴

In *State v. Jackson*⁵ the North Carolina Supreme Court applied the totality of circumstances test and reached a decision that broadens the parameters of acceptable police conduct during noncustodial interrogations⁶ to previously unimagined dimensions. By holding that the use of fabricated evidence, false statements, and implied threats was not sufficient to render defendant's confession involuntary,⁷ the court implicitly condoned such unconscionable behav-

1. *Rogers v. Richmond*, 365 U.S. 534 (1961); *Spano v. New York*, 360 U.S. 315 (1959); *Leyra v. Denno*, 347 U.S. 556 (1954); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lisenba v. California*, 314 U.S. 219 (1941); *Brown v. Mississippi*, 297 U.S. 278 (1936).

2. C. WHITEBREAD, CRIMINAL PROCEDURE § 15.01 (1980).

3. *Haynes v. Washington*, 373 U.S. 503, 514 (1963). In *Leyra v. Denno*, 347 U.S. 556, 558 (1954), the Court emphasized that each case involving a question of voluntariness must be decided on its own facts. It was not until 1956, in *Fikes v. Alabama*, 352 U.S. 191, 197 (1957), however, that the Court first used the phrase "totality of the circumstances" in relation to voluntariness. See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) ("[v]oluntariness is a question of fact to be determined from all the circumstances"); *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (courts must look to the "context in which [the confession was] made" to determine voluntariness); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) (voluntariness depends on the "pertinent circumstances"); *Crooke v. California*, 357 U.S. 433, 440 (1958) (the court must weigh the "sum total of the circumstances" in determining voluntariness).

Many commentators have suggested that the totality of circumstances approach is simply a means for a court to express its opinion that, in a given case, there was a causal relationship between police misconduct and the subsequent confession. See Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Note, *Police Use of Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167 (1979).

4. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961) (confession is involuntary if the behavior of the police caused the suspect's will to resist to be overborne).

5. 308 N.C. 549, 304 S.E.2d 134 (1983).

6. Noncustodial interrogations are distinguished from custodial interrogations on the basis of whether defendant's freedom of action is restricted. During noncustodial interrogations, the defendant is free to leave at will. At custodial interrogations the defendant's presence can be compelled. Furthermore, *Miranda* warnings are required for custodial interrogations but not for noncustodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

Miranda warnings are the procedural safeguards that must be read to a defendant prior to a custodial interrogation. The defendant must be warned that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

7. *Jackson*, 308 N.C. at 574, 304 S.E.2d at 148 ("while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible").

ior and virtually emasculated the principle of fundamental fairness.⁸ In analyzing the court's decision, this note will discuss whether defendant was seized within the meaning of the fourth amendment⁹ and analyze whether defendant's subsequent confession was given voluntarily under the "totality of circumstances" test.¹⁰

In *Jackson* defendant initially was sought by the police as a possible witness in the stabbing death of Leslie Hall-Kennedy. Jackson had been at the scene of the murder when the body was discovered; but he left the scene soon after the police arrived and did not speak to them.

Jackson was interviewed by members of the Raleigh Police Department on three occasions during the course of the investigation.¹¹ During the second interview the police told Jackson that they had found bloodstains on the pants he had given them the previous day and that tracks from his tennis shoes had been found in the victim's house.¹² Jackson knew that the police did not have such evidence, however, because he had not given them the clothes he had worn on the night of the murder.¹³ Jackson denied committing the crime and stated that "he went with other persons into the apartment . . . after they heard screams coming from the apartment."¹⁴

Defendant did not hear from the police again until almost two weeks later, when a detective approached him on a downtown street to tell him that

8. *But cf.* *Rochin v. California*, 342 U.S. 165, 173 (1952) (due process expresses a sense of "fair play"); *Lisenba v. California*, 314 U.S. 219, 236 (1941) (due process protects against fundamental "unfairness" in the use of confessions). See generally Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954) (court will measure police conduct against certain basic standards of fundamental fairness that are essential to our system of justice).

9. The fourth amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. See *infra* note 33.

10. See *supra* note 3. In ruling that defendant's confession was involuntary and therefore inadmissible, the trial court relied on language in *State v. Roberts*, 12 N.C. (1 Dev.) 259 (1827). In *Roberts* the court stated that "[c]onfessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man . . ." *Id.* at 261. The trial court concluded that defendant confessed because his guilt had been ascertained rather than for a "love of truth"; thus, the confession was ruled involuntary. *Jackson*, 308 N.C. at 584, 304 S.E.2d at 154.

In reversing the trial court, the North Carolina Supreme Court ruled that "it has never been held by this Court that a confession is inadmissible in evidence unless it is 'attributable to that love of truth which predominates in the breast of every man.'" *Id.* (quoting *Record* at 25). The court stated that "[t]he North Carolina test to determine the admissibility of a confession continues to be whether the confession is voluntary under the totality of the circumstances of the case." *Id.* at 585, 304 S.E.2d at 154. In his dissent, Justice Exum claimed that under North Carolina case law, trickery or deception on the part of the police rendered a confession involuntary and inadmissible. *Id.* at 599, 304 S.E.2d at 162 (Exum, J., dissenting).

11. The investigation lasted from March 15, 1983, until April 8, 1983. Jackson was questioned by the police on March 26th, March 27th, and April 8th. The April 8th interview, during which the defendant confessed, lasted approximately five hours. *Jackson*, 308 N.C. at 551-59, 304 S.E.2d at 135-39.

12. *Id.* at 566, 304 S.E.2d at 143. Both of these statements were false, *id.*, and presumably defendant realized they were false.

13. *Id.*

14. *Id.*

Detective Mack wanted to talk with him about the Hall-Kennedy murder. Defendant was not arrested; he voluntarily got into the detective's car and went to the police station.¹⁵ During the course of the five-hour interrogation,¹⁶ defendant was told that "the police had a murder weapon; they had defendant's fingerprints . . . and that they had a witness who saw the defendant coming out the door carrying a knife."¹⁷ The police, in fact, had not found defendant's fingerprints on the weapon nor was there any such eyewitness account.¹⁸ Shortly after the recitation of these facts, defendant confessed.¹⁹

On April 27, 1981 a grand jury returned a bill of indictment charging defendant with first degree murder.²⁰ Defendant filed a motion to suppress the use of oral and written statements that the officers had solicited from him. He alleged that his statements had been obtained in violation of his fourth and fifth amendment rights under the constitutions of North Carolina and the United States, and in contravention of North Carolina case law.²¹ The superior court granted defendant's motion to suppress the evidence, stating that his confession failed to meet the North Carolina standard for the admissibility of confessions articulated in *State v. Roberts*.²²

On appeal²³ to the North Carolina Supreme Court, the State argued that the trial court had applied an improper standard in determining whether the confession had been voluntary.²⁴ The supreme court agreed, stating that "the North Carolina test to determine the admissibility of a confession continues to be whether the confession is voluntary under the totality of the circumstances."²⁵ In reversing the superior court, the court concluded that police

15. *Id.* at 566, 304 S.E.2d at 144. *Miranda* warnings are required only when a suspect is taken into custody. See *supra* note 6.

16. See *supra* note 11.

17. *Jackson*, 308 N.C. at 568, 304 S.E.2d at 144. Although defendant probably knew that earlier statements made by the police were untrue, there was no evidence nor any finding by the trial court that defendant knew that the evidence concerning his fingerprints or the witness who saw him was fabricated. *Id.* at 601, 304 S.E.2d at 163.

18. *Id.* at 601, 304 S.E.2d at 163.

19. *Id.* at 568, 304 S.E.2d at 144.

20. *Id.* at 550, 304 S.E.2d at 135.

21. *Id.* Defendant argued that his fourth amendment rights were violated because he had been seized illegally, and that his fifth amendment rights were contravened because the coercive methods employed by the police had elicited an involuntary confession. *Id.*

22. *State v. Roberts*, 12 N.C. (1 Dev.) 259 (1827). The superior court stated that "the defendant 'confessed' because he was found out and caught, rather than because such confession was 'attributable to that love of truth which predominates in every man, not operated upon by other motives more powerful with him, and thus the confession was not admissible under state law.'" *Jackson*, 308 N.C. at 562, 304 S.E.2d at 141. See *supra* note 10.

Although the court granted defendant's motion to suppress, defendant's contention that the police violated his rights under the constitutions of the United States and the State of North Carolina was rejected. *Jackson*, 308 N.C. at 562, 304 S.E.2d at 141. Justice Exum, in his dissent, challenged this conclusion. *Id.* at 602, 304 S.E.2d at 164 (Exum, J., dissenting).

23. The State appealed pursuant to N.C. GEN. STAT. § 15A-979(c) (1983) and rule 4 of the North Carolina Rules of Appellate Procedures. *Jackson*, 308 N.C. at 550, 304 S.E.2d at 135.

24. *Jackson*, 308 N.C. at 584-85, 304 S.E.2d at 153-54.

25. *Id.* at 585, 304 S.E.2d at 154. See *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982) ("Voluntariness is to be determined from consideration of all circumstances surrounding the confession."); *State v. Booker*, 306 N.C. 302, 311, 293 S.E.2d 78, 83 (1982) (key question concerning voluntariness is "whether the totality of the evidence, including both the uncontro-

methods had not been so coercive as "to make an innocent person confess."²⁶ The court balanced the societal interest in obtaining confessions against the interest in safeguarding defendants' rights, and concluded that the interest served by extracting confessions should prevail unless the methods employed were likely to produce an unreliable confession.²⁷ With this conclusion the court sought to avoid the situation in which relatively harmless police misconduct renders an otherwise valid confession inadmissible.²⁸ *Jackson* presents two critical issues: whether defendant's confession was inadmissible because it followed an unlawful seizure under the fourth amendment and whether the confession was inadmissible because it was given involuntarily.

The fourth amendment protects an individual from unreasonable searches and seizures by law enforcement officials.²⁹ This safeguard applies to seizures of individuals as well as seizures of tangible goods.³⁰ The linchpin of the fourth amendment is probable cause.³¹ For police officers to effect a lawful arrest or seizure, there must be probable cause for their action. In *Brinegar v. United States*³² the United States Supreme Court held that probable cause "exists where 'the facts and circumstances within [the officers'] knowledge and of which [they] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."³³

The protection afforded by the fourth amendment is effectuated by the exclusionary rule,³⁴ a judicial device requiring the suppression of evidence obtained by law enforcement officers in contravention of the Constitution. The policy underlying this sanction against illegal police conduct is to "compel respect for the constitutional guaranty [of the fourth amendment] in the only

verted evidence and the evidence in conflict, amounted to such coercion, actual or psychological, as would render defendant's confession involuntary"); *State v. Davis*, 305 N.C. 400, 419-20, 290 S.E.2d 574, 586 (1982) (voluntariness is determined "based upon . . . examination and consideration of the entire record on appeal"); *State v. Morgan*, 299 N.C. 191, 198, 261 S.E.2d 827, 831-32 (1980) (test for voluntariness is "whether, from the totality of the circumstances, . . . such mental or psychological pressure was brought to bear against defendant so as to overcome his will").

26. *Jackson*, 308 N.C. at 573, 304 S.E.2d at 148. (citing the standard for admissibility of confessions suggested in *F. IMBAU, CRIMINAL INTERROGATION AND CONFESSIONS* 218 (1967)).

27. *Id.* at 573-74, 304 S.E.2d at 148.

28. *Id.* at 573, 304 S.E.2d at 148.

29. See *supra* note 9.

30. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Weeks v. United States*, 232 U.S. 383, 390-92 (1914).

31. C. WHITEBREAD, *CRIMINAL PROCEDURE* § 3.02 (1980). Because police conceded there was no probable cause to arrest or seize Jackson, his status during the interrogation was a pivotal issue at the suppression hearing. In his concurring opinion to the 4-3 decision, Justice Mitchell stated, "Had it not been established . . . that the defendant was not in custody at the time of his confession, I might well join the dissenters." *Jackson*, 308 N.C. at 587, 304 S.E.2d at 155.

32. 338 U.S. 160 (1949).

33. *Id.* at 175-76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

34. The exclusionary rule was established in *Weeks v. United States*, 232 U.S. 383 (1914). See generally 1 W. LAFAVE, *SEARCH AND SEIZURES: A TREATISE ON THE FOURTH AMENDMENT* §§ 1.1 to 1.11 (1978). The United States Supreme Court carved out exceptions to the exclusionary rule in opinions announced July 5, 1984. See *United States v. Leon*, 52 U.S.L.W. 5155 (1984); *Segura v. United States*, 52 U.S.L.W. 5128 (1984); *Massachusetts v. Sheppard*, 52 U.S.L.W. 5177 (1984). These decisions do not change the arguments made in this note.

effectively available way—by removing the incentive to disregard it.”³⁵ Thus, any evidence, including verbal and written statements made by defendant, obtained pursuant to an illegal arrest or seizure must be excluded from use at trial.

In *United States v. Mendenhall*³⁶ the Supreme Court articulated the reasonable man standard for determining whether a defendant had been seized properly under the fourth amendment. The Court stated that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.”³⁷ The following circumstances might indicate a seizure: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, and the use of language or a tone of voice indicating that compliance with the officer’s request might be compelled.”³⁸

The North Carolina Supreme Court adopted the *Mendenhall* standard in *State v. Freeman*.³⁹ In *Freeman* the court ruled that defendant was entitled to a new trial because inculpatory statements made by defendant and introduced at trial were the product of an illegal seizure.⁴⁰ Defendant was “picked up” by the police after his sister made statements to the police that incriminated him in an arson case. When an officer from the police force confronted defendant at his home, he stated: “Detective Parham . . . asked me to come by and pick [you] up.”⁴¹ The officer also informed the suspect about the incriminating statements his sister had made to the police. Defendant accompanied the officer to the law enforcement center and was taken to a small room where he was advised of his *Miranda* rights. After being interrogated for approximately three and one-half hours, defendant confessed.⁴² At trial, the State introduced defendant’s confession into evidence, and defendant was convicted.⁴³

On appeal, the North Carolina Supreme Court granted defendant a new trial, stating that his confession was inadmissible because it was the product of an illegal seizure.⁴⁴ The Court emphasized that the officer’s declaration that he was there to “pick him up,” coupled with his revelation of defendant’s sister’s accusatory statement, could have led a reasonable person to believe that his compliance with the deputy’s request might be compelled.⁴⁵

35. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

36. 446 U.S. 544 (1980).

37. *Id.* at 554.

38. *Id.*

39. 307 N.C. 357, 298 S.E.2d 331 (1983).

40. *Id.* at 358, 298 S.E.2d at 332.

41. *Id.* at 361, 298 S.E.2d at 333.

42. *Id.* at 361, 298 S.E.2d at 333-34.

43. At the pretrial hearing, defendant argued that his confession should be excluded from trial because it was the product of an illegal seizure. After hearing the evidence, the Court denied this motion, stating that defendant’s confession was given voluntarily and that “applicable procedures concerning custodial interrogation of defendant . . . were complied with.” *Id.*

44. *Id.* at 363, 298 S.E.2d at 335.

45. *Id.* In *Freeman* the North Carolina Supreme Court cited its landmark decision in *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982), the first case in which the court applied *Mendenhall*.

In *Jackson* the critical encounter for purposes of fourth amendment analysis occurred on April 8, 1981—it was during that interrogation that defendant confessed. Based on the reasonable man standard enunciated in *Mendenhall* and applied in *Freeman*, the court's conclusion that defendant had not been seized was warranted. Two key facts support the court's finding. First, defendant was not arrested when confronted by police on April 8, 1981, but was simply told that "the [police] wanted to talk with him again in reference to the murder on Cox Avenue."⁴⁶ Following this exchange with the police, defendant voluntarily entered the police car and accompanied the officers to the station. The circumstances surrounding this encounter were different from those in *Freeman*, in which defendant was told specifically by the officer that he was there "to pick him up." In *Freeman* there was no doubt that, given the officer's authoritative command, defendant's presence would have been compelled had he resisted. The same conclusion, however, cannot be drawn in *Jackson*; the officer merely requested defendant's presence at the station.

The second key fact is that Jackson was told by officers that he was free to leave.⁴⁷ This statement certainly would have served notice to a reasonable person that his participation in the interrogation would not be compelled. This conclusion is buttressed by defendant's own testimony that the officers did not arrest him but just wanted to talk with him.⁴⁸

The facts in *Jackson* clearly indicate that defendant had not been seized on the evening he confessed. There was nothing in the conduct of the officers during the initial encounter on April 8, 1981, or the interrogation that ensued, which would have indicated to a reasonable person that he had been taken into custody or deprived significantly of his freedom of movement. The record does not reveal any of the circumstances delineated by the Supreme Court in *Mendenhall* as indicia of seizure. Furthermore, the evidence indicates that defendant was given water and coffee, and was allowed to use the bathroom at his request.⁴⁹ Thus, the facts of the case support the court's conclusion that defendant had not been seized.

In *Davis* a member of the Asheville Police Department received information that led him to consider defendant as a suspect in a recent murder. At the police's request, defendant came to the station for questioning. After being advised of his *Miranda* rights, defendant was interrogated concerning the murder. Defendant disavowed any knowledge of the crime, but agreed to take a polygraph test. Once inside the polygraph room, however, defendant refused to take the test. Following his refusal to take the test, at approximately 8:00 p.m., a detective gave defendant a ride home and asked him to return to the station at 10:00 p.m. The defendant agreed to do so. Upon returning to the station, defendant again was advised of his *Miranda* rights and, after a brief period of interrogation, defendant confessed. *Davis*, 305 N.C. at 403-04, 290 S.E.2d at 577.

At the pretrial hearing, defendant argued that his confession should be suppressed because it was the result of an illegal seizure. Because the State conceded there was no probable cause to arrest defendant, the defendant's status during the interrogation period was the pivotal issue in the case. Applying the reasonable man standard enunciated in *Mendenhall*, the court held that defendant had not been in custody or deprived of his freedom of action in any significant way. *Id.* at 419-20, 290 S.E.2d at 581.

46. *Jackson*, 308 N.C. at 576, 304 S.E.2d at 149.

47. *Id.*

48. *Id.*

49. *Id.* at 578, 304 S.E.2d at 150.

The next issue for determination is whether defendant's confession was voluntary and therefore admissible. The United States Supreme Court has held that, to comport with the fourteenth amendment due process requirement, confessions must be given voluntarily.⁵⁰ Resolution of the voluntariness issue hinges on whether tactics used by the police caused defendant's will to resist to be "overborne."⁵¹ If a defendant's confession is given freely, without physical or mental duress, it is admissible. If, however, defendant confesses because police methods overbear his will, then it is given involuntarily and is not admissible at trial. The due process voluntariness standard seeks to ensure the reliability of a defendant's confession by prohibiting the use of coerced confessions to convict a defendant.⁵²

Although the thrust of the voluntariness standard is stated easily, it is difficult to apply because there is no single test for determining when interrogations are constitutionally permissible. As Justice Goldberg noted: "The line between proper and permissible police conduct and techniques and methods offensive to due process is . . . difficult . . . to draw, particularly . . . where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."⁵³ In the absence of specific guidelines categorizing particular methods as per se violations of due process, courts have applied the "totality of the circumstances" test.⁵⁴

Although the *Jackson* court applied the proper "totality of circumstances" standard⁵⁵ for determining voluntariness, the court erred in concluding that Jackson's confession had been rendered voluntarily.⁵⁶ Two elements can be found in the *Jackson* case which require a finding that the confession was involuntary. First, the police used threats and promises to overcome defendant's will to resist.⁵⁷ Second, the police used trickery and deception to elicit the confession.⁵⁸

The facts support the argument that the police used threats and promises

50. *Brown v. Mississippi*, 297 U.S. 278 (1936). In *Brown* a deputy sheriff, after severely beating one of the defendants, claimed that he would continue the beatings until the suspect confessed. The defendant then agreed to confess. The Court ruled that the use of physical torture had violated the fourteenth amendment requirement of due process. The Court stated that, "state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Id.* at 286 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)). For additional cases applying the due process voluntariness standard, see *supra* note 1.

51. See *supra* note 4.

52. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

53. *Haynes v. Washington*, 373 U.S. 503, 515 (1963).

54. See *supra* notes 3 & 25.

55. See *supra* note 10.

56. In ruling to suppress confessions for lack of voluntariness, the North Carolina Supreme Court has emphasized various elements that, under the totality of the circumstances, caused the defendant's will to be overborne. See, e.g., *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937) (misrepresentation of the quantum of evidence); *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975) (suggestions of hope or fear); *State v. Roberts*, 12 N.C. 259 (1 Dev.) (1827) (false statements concerning the admissibility of evidence).

57. *Jackson*, 308 N.C. at 586-90, 304 S.E.2d at 155-57 (Exum, J., dissenting).

58. *Id.* at 553-59, 304 S.E.2d at 137-39.

to induce Jackson's confession. The officers admitted to telling defendant, among other things, that "if he did go to the gas chamber, nobody, after the pill was dropped in the bucket of water, would rush in to save his life,"⁵⁹ and that "he could go into court and plead not guilty and if he did that then the other officers would probably go into court and testify that he was a black man out here viciously raping and murdering white women."⁶⁰ Moreover, one officer told defendant that "if he would tell the truth about the incident that it would certainly come out in court that he cooperated."⁶¹ The police officers also intimated that if defendant did not confess, they would introduce fabricated evidence against him at trial.⁶² These statements clearly are indicia of "threats or promises" calculated to induce defendant's confession. In numerous cases, the court has declared confessions involuntary on facts far less compelling than those in *Jackson*.⁶³

In addition to inducing Jackson's confession through the use of implied threats and promises, police unduly influenced the substance of his statements by raising the specter of the death penalty.⁶⁴ During the interrogation, officers told Jackson that first degree murder carried a sentence of death unless there were "extenuating circumstances."⁶⁵ In explaining what would constitute extenuating circumstances, one of the officers stated:

[I]f you did kill the girl and you done it by accident, or it wasn't premeditated, or it happened at a rational moment, irrational moment or something to that effect, that the judge and jury should know that . . . not that you premeditated, set there with a knife and went through the house and stabbed her without some other circumstance besides premeditation.⁶⁶

Jackson clearly incorporated the officer's admonition that extenuating circumstances could spare him from the death penalty into his confession. He

59. *Id.* at 587, 304 S.E.2d at 155 (Exum, J., dissenting).

60. *Id.* at 590, 304 S.E.2d at 157 (Exum, J., dissenting).

61. *Id.* at 589, 304 S.E.2d at 156 (Exum, J., dissenting).

62. *Id.* at 590, 304 S.E.2d at 157 (Exum, J., dissenting).

63. In *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), police officers told defendant that they knew he was "lying" and that they did not want to "fool around." In addition, defendant was told that it would be "harder on him" if he did not cooperate. The North Carolina Supreme Court ruled that the confession had been given involuntarily because it had been "made under the influence of fear . . . growing out of the language and acts of those who held him in custody." *Id.* at 458, 212 S.E.2d at 102-03. In *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968), interrogating officers told the accused that it would be "a lot better" if he would tell the truth about what happened, and that he would probably only "be charged with being an accessory" to murder. Again, the court ruled that admission of the confession was prejudicial error because the statements by the officers constituted suggestions of hope and fear. *Id.* at 292-93, 103 S.E.2d at 503. Finally, in *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937), a case similar to *Jackson*, the court ruled defendant's confession involuntary because it had been induced by officers' claims that they had sufficient evidence to convict defendant.

64. One of the reasons the United States Supreme Court promulgated the voluntariness standard was to ensure the reliability of confessions. The Court was concerned that in the absence of such a safeguard, police coercion would cause defendants to skew their confessions to fit the fact scenarios suggested by the police. *Jackson* vividly illustrates this phenomenon. See *supra* note 52 and accompanying text.

65. *Jackson*, 308 N.C. 587, 304 S.E.2d at 155-56 (Exum, J., dissenting).

66. *Id.* at 588, 304 S.E.2d at 156 (Exum, J., dissenting).

admitted committing the murder, but stated that the victim, a recently married woman, had invited him to come to her home and, once there, had indicated a willingness to have sexual relations with him. He claimed that upon his advances toward her she began to scream and, in a state of panic, he "stabbed her in the back."⁶⁷

The reliability of Jackson's confession is questionable. The correlation between defendant's statements and the officer's suggestions concerning the mitigating effect of extenuating circumstances is too great to disregard. In fact, the trial judge ordered the suppression of defendant's confession because he doubted its veracity.⁶⁸

The second, and perhaps most compelling, reason for concluding that Jackson's confession was given involuntarily is that the police used trickery and deception to extract his statements. During the second interview police told defendant that they had found bloodstains on the pants he had given them, and that tracks from his tennis shoes had been found in the victim's house. Both statements were false.⁶⁹ Furthermore, in preparation for the third interview, one of the detectives obtained a knife identical to the one believed to be the murder weapon, smeared blood on it, and placed his right thumb print in the blood.⁷⁰ Then, with the bloody knife lying on the interview table, another detective told defendant that the police had found the murder weapon, a knife, and that his fingerprints had been lifted from the weapon. Defendant also was told that the police had a witness who saw him coming out of the victim's front door carrying a knife.⁷¹ After being confronted with these falsehoods, defendant confessed.

Based on the extreme fact situation in *Jackson*, it is inconceivable that a court, applying the totality of circumstances test, could conclude that defendant's confession was voluntary. The error of the court's conclusion is demonstrated by the fact that any one of the tactics used by the police—threats, false statements, or trickery—might have been sufficient to cause defendant's will to be overborne. Any test that purports to measure whether a defendant's will has been overborne, yet is flexible enough to accommodate the unconscionable methods used by the police in *Jackson*, is seriously deficient.

In his dissent, Justice Exum argued that prior to *Jackson*⁷² the use of trickery and false statements had been sufficient to render the resulting confession involuntary under *State v. Stephens*⁷³ and *State v. Anderson*.⁷⁴ In *Stephens* investigators told defendant and his attorney that the attorney could not be present during the polygraph examination but that he could be present during the subsequent interrogation. The investigators started questioning the de-

67. *Id.* at 563, 304 S.E.2d at 141-42.

68. *Id.* at 600, 304 S.E.2d at 163 (Exum, J., dissenting).

69. *Id.* at 566, 304 S.E.2d at 143-39. See *supra* note 12 and accompanying text.

70. *Jackson*, 308 N.C. at 553, 304 S.E.2d at 137.

71. *Id.* at 558-59, 304 S.E.2d at 139.

72. *Id.* at 599, 304 S.E.2d at 162 (Exum, J., dissenting).

73. 300 N.C. 321, 266 S.E.2d 588 (1980).

74. 208 N.C. 771, 182 S.E. 643 (1935).

fendant immediately after the polygraph, however, without informing his attorney, who had been waiting outside the door. The court suppressed the confession and stated that "[i]f the totality of circumstances indicates that defendant was threatened, *tricked*, or cajoled into a waiver of his rights, his statements are rendered involuntary as a matter of law."⁷⁵

Stephens fails, however, to support Exum's claim that trickery alone will render a confession involuntary. The court stated specifically that its decision to suppress defendant's confession was based on the "totality of the circumstances."⁷⁶ Also, *Stephens*' relevance to *Jackson* is questionable because it can be distinguished on its facts. In *Stephens* the police's trickery effectively deprived defendant of his sixth amendment right to counsel.⁷⁷ No corresponding right-to-counsel issue existed in *Jackson* because the defendant had waived his sixth amendment right.⁷⁸ Also, unlike *Stephens*, *Jackson* was not in custody at the time of his confession. Consequently, the procedural safeguards⁷⁹ offered to people in custody were not in effect.

In *Anderson*,⁸⁰ the second case cited by Justice Exum, defendant confessed after being informed that some of his codefendants had "talked" to police officials.⁸¹ The court granted *Anderson*'s motion to suppress. *Anderson* supports Justice Exum's proposition that a confession induced by trickery or deception is inadmissible as a matter of law. The only impropriety by law enforcement officials was the false allegation concerning statements made by his accomplices.⁸² Furthermore, the pertinent facts in *Anderson* were similar to those in *Jackson*. In both cases false statements concerning the quantum of evidence possessed by the interrogators caused the defendants to confess.

Because the court did not articulate clearly the standard it was applying, the precedential value of *Anderson* is diminished. The court simply stated that "inasmuch as the involuntariness of the alleged confession is apparent from the testimony of the state's witness . . . we are disposed to disregard form for merit and to hold that the alleged confession should have been stricken out."⁸³

Although *Stephens* and *Anderson* do not support Justice Exum's assertion that prior to *Jackson* trickery and false statements rendered a confession involuntary, serious attention should be given to promulgating such a rule. In *Miranda v. Arizona*,⁸⁴ the Supreme Court attempted to eliminate the "inherently

75. *Stephens*, 300 N.C. at 327, 266 S.E.2d at 592.

76. *Id.*

77. *Id.*

78. *Jackson*, 308 N.C. at 576, 304 S.E.2d at 149 (court held that although defendant knew he could have attorney present during questioning, he never requested one).

79. See *supra* note 6.

80. *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935).

81. *Id.* at 780, 180 S.E.2d at 648-49. This precipitous statement by police officials was false. *Id.*

82. Because the false statements were the only impropriety mentioned by the court, one can infer that trickery alone was sufficient to render the confession inadmissible.

83. *Anderson*, 208 N.C. at 783, 182 S.E.2d at 650.

84. 384 U.S. 436 (1966).

coercive" nature of custodial interrogation.⁸⁵ By extending certain fifth amendment protections⁸⁶ to the interrogation room, the Court theorized that the coercive atmosphere would be reduced. In practice, however, this result has not occurred because most suspects waive their *Miranda* rights and, as a result, interrogation proceeds much as it did prior to *Miranda*.⁸⁷ Consequently, the policy goal underlying *Miranda*—reducing the coercive atmosphere that permeates police interrogation—has not been realized. Thus, more effective steps must be taken to defuse the coercive nature of interrogation.

That trickery is an especially coercive interrogation technique is indisputable. Its powerful effect stems in part from the fact that once a suspect believes that evidence of his guilt exists, he may see no further reason to resist interrogation. The *Miranda* Court sought to blunt the adverse effect of trickery by prohibiting its use to obtain a waiver of rights.⁸⁸ The Court, however, did not expressly ban the use of trickery once a waiver was secured. A study conducted by Professor Driver suggests that the Court did not extend its prohibition against trickery far enough.⁸⁹ In his study, Driver concluded that "[t]he *Miranda* warnings failed to provide safeguards against the social psychological rigors of arrest and interrogation except to the extent that they prevent interrogation altogether."⁹⁰

If the deceptive methods, including trickery, threats, and false statements, employed by the police in *Jackson* are not sufficient to render a confession involuntary, one wonders what measure of psychological coercion would transcend the threshold of acceptable police behavior. Unfortunately, the court did not address this critical question directly. It can be inferred from the court's silence, however, that police officers are to be given considerable latitude in employing psychological measures of coercion when interrogating suspects.

As a safeguard against the abusive methods used by the police in *Jackson*, North Carolina should adopt the standard on deceptive practices promulgated in the American Law Institute's Model Code of Pre-Arrest Procedure. The Code stipulates that:

No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise cooperate by . . . any . . .

85. See *supra* note 6. Although the *Miranda* Court was addressing custodial interrogations specifically, it is arguable that the same policy rationale should apply to noncustodial interrogations as well. As Professor LaFave has noted, "the person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable." LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 105 (1968).

86. *Miranda* held that the fifth amendment's self-incrimination clause requires that a person undergoing custodial interrogation be informed of his right to silence as well as of his right to the presence of counsel, either obtained or appointed, during interrogation. See *supra* note 6.

87. See Medalie, Zeitz and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1394-95 (1968); Comment, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1562-78, 1613-16 (1967).

88. *Miranda*, 384 U.S. at 476.

89. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

90. *Id.* at 59.

method which, in light of such person's age, intelligence and mental and physical condition, unfairly undermines his ability to make a choice whether to make a statement or otherwise cooperate.⁹¹

Under this provision, a suspect's confession would be inadmissible if police tactics impaired his ability to make a rational decision. This standard would protect the fifth amendment and due process rights of defendants without hindering police interrogation.

In conclusion, the *Jackson* court's decision increases the quantum of evidence a defendant must present to demonstrate that his will was overborne by the circumstances surrounding his confession. This undermines the United States Supreme Court's objective in promulgating the voluntariness standard.⁹² As a consequence, it is probable that confessions will be less reliable and defendants subject to greater coercion than before *Jackson*. To defuse the coercive atmosphere that envelops police interrogation, North Carolina should adopt the deceptive practices standard recommended by the American Law Institute.

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91. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 140.4 (Proposed Official Draft 1975).

92. See *supra* note 52 and accompanying text.

Post-Conviction Rights of Pregnant Women Under North Carolina Law

Under North Carolina law a convicted criminal defendant generally begins to serve her sentence on the date that the court issues the order of commitment.¹ During the 1983 session of the North Carolina General Assembly, legislation was passed to allow a judge to defer the imprisonment of a pregnant defendant convicted of a nonviolent crime until six weeks after either the birth of the child or the termination of the pregnancy.² The new amendment is one of two statutory provisions for pregnant inmates under North Carolina law. The other provision requires the surrender of a child born to a female prisoner while in custody to the department of social services unless the mother places the child with the legal father or another suitable relative.³ Although the amendment allowing sentence deferral for pregnant inmates is a positive step toward adequate statutory provisions for these inmates, the limited scope of North Carolina's statutes dealing with the treatment of pregnant inmates represents a failure on the part of the legislature to consider adequately either the best interests of the inmate's child or the rehabilitation of the mother. These statutes fail to address whether an incarcerated mother should have the right under certain circumstances to care for her child in prison.

This note examines the rights of pregnant defendants and inmates within the framework of existing North Carolina law. The note addresses two issues: whether allowing an incarcerated mother to care for her child is in the best interest of the child, and whether an incarcerated mother has a constitutional right to care for her child. Although reaching the conclusion that an incarcerated mother does not have a constitutional right to care for her child, the note urges the legislature to adopt statutes that will consider more adequately the best interests of the child and allow, in some circumstances, an incarcerated mother to care for her child.

During the 1983 legislative session the General Assembly amended North Carolina General Statutes section 15A-1353(a) to allow a judge to defer the imprisonment of a pregnant defendant convicted of a nonviolent crime. As amended, the pertinent portion of section 15A-1353(a) provides:

If a female defendant is convicted of a nonviolent crime and the court is provided medical evidence from a licensed physician that the defendant is pregnant or the court otherwise determines that the defendant is pregnant, the court may specify in the order that the date of service of the sentence is not to begin until at least six weeks after the birth of the child or other termination of the pregnancy unless the defendant requests to serve her term as the court would otherwise

1. N.C. GEN. STAT. § 15A-1353 (1983). The court may grant a stay so that the defendant can get her affairs in order.

2. *Id.*

3. *Id.* § 148-47.

order. The court may impose reasonable conditions upon defendant during such waiting period to insure that defendant will return to begin service of the sentence.⁴

The statute's basic meaning is clear. The term "nonviolent," however, is not defined. Presumably, a woman convicted of either a misdemeanor or a felony could be eligible for sentence deferral if the judge determines that her crime was nonviolent.⁵ The language of the statute encourages the judge to defer the sentence; the judge is allowed expressly to defer the sentence unless the defendant requests to serve her term as the court otherwise would order.

This statute provides a benefit both to the defendant and the State. The defendant is spared the emotional and physical trauma of beginning a term of imprisonment while pregnant.⁶ Deferral of imprisonment allows her to retain the assistance and emotional support of family and friends and the freedom to pursue medical care as needed. The primary benefits to the State are economic and administrative. By allowing pregnant women convicted of nonviolent crimes to defer their imprisonment, the State reduces the number of pregnant women inmates in the prison population.⁷ Because pregnant women often require special medical treatment, special diets, hospitalization for delivery, and transportation to hospital facilities for treatment, the reduction in the number of pregnant women inmates through sentence deferral reduces costs to the Department of Corrections.

Another result of sentence deferral is that the Department of Corrections does not become involved as an intermediary in the process of arranging for the care of the child. Since imprisonment is delayed until six weeks after the child's birth, the woman is free to make arrangements for care of the child

4. *Id.* § 15A-1353. The commentary to the statute states that the section applies both to an initial sentence of imprisonment and to activation of a sentence following probation revocation.

5. See REPORT OF THE CITIZENS COMMISSION ON ALTERNATIVES TO INCARCERATION (1982) (available in the library of the Institute of Government, Chapel Hill, N.C.) [hereinafter cited as *Alternatives to Incarceration*] which suggests that "nonviolent" offenders should include misdemeanants and persons guilty of felony offenses in classes H, I, and J. Misdemeanor offenses for which individuals are sentenced to prison in North Carolina include writing worthless checks and nonsupport of dependents. H, I, and J felons are persons convicted of larceny, breaking and entering, forgery, embezzlement, and credit card crimes. N.C. GEN. STAT. § 14-1.1(a) (1981). See *Alternatives to Incarceration, supra*, at 11 (advocating community based alternative penalties for those convicted of nonviolent crime).

6. For a discussion of some of the potential adverse affects of prison on a pregnant inmate's physical health, see McHugh, *Protection of the Rights of Pregnant Women in Prisons and Detention Facilities*, 6 NEW ENG. J. PRISON L. 231, 235-45 (1979-80) and Resnik & Shaw, *Prisoners of Their Sex: Health Problems of Incarcerated Women*, 3 PRISON L. MONITOR 57, 75-77 (1981). See also *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193 (E.D. Wis. 1974) (a woman seven months pregnant was twice forced to painfully bend over for vaginal searches conducted in an unsterile environment by two untrained policewomen). Other cases specifically citing lack of adequate medical facilities and medical care for pregnant women inmates include *Lasky v. Quinlan*, 419 F. Supp. 799, 802-03 (S.D.N.Y. 1976), *vacated as moot*, 558 F.2d 1133 (2d. Cir. 1977); *Morales v. Turman*, 383 F. Supp. 53, 102 (E.D. Tex. 1974); and *Newman v. Alabama*, 349 F. Supp. 278, 282-83 (M.D. Ala. 1972).

7. Pregnancy is not a problem limited to female convicts who have not yet begun to serve their sentences. An incarcerated female may become pregnant as a result of "intercourse or rape by guards or jail officials, intercourse with other inmates in a sexually integrated prison, conjugal visits, furloughs and work releases, and even prostitution." Note, *Nine Months to Life—The Law and the Pregnant Inmate*, 20 J. FAM. L. 523, 525 (1981-82).

personally or, if she cannot provide for the child, to place the child with the Department of Social Services in her home community. If the Department of Social Services or the domestic court is involved, sentence deferral increases the likelihood that the woman will be able to participate actively in the process of determining where the child will be placed. Thus, deferral of imprisonment has many benefits for both the mother and the Department of Corrections.

When considered separately, the amendment to section 15A-1353(a) represents a positive change in North Carolina correctional law. The statute establishes a reasonable compromise between the physical and emotional well-being of pregnant defendants and the requirements of the correctional system. Because sentence deferral is limited to nonviolent offenders, the State's interest in the safety of its citizens is not compromised. The statute also is fair. Pregnant defendants do not receive more favorable treatment than others convicted of similar crimes, just a temporary deferral of their sentences. Thus, the statute does not create an incentive for female defendants to attempt to become pregnant to receive lenient treatment.

Despite the positive benefits of section 15A-1353, North Carolina law fails to address other crucial issues that arise when a pregnant woman is sentenced to a prison term. Apart from the recent amendment to section 15A-1353, the only statute that addresses the subject of pregnant inmates is section 148-47,⁸ which provides:

Any child born of a female prisoner while she is in custody shall as soon as practicable be surrendered to the director of social services of the county wherein the child was born upon a proper order of the domestic relations court or juvenile court of said county affecting the custody of said child. When it appears to be for the best interest of the child, the court may place custody beyond the geographical bounds of Wake County: Provided, however, that all subsequent proceedings and orders affecting custody of said child shall be within the jurisdiction of the proper court of the county where the infant is residing at the time such proceeding is commenced or such order is sought: Provided, further, that nothing in this section shall affect the right of the mother to consent to the adoption of her child nor shall the right of the mother to place her child with the legal father or other suitable relative be affected by the provisions of this section.⁹

Unlike section 15A-1353, which strikes a balance between state correctional goals and the mother's emotional and physical needs, section 148-47 fails to provide a framework for considering the best interests of the child and the mother's relationship with the child. The statute assumes that the infant will not be allowed to remain with the mother in prison. This assumption,

8. In comparison, the federal regulations, applicable only to federal prisoners, are quite comprehensive, ensuring medical and social services, birth control, and abortions if desired. Delivery of a child must take place in a hospital outside of the institution. No provision, however, is made for mothers to keep their infants with them in prison. The child only is allowed to visit the institution. 28 C.F.R. §§ 551.20-24 (1980).

9. N.C. GEN. STAT. § 148-47 (1983).

however, has been criticized by commentators,¹⁰ and some states have statutes that allow inmates to care for their newborns under certain circumstances.¹¹ Of the states that permit mothers to care for their infants on more than a temporary basis, one allows the child to stay with the mother until two years of age,¹² and the other provides for care until the child is six years old.¹³ Some commentators have suggested that, after the child reaches the age of two, any positive benefits the child might gain from its mother's care are offset by the prison's restrictive environment.¹⁴ A consideration of whether and under what circumstances an imprisoned inmate should be allowed to care for her child requires a balanced examination of the best interests of the child and the mother's parental rights within the context of the correctional system.

Proponents of statutes allowing incarcerated women to care for their infants argue that under some circumstances, it is in the child's best interest to be cared for by its mother even if the mother is in prison.¹⁵ The "child's best interest" argument is based upon psychological studies showing the importance of mother-child bonding.¹⁶ Research has shown that one of the critical factors in the formation of an emotionally healthy child is the development of an enduring attachment to at least one care-giver during infancy.¹⁷ The formation of this bond also increases the likelihood that the mother and child will readjust successfully after the mother's release from prison.¹⁸ Psychological studies also provide support for the contention that after two years of age, the restrictive environment of a prison would be detrimental to the child's

10. See Fabian, *Toward the Best Interests of Women Prisoners: Is the System Working?*, 6 NEW ENG. J. PRISON 1, 58 (1979-80); Comment, *The Prisoner—Mother and Her Child*, 1 CAP. U.L. REV. 127, 138-44 (1972); Note, *The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment*, 6 NEW ENG. J. PRISON L. 61, 111 (1979-80) [hereinafter cited as Note, *Loss of Parental Rights*]; Note, *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women*, 4 NEW ENG. J. PRISON L. 141, 152-55 (1977-78) [hereinafter cited as Note, *Mothers Behind Bars*]; Comment, *Babies Behind Bars: Should Incarcerated Mothers Be Allowed to Keep Their Newborns with Them in Prison?* 16 U. RICH. L. REV. 677 (1981-82) [hereinafter cited as Comment, *Babies Behind Bars*]; Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408, 1422-29 (1978) [hereinafter cited as Note, *Tie That Binds*].

11. CAL. PENAL CODE §§ 3410-3422 (West 1982), authorizes the development of a community treatment program for prison mothers with children under six years of age. Other states allow the child to stay with the mother on a temporary basis until permanent placement elsewhere can be arranged. See CONN. GEN. STAT. ANN. § 18-69 (West Supp. 1984) (baby can stay for 60 days while permanent placement arranged); ILL. ANN. STAT. ch. 38, § 1003-6-2 (Smith-Hurd 1982) (allowing a child to remain with its mother until the child is one year old if the Director of Corrections determines that there are special reasons why the child should continue in custody of the mother); N.Y. CORRECT. LAW § 611 (McKinney 1968). For over 50 years New York's policy has been to allow inmate mothers to keep their newborn infants. *Apgar v. Beauter*, 75 Misc. 2d 439, 441, 347 N.Y.S.2d 872, 875 (1973). N.C. GEN. STAT. § 148-47 (1983) (baby can stay only until permanent placement is made elsewhere).

12. N.Y. CORRECT. LAW § 611 (McKinney 1968).

13. CAL. PENAL CODE §§ 3410-3422 (West 1982).

14. See Note, *Tie That Binds*, *supra* note 10, at 1424-25.

15. See *id.*

16. See *id.* at 1411-22 for further discussion of the psychological results of the formation of the parent-child bond.

17. *Id.* at 1411-12. See also Comment, *Babies Behind Bars*, *supra* note 10, at 680-82.

18. See Note, *Loss of Parental Rights*, *supra* note 10, at 99.

development.¹⁹

These arguments in favor of allowing the mother to care for her infant until age two are most persuasive under circumstances in which the mother's sentence is relatively short and will be served in a minimum security environment,²⁰ the mother will assume full-time care of the child upon her release,²¹ and the mother's background and crime provide no indication of parental unfitness.²² Care by the mother also is preferable when the infant's only other alternative would be undesirable institutional or foster care.²³ Conversely, the best interests of the child militate against care by the mother if she has a history of violence or of abusing or neglecting her children.²⁴ Also, when the mother's sentence is long and chances of parole are nonexistent during the early years of the child's life, it would seem undesirable for the infant to become emotionally attached to the incarcerated mother.

Opponents of statutes allowing women to care for their infants in prison argue that prison is no place for a child and that the idea of babies behind bars is shocking.²⁵ The lack of adequate facilities and trained personnel, possible physical danger to the child, and a negative moral influence upon the child are advanced as reasons why inmate mothers should not be allowed to care for their infants.²⁶ Proponents of statutes allowing infants to remain with their incarcerated mothers, however, counter that the fears of physical danger to children have proved unfounded at facilities where mothers are allowed to care for their children.²⁷ Furthermore, the risk that a child's morals will be influenced negatively by exposure to inmates is slight due to the highly supervised living situation and the infancy of the child.²⁸

Although the child's best interest often might be served by allowing her mother to care for her while in prison,²⁹ the idea has not been adopted by the majority of state legislatures.³⁰ Only New York and California expressly allow the child to stay with her mother for a definite period of time.³¹ Other states allow the child to stay only until other arrangements for care can be

19. See Note, *Tie That Binds*, *supra* note 10, at 1425. See also Comment, *Babies Behind Bars*, *supra* note 10, at 681.

20. See Note, *Tie That Binds*, *supra* note 10, at 1423.

21. See Comment, *Babies Behind Bars*, *supra* note 10, at 680-81.

22. *Bailey v. Lombard*, 101 Misc. 2d 56, 420 N.Y.S.2d 650 (1979).

23. See Note, *Tie That Binds*, *supra* note 10, at 1418-22 for a discussion of the potential harm to a child as a result of institutional or foster care. See also, Fabian, *supra* note 10, at 49-50 (example of inadequate foster care for incarcerated mother's child).

24. *Bailey v. Lombard*, 101 Misc. 2d 56, 420 N.Y.S.2d 659 (1979) (incarcerated mother who previously had exhibited lack of parental concern for her other children was denied permission to care for her newborn infant).

25. See Note, *Tie That Binds*, *supra* note 10, at 1424.

26. See Comment, *Babies Behind Bars*, *supra* note 10, at 681. See also Note, *Tie That Binds*, *supra* note 10, at 1424 n.79.

27. See Comment, *Babies Behind Bars*, *supra* note 10, at 681-82 & n.31.

28. See Note, *Tie That Binds*, *supra* note 10, at 1423 n.74 (discussion of residential facilities for adult offenders).

29. See *supra* notes 15-24 and accompanying text.

30. See *supra* note 11.

31. See *supra* notes 11-13.

made.³² In some states, litigation by women inmates seeking to enforce existing statutory provisions allowing women inmates to care for their infants has triggered repeal of those statutes.³³

Given the lack of statutory provisions allowing women inmates to care for their children, several commentators have attempted to develop constitutional theories to support a claim by a woman inmate of the right to care for her infant while in prison. One possible theory advanced is that the parent-child relationship is fundamental³⁴ and therefore protected by the due process clause of the fourteenth amendment.³⁵ Parents, however, never have possessed an absolute right to raise their children. The state always has retained the power to intervene on the child's behalf when necessary to protect the child's best interest.³⁶ The state's power to terminate permanently parental rights against the wishes of the parent is drastic, but constitutional.³⁷ At most, society seems to recognize that parental rights include some sort of interest in the care, custody, and nurture of one's child.³⁸

32. See *supra* note 11.

33. *Wainwright v. Moore*, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979). A 22 year old pregnant inmate brought suit to enjoin Florida correctional officials from separating her from her child after the child was born. She based her suit on Act of May 16, 1957, ch. 57-121, § 22, 1957 Fla. Laws 186, 193 (repealed 1981), which allowed women inmates to care for their babies in prison if they so desired. The court of appeals reversed a lower court decision in the inmate's favor on the grounds that the statute merely permitted the child to remain with her mother if the court determined that to do so was in the child's best interest. Since the trial court had made no determination of the child's best interest, the court of appeals remanded the case for this determination. Before the trial court could rehear the case, however, the mother was paroled and left prison with her infant. After the *Wainwright* case, the Florida legislature repealed the statute upon which the suit was based. See Comment, *Babies Behind Bars*, *supra* note 10, at 678 n.8.

A similar sequence of events occurred in California. In *Cardell v. Enomoto*, Memorandum of Intended Decision, No. 701-94 (Cal. Super. Ct. 1976) a prison mother sued for enforcement of Act of April 15, 1941, ch. 106, § 3401, 1941 Cal. Stat. 1080, 1116 (repealed 1980), which allowed young children to stay with their mothers in prison. Her suit failed because the court interpreted the statute as discretionary rather than mandatory. California subsequently repealed the statute. A new statute was adopted authorizing the development of a community program for prison mothers with children under six years of age. CAL. PENAL CODE §§ 3410-3424 (West 1982). Funding for the development of the program is uncertain, however, and the restrictive qualifications for the program ensure that few women actually would be eligible to participate if the program were developed. See Fabian, *supra* note 10, at 50-51.

34. See *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) ("The entire fabric of the Constitution and the purposes that underlie its specific guarantees demonstrate that the rights to marital privacy, to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (In addressing the issue of a parent's right to control the religious training of a child, the court stated that, "it is cardinal with us that the custody, care and nurture of the child reside first in the parents.").

35. See Comment, *Babies Behind Bars*, *supra* note 10, at 682.

36. Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 396 (1970):

[T]he venerable common law doctrine of *paren patriae* . . . declares the state to be the ultimate guardian of every child. Under this doctrine, with its great emphasis on the correlation of the welfare of the child with the welfare of the state, the state has not only the right, but the duty to establish standards for a child's care. The only constitutional check on this responsibility is that the standards so established must bear a reasonable relationship to the community's health, safety and welfare.

37. See Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICKINSON L. REV. 733 (1976-77) for a discussion of the violation of parents' constitutional rights in the process of determining the best interests of the child.

38. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (an unwed father is entitled to a forum and

Because parental rights never have been defined in absolute terms, arguments that an incarcerated mother has a fundamental constitutional right to care for her child in prison are not persuasive. Even if raising one's child is a fundamental right, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."³⁹ Litigation asserting claims to other rights related to maintaining familial bonds has not been successful. Conjugal visitation rights are not required by the Constitution.⁴⁰ Inmates have no constitutional right to physical contact with family or to sexual intimacy with their spouse or anyone else.⁴¹ One court has held that neither prisoners nor their potential visitors have a constitutional right to prison visitation.⁴² Given the hostility of the courts towards recognizing a constitutional right to simple family visitation privileges, it is highly unlikely that courts would recognize that an incarcerated mother has a constitutional right to care for her infant while in prison.

Other commentators have suggested that deprivation of parental rights is a form of cruel and unusual punishment,⁴³ unconstitutional under the eighth amendment.⁴⁴ Historically, violations of the eighth amendment have been found when inmates were subjected to abusive physical punishment, intolerable living conditions, or excessively long sentences for minor crimes.⁴⁵ Findings of cruel and unusual punishment have not been frequent when the inmate's deprivation is unrelated to his physical well being or the fairness of his sentence. One commentator who asserts that loss of parental rights constitutes cruel and unusual punishment⁴⁶ cites *Trop v. Dulles*⁴⁷ to support the proposition that the eighth amendment proscription is not limited to physical punishment. The Supreme Court held in that case that loss of citizenship, a nonphysical punishment for military desertion, was unconstitutional under the eighth amendment. Furthermore, in *Trop* Chief Justice Warren stated that the scope of the amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴⁸

the opportunity to show why his interest in his children should not be terminated after the death of the children's mother).

39. *Price v. Johnston*, 334 U.S. 266, 285 (1948). See also *Jones v. North Carolina Prisoner's Union*, 433 U.S. 119 (1977).

40. *Tarlton v. Clark*, 441 F.2d 384 (5th Cir.), cert. denied, 403 U.S. 934 (1971); *Payne v. District of Columbia*, 253 F.2d 867 (D.C. Cir. 1958).

41. *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975); *Lyons v. Gilligan*, 382 F. Supp. 198 (N.D. Ohio 1974); *Stuart v. Hand*, 359 F. Supp. 921 (S.D. Tex. 1973).

42. *White v. Keller*, 438 F. Supp. 110 (D. Md.), aff'd, 588 F.2d 913 (4th Cir. 1978).

43. See Comment, *Women, Prison and the Eighth Amendment*, 12 N.C. CENT. L.J. 434, 448-50 (1980-81); Note, *Female Offenders: A Challenge to Courts and the Legislature*, 51 N.C.L. REV. 827, 842 n.111 (1974-75); Note, *Loss of Parental Rights*, supra note 10, at 97.

44. U.S. CONST. amend. VIII.

45. Fair, *The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. L. 119, 122-23 (1979); Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration under the Eighth Amendment*, 29 STAN. L. REV. 893, 900-06 (1977).

46. See Note, *Loss of Parental Rights*, supra note 10, at 97.

47. 356 U.S. 86 (1958).

48. *Trop*, 356 U.S. at 101.

Commentators assert that parental rights are of at least comparable significance to rights of citizenship.⁴⁹ Their argument—that forfeiting one's parental rights is cruel and unusual punishment—is most persuasive in states whose statutes permit the permanent termination of parental rights without the parent's consent simply because the parent is incarcerated.⁵⁰ The argument is less persuasive when an incarcerated mother is deprived of her right to care for her infant while she is imprisoned, but retains all of her other parental rights. The likelihood that the courts would characterize the latter type of deprivations as cruel and unusual is remote.

A final argument in favor of allowing incarcerated mothers to keep their infants with them is that it may further the state's goal of rehabilitating the inmate. Inmates may not have a constitutional right to rehabilitation, but it is in the best interest of the inmate, the state, and the state's citizenry to promote responsible behavior among inmates who will be released from prison.

In conclusion, an inmate has no constitutional right to care for her newborn infant in prison. Thus, in states such as North Carolina, in which no statutory provision is made for pregnant mothers who wish to care for their newborns, an inmate has no legal grounds to assert a right to care for her child. The argument can be made, however, that separating the mother from her infant without making a determination of the best interest of the child undermines the State's goal of protecting the best interests of the child.⁵¹ Furthermore, statutory provisions that are less destructive of family relationships, such as one allowing women inmates to care for their infants, would further the State's goal of rehabilitating the inmate. Provisions should be made for women inmates to care for their infants based upon a determination that this is in the best interest of the child and upon a consideration of the mother's circumstances, including the nature of her crime, the length of her sentence, and her chances of parole. North Carolina General Statutes section 148-47, which requires incarcerated mothers to relinquish the care of their newborns to others, fails to consider the best interests of the child.

The 1983 amendment to section 15A-1353(a) demonstrates legislative recognition of the need for the correctional system to consider the circumstances of the pregnant defendant while enforcing the requirements of the penal code. The amendment is a significant first step towards accommodating the requirements of the legal system to the needs of pregnant defendants. Further legisla-

49. See Note, *Loss of Parental Rights*, *supra* note 10, at 97.

50. See, e.g., N.Y. DOM. REL. LAW § 111(2)(d) (McKinney 1977) ("The consent shall not be required of a parent or of any other person having custody of the child . . . who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored . . ."). See also *In re Anonymous*, 79 Misc. 2d 280, 359 N.Y.S.2d 738 (1974). Some states have equated parental incarceration with abandonment of parental responsibility and have implied the power to terminate parental rights upon incarceration. See, e.g., *Logan v. Coup*, 238 Md. 253, 208 A.2d 694 (1965); *In re Jacques*, 48 N.J. Super. 523, 138 A.2d 581 (1958), cited in Note, *Mothers Behind Bars*, *supra* note 10, at 145-46.

51. See Note, *Tie That Binds*, *supra* note 10, at 1419.

tion is needed, however, to ensure that the best interests of the child of an incarcerated woman are protected adequately.

JANINE ELIZABETH MCPETERS

The North Carolina "Canary" Rule—Protection for an Endangered Species?

For a forty-three day period beginning July 14, 1983, the North Carolina statute that allows criminal defendants discovery of their past oral statements¹ was among the most liberal of such statutes in the United States. The statute allowed defendants discovery of all of their past statements, regardless of to whom they were made, and seemed to require prosecutors to make a "diligent search" for all such statements. Many North Carolina district attorneys believed that the statute was too liberal and would be harmful to law enforcement efforts. They feared that it would impose a tremendous paperwork burden and would have a detrimental effect on the use of confidential informants.² Because of these concerns, the North Carolina General Assembly met in a special session on August 26, 1983, and amended the statute.³ Although this amendment limited the scope of discovery, criminal defendants in North Carolina remain in a better position than they were prior to 1983. The amended statute balances the defendants' interests in expansive discovery with the State's interests in less burdensome procedures and the use of confidential informants. This note considers the concerns that prompted the General Assembly to limit discovery of defendants' past statements and concludes that, although many of these concerns are supported weakly, the amended statute represents an effective compromise.

By liberalizing defense discovery the legislature probably hoped to make trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."⁴ Allowing a defendant to discover his past oral statements that are known to the prosecution is supported on the ground that "it is especially helpful to defense counsel in preparing for trial or in determining whether a guilty plea is advisable."⁵ Prior to 1983, a North Carolina defendant's right to discovery of such state-

1. Act of July 14, 1983, ch. 759, § 3, 5 1983 N.C. Adv. Legis. Serv. 39, amended by Act of Aug. 26, 1983 (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

2. See *infra* text accompanying notes 18-28.

3. Act of Aug. 26, 1983. See *infra* text accompanying notes 47-53.

4. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1147 (5th ed. 1980) (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958)) [hereinafter cited as Y. KAMISAR].

5. Y. KAMISAR, *supra* note 4, at 1155. The American Bar Association Standards for Criminal Justice identifies as one of its "General Principles" that "procedure prior to trial should: . . . [p]rovide the accused with sufficient information to make an informed plea." STANDARDS FOR CRIMINAL JUSTICE § 11-1.1(a)(ii) (1978). In its comments, the ABA notes,

[A] defendant who is ill-informed about the circumstances of the case may make judgments that are costly to the individual as well as the system. An overly optimistic view of the circumstances may lead to a wasteful trial, while an unduly pessimistic view of the circumstances may lead to a premature plea which is subsequently challenged. The finality of guilty pleas is particularly important when a substantial majority of all cases are resolved by plea.

Id. § 11 commentary at 11. In its comments regarding the principle that pretrial procedures should "permit thorough preparation for trial and minimize surprise at trial," the drafters note that "preparation is essential to proper conduct at trial . . . [T]he realist knows that effective-

ments was governed by the limiting language of North Carolina General Statutes section 15A-903(a)(2).⁶ Section 15A-903(a) provided that:

Upon motion of a defendant, the court must order the prosecutor:

....

(2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at trial.⁷

Disclosure of the substance of the defendant's oral statements that the prosecutor intended to use at trial was mandatory. An additional limitation imposed by the judiciary restricted mandatory disclosure to statements that had been made to a person acting on behalf of the State.⁸ Both these limitations were modeled on rule 16 of the Federal Rules of Criminal Procedure, the model for the more restrictive discovery statutes in the United States.⁹

In July of 1983 the North Carolina General Assembly significantly broadened the scope of mandatory disclosure by amending the statute to eliminate both limitations. Amended section 15A-903(a)(2) required the prosecutor:

To divulge, in written or recorded form, the substance of any oral statement made by the defendant, regardless of to whom the statement was made, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.¹⁰

Thus, the July amendment removed the "intended for use at trial" limitation and specifically removed from the coverage of the statute any limitation to statements made to persons acting on behalf of the State.¹¹ Those who favored the amendment stated that it ensured that "all the cards are on the table"¹² during trial, and gave "the defendant the opportunity to know what he is dealing with."¹³ These proponents noted that the defendant would no longer "be confronted by nameless accusers."¹⁴

ness at trial depends upon meticulous evaluation and preparation of the evidence to be presented at trial. *Id.*

6. N.C. GEN. STAT. § 15A-903(a)(2) (1983), *amended by* Act of Aug. 26, 1983. North Carolina has recognized that "no right to pretrial discovery existed at common law." *State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977). Instead, a defendant's right to discovery in North Carolina is governed by Article 48 of Chapter 15A of the General Statutes. Section 15A-903(a) governs discovery of statements made by the defendant; subdivision 1 governs written or recorded statements. Subdivision 2, with which this note is concerned, covers oral statements.

7. N.C. GEN. STAT. § 15A-903(a)(2) (1983).

8. *See State v. Mills*, 307 N.C. 504, 299 S.E.2d 203 (1983).

9. *See id.* at 509, 299 S.E.2d at 206; *State v. Crews*, 296 N.C. 607, 619, 252 S.E.2d 745, 753-54 (1979). Federal rule 16 limits discovery of a defendant's oral statements to those intended to be used at trial and those made "in response to interrogation by any person then known to be a government agent." FED. R. CRIM. P. 16.

10. Act of July 14, 1983, ch. 759, § 3, 5 1983 N.C. Adv. Legis. Serv. 39, *amended by* Act of Aug. 26, 1983, (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

11. *See id.*

12. Interview with Alan D. Briggs, Lobbyist for the N.C. Academy of Trial Lawyers, *quoted in* Raleigh News and Observer, July 29, 1983, at 1D, col. 3.

13. Interview with Rep. Allen Adams, D-Wake, *quoted in* Raleigh News and Observer, July 29, 1983, at 1D, col. 3.

14. *Id.*

The July amendment made North Carolina one of the more liberal jurisdictions under this category of defense discovery. The North Carolina statute no longer resembled federal rule 16, but came closer in form to the American Bar Association Standards,¹⁵ the primary model for many of this country's most liberal discovery statutes.¹⁶

Although proponents of liberal discovery supported this change, many North Carolina district attorneys disagreed. The district attorneys contended that the amended statute would harm law enforcement efforts. They argued against the statute, asserting two criticisms that traditionally are directed at broad discovery: first, the statute's vague and undefined boundaries would increase the prosecutor's paperwork burden; and second, the statute would lead to harassment of informants.¹⁷ The argument that the broadened scope of the prosecutor's duty would greatly increase their paperwork burdens¹⁸ was based on the requirement that the prosecutor disclose to the defendant all statements made by the defendant to any person, regardless of whether that person would be testifying at trial. The limits of this duty were marked by vague and undefined boundaries. The prosecutor was to disclose all such statements "within the possession, custody, or control of the State" that are "known or by the exercise of due diligence may become known to" the prosecutor.¹⁹ The statute did not indicate whether the prosecutor's duty was limited

15. STANDARDS FOR CRIMINAL JUSTICE § 11-2.11 (1978) provides for open file discovery.

16. "By 1975, twenty-two states had substantially implemented the ABA standards through judicial or legislative action." *Id.* § 11-1.1 commentary at 11.8, n.3 (citing Robinson, *The ABA Standards for Criminal Justice: What They Mean To The Criminal Defense Attorney*, 1 NAT'L J. CRIM. DEF. 3 (1975)); see generally Y. KAMISAR, *supra* note 4, at 1155.

17. See *infra* note 24.

18. See L. WATTS, REPORT TO THE HOUSE SELECT COMMITTEE TO EXAMINE THE PRETRIAL CRIMINAL DISCOVERY PROVISIONS OF SECTION 3 OF CHAPTER 759 (HOUSE BILL 1143), SESSION LAWS OF 1983 7 (Aug. 24, 1983) (Mr. Watts is Assistant Director, The Institute of Government, The University of North Carolina at Chapel Hill.). The report concluded that "paperwork is the most important single factor in the acceptance or rejection of any new procedure." *Id.* at 12. See also M. EASLEY, INTERVIEWS WITH FLORIDA STATE'S ATTORNEYS AND FLORIDA LAW ENFORCEMENT OFFICERS (Aug. 23, 1983) (Easley is the District Attorney for the 13th Judicial District of North Carolina.). Easley's report placed great emphasis on the greatly increased time and expense burdens.

The ABA Standards recognize that pretrial procedures should "effect economies in time, money, judicial resources, and professional skills by minimizing paperwork." STANDARDS FOR CRIMINAL JUSTICE § 11-1.1(vi) (1978). Although the ABA Standards provide for broad, liberalized discovery, the policy of minimizing paperwork is accomplished by allowing "open file" discovery—the prosecutor's files are open to the defendant. This minimizes the prosecutor's burden. Because the North Carolina statute denies discovery for much information, such as the names of witnesses, and witness statements, see *supra* text accompanying note 8, disclosure must be accomplished by defining the prosecutor's duty.

19. See *supra* note 10 and accompanying text.

Since one does not ordinarily use the language "possession, custody, or control," when speaking of things that do not have physical existence (such as oral statements), it is not possible to predict with reasonable certainty how this limitation will be interpreted. . . . It is unclear whether oral statements known to non-law-enforcement potential State's witnesses are included within "possession, custody, or control," but once anyone investigating or prosecuting the case learns of it, the State would seem to have possession, custody, or control. . . . [T]he statute places a further limitation based on the knowledge of the prosecutor in the case. He must know of the statement or be able to know of it through the exercise of due diligence. This raises an issue whether a discovery request by a defendant requires a prosecutor to begin a diligent search for any oral statements.

to disclosure of statements that were relevant to the offense charged, or whether there was a limitation with respect to the time when the statement was made.²⁰ Thus, the new statute arguably expanded the prosecutor's duty far beyond his own trial preparation to require a "diligent search"²¹ for any oral statements made by the defendant. The statute created an expensive, time-consuming paperwork burden for the State.

The paperwork argument, though important for the policy of effecting economies in the discovery process,²² was not the pivotal reason for the amendment by the North Carolina General Assembly. The needlessly vague and overreaching aspects of the statute could be changed easily and without-controversy to appease the district attorneys.²³ The district attorney's second argument—that the Act would lead to harassment of confidential informants—goes to the heart of the broad-versus-limited discovery argument and was the focal point of the controversy that led to the second amendment in August 1983.²⁴

The district attorneys contended that the July amendment would lead to the disclosure of the identities of confidential informants,²⁵ and that such disclosure would give rise to threats, and, in many cases, harm to informants. Although the July amendment did not order specifically the disclosure of the

The likelihood, however, is that the prosecutor—with his continuing duty to disclose under G.S. 15A-907—must, at a minimum, disclose oral statements when he learns of them.

K. CANNADAY, MEMORANDUM TO REPRESENTATIVE ALLEN ADAMS 2 (Aug. 11, 1983) (Cannaday is Assistant Director, The Institute of Government, The University of North Carolina at Chapel Hill.)

20. [M]ust the statement have some apparent relevance to the crime charged to be discoverable? No such limitation is explicitly contained in G.S. 15A-903(a)(2) as amended. Probably some apparent relevance is required. The question of whether that relevance was "apparent" would be for ad hoc determination in a hearing conducted in the absence of the jury. This issue did not arise under the old law since all statements intended for use at trial have apparent relevance.

Second, is there a limitation with respect to the time when the statement was made? Under the old law, this issue did not arise, since discovery was limited to statements made to persons acting on behalf of the State, which normally occur during the investigation of the alleged crime. This is in accord with the use of the word "statement" which, especially in the context of litigation, normally refers to formal declarations, reports, or narratives. However, "statement" can also mean a single declaration or remark. Thus, the new law may be interpreted to mean that the prosecutor must reduce to written or recorded form everything said by the defendant during the commission of the alleged offense, as well as anything relevant that he said before or afterward, no matter how voluminous this material may be.

K. CANNADAY, *supra* note 19, at 2-3.

21. *See supra* note 19.

22. *See supra* note 18.

23. *See infra* text accompanying notes 49-53.

24. According to newspaper reports, the concern that led to the August amendment was the protection of confidential informants. *See* Raleigh News and Observer, July 16, 1983, at 1C, col. 5; *id.* July 29, 1983, at 1D, col. 3; *id.* July 30, 1983, at 1A, col. 6; *id.* Aug. 5, 1983, at 1A, col. 1; *id.* Aug. 13, 1983, at 1A, col. 1; *id.* Aug. 16, 1983, at 1A, col. 5; *id.* Aug. 21, 1983, at 29A, col. 3; *id.* Aug. 23, 1983, at 1A, col. 1; *id.* Aug. 25, 1983, at 1A, col. 1.

25. North Carolina recognizes the privilege to withhold the identity of informants in N.C. GEN. STAT. § 15A-978(b) (1983). *See also* State v. Boles, 246 N.C. 83, 97 S.E.2d 476 (1957). This privilege is constitutional, at least as long as the issue is the lawfulness of the arrest. *Rugendorf v. United States*, 376 U.S. 528 (1964).

identities of prosecution informants, as do the statutes of the most liberal discovery jurisdictions,²⁶ opponents argued that a defendant who learned the incriminating statements from the prosecutor, as required by the July amendment, often would be able to determine the identity of the informants.²⁷ At a minimum, opponents argued that the possibility of exposure of the identities of informants and the resulting reluctance of informants to come forward would have a "chilling effect" on the use of this important prosecution device.²⁸

Proponents countered by arguing that this "chilling effect" would not result because district attorneys under existing state law would be able to obtain protective orders to shield informants.²⁹ Prosecutors, however, argued that protective orders do not guarantee satisfactorily informant anonymity. What a prosecutor might consider to be good cause for a protective order might not satisfy the judge who issues the orders. Thus, policemen and prosecutors would not be certain whether they could obtain a protective order. Without such guarantees most informants likely would not come forward.³⁰

These witness harassment arguments are speculative.³¹ The evidence presented to the legislative committee that examined the difficulties experienced by other states in implementing similar statutes demonstrates that, with the possible exception of Florida, no state has had any difficulty with witness harassment.³² A report on Florida's witness harassment experience was the

26. See Y. KAMISAR, *supra* note 4, at 1158.

27. Raleigh News and Observer, July 29, 1983, at 1D, col. 3.

28. *Id.*, Aug. 16, 1983, at 1A, col. 5.

29. *Id.* See also N.C. GEN. STAT. § 15A-908 (1983); *infra* text accompanying note 55.

30. Raleigh News and Observer, July 30, 1983, at 1A, col. 6; *id.* Aug. 13, 1983, at 1A, col. 1.

31. The ABA finds such arguments unconvincing:

Some of the traditional reasons for denying or restricting discovery have been the fear that pretrial disclosure will subject victims and witnesses to threats or other abuse. . . . However, experience with broad discovery suggests that discovery does not pose such problems in the majority of cases and that protective orders are an appropriate method of coping with the occasional case in which pretrial disclosure will jeopardize victims, witnesses, or evidence.

STANDARDS FOR CRIMINAL JUSTICE § 11 commentary at 11.16-17.

32. See M. EASLEY, *supra* note 18; L. WATTS, *supra* note 18. The difficulty of making comparisons with other states was recognized in the L. WATTS report:

Other states usually enacted broad discovery as a package, and the respondents from other states had difficulty in focusing upon the problems specifically caused by the portion on oral statements of defendants.

Most of the sixteen states surveyed require the provision of witness lists to defendants, and in many instances the statements of those witnesses. Thus a major criticism made here that furnishing the oral statements of defendants made to third parties will reveal the identity of those parties has no force in those states. Many other jurisdictions have specific provisions for keeping the identity of confidential informants secret, in the absence of constitutional prejudice to the defendant. In some states the privilege is in the section concerning what need not be disclosed along with the work-product exception; in others the maintenance of confidentiality as to an informer's identity is specifically a factor to be considered by the judge in fashioning protective orders. The most pervasive problem of comparability, though, arises from the fundamentally different way that prosecutors screen and prepare cases in the other jurisdictions contacted and contrasted with the way the majority of North Carolina prosecutors do.

L. WATTS, *supra* note 18, at 8.

instrumental factor in prompting the August amendment of the North Carolina statute.³³ To evaluate the effect of the August amendment, an analysis of the Florida experience is necessary.

Initially, it must be emphasized that any comparison between Florida's discovery laws and the July amendment to section 15A-903(a)(2) is critically suspect. The Florida law specifically requires the disclosure, prior to trial, of the names and addresses of all people whom the prosecutor believes have information concerning the case.³⁴ Furthermore, it allows the defendant to see the statements of informants.³⁵ Under North Carolina's July amendment, however, informants who did not offer prior statements of the defendant remained anonymous. Defendants were not entitled to see the exact statements or know the identity of the source. Therefore, Florida law differs substantially from the North Carolina law in a way that makes witness harassment considerably more likely under the former's version.

Although both states have protective order provisions to deny discovery when necessary to protect informants,³⁶ the effectiveness of such orders on an informant's willingness to come forward depends on the informant's certainty that the order will be issued.³⁷ Because Florida's discovery statute is much broader than the July amendment, there is a much greater risk to informants, and much less certainty about the effectiveness of protective orders. Thus, it does not follow that the July amendment would have caused any of the Florida witness harassment problems or the "chilling effect" on use of informants.

Although the Florida statute is distinguishable from the July amendment, Florida's experience contributed significantly to the North Carolina General Assembly's decision to amend the statute. It appears that the General Assembly was impressed by the similarity between both states' experience with drug trafficking, and the large amount of drug-related deaths in Florida that are connected with witness harassment.³⁸ Interestingly, the evidence presented to

33. Act of Aug. 26, 1983.

34. FLA. R. CRIM. P. 3.220.

35. *Id.*, which states in part:

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. . . .

36. See *id.*; N.C. GEN. STAT. § 15A-908 (1983). In Florida, the "general rule is that the State has the privilege of nondisclosure of the identity of a confidential informant and the burden is on the defendant to show why disclosure should be compelled." *Elkins v. State*, 388 So. 2d 1314, 1315 (Fla. Dist. Ct. App. 1980).

37. This conclusion follows from the argument of the North Carolina district attorneys who feared a "chilling effect" on the use of confidential informants. See *supra* text accompanying note 30.

38. See *infra* note 42.

the General Assembly demonstrates that Florida's problems with witness harassment are not widespread,³⁹ but apparently confined to a single county. In his report to the General Assembly,⁴⁰ Michael F. Easley, a North Carolina district attorney, noted that drug-related homicides were the second-highest category of murders in Dade County during 1981 and 1982.⁴¹ He also noted that Florida's discovery law, which requires disclosure of the names of witnesses, "contributed heavily to the drug-related murders."⁴²

The North Carolina General Assembly was concerned with the possibility of a similar increase in drug-related homicides as a result of the July amendment. The North Carolina district attorneys who were most unhappy with the July amendment were those in the coastal counties where, because of the "extensive coastline and expansive rural areas," drug smuggling is "rampant."⁴³ It was argued that under the liberal discovery provision of the July amendment, "[a]n attempt by the state, under those circumstances, to continue to aggressively prosecute all drug trafficking cases would be irresponsible. It would result in intimidation, serious bodily injury and death of potential state witnesses."⁴⁴ The district attorneys argued that in drug-related cases, "criminal penalties are stiff and defendants go to great lengths to avoid conviction."⁴⁵ Thus, because of organized crime's involvement in drug trafficking,⁴⁶ there would be a dangerous likelihood of harassment and harm to informants if their identity could be ascertained from the disclosures required by the July amendment. The General Assembly apparently was persuaded.

In response to the issues raised by the liberalized discovery statute the

39. See, e.g., Raleigh News and Observer, Aug. 21, 1983, at 29A, col. 3 (quoting Steve Masterson, Executive Director, Academy of Florida Trial Lawyers):

Masterson said his state has no problems prosecuting criminal cases while operating under a far more liberal disclosure rule than North Carolina's law officers are fighting. . . .

When informants do need to be kept confidential, Florida's rules permit statements and identities to be withheld from the defendant if "there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure."

According to Masterson, "If the prosecution can go in and show with any kind of reasonable prospect that there is going to be danger, it can get a protection order. In our area, many judges are former prosecutors, and they understand well the problems."

40. See M. EASLEY, *supra* note 18.

41. *Id.* at 2.

42. In a summary of his interview with Mike Diaz, a detective with the Homicide Division in Dade County, Easley noted the statement by Diaz that "the name of a witness must be disclosed prior to trial under their current discovery law and that this contributed heavily to the drug related murders." *Id.* at 2.

43. Raleigh News and Observer, July 30, 1983, at 1A, col. 6; *id.* July 29, 1983, at 1D, col. 3.

44. Raleigh News and Observer, July 30, 1983, at 1A, col. 6.

45. *Id.*, July 29, 1983, at 1D, col. 3.

46. Officer Diaz stated that these murders are difficult to solve because it was very easy to have Colombians and other Latins to fly in, get off the airplane, go to the victim's home, do the killing, go back to the airport and leave the country. Under those circumstances even if they could determine who did the killing it would not be practical to attempt to extradite the defendant from Colombia.

M. EASLEY, *supra* note 18, at 3.

General Assembly again amended the statute in August 1983. As amended, section 15A-903(a)(2) requires the prosecutor:

To divulge, in written or recorded form, the substance of any oral statement *relevant to the subject matter of the case* made by the defendant, regardless of to whom it is made, within the possession, custody, or control of the State, the existence of which *is known to the prosecutor or becomes known* to him prior to or during the course of the trial. . . .⁴⁷

Thus, amended section 15A-903(a)(2) limits the prosecutor's duty to disclose to defendants, statements "relevant to the subject matter of the case" and eliminates the "diligent search" requirement. By more clearly defining this duty, the August amendment rids the statute of much of the vagueness of the July amendment, and makes certain that this duty is not as broad as the July amendment implied.⁴⁸

The August amendment also reduces the prosecutor's paperwork burden. The statute continues with the limitation that "disclosure of such a statement is not required if it was made to an informant whose identity is a prosecution secret and who will not testify for the prosecution, and if the statement is not exculpatory."⁴⁹ This limitation also reduces significantly the paperwork burden since prosecutors need only be concerned with documenting statements made to witnesses who will testify at trial—a burden that merely is incidental to normal trial preparation. Moreover, the prosecutor no longer will have to worry about divulging statements of his informants as long as they do not testify at trial. This latter aspect should eliminate fears of witness harassment and reduce any "chilling effect" on witnesses or informants. Furthermore, the reference in the statute requiring the disclosure of "exculpatory statements" known to the prosecutor is consonant with the due process requirement that exculpatory evidence be made available to the defendant.⁵⁰

As a safeguard to the defendant's interests in not being surprised at trial, the new statute adds: "If disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial."⁵¹ This addition ensures that if a statement is withheld from a defendant because it became known to the prosecution through a confidential informant, the informant will not be allowed to testify for the prosecution at trial—even if the informant

47. Act of Aug. 26, 1983 (emphasis added) (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

48. See *supra* text accompanying note 21.

49. Act of Aug. 26, 1983 (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

50. The disclosure of known exculpatory evidence that has been "requested" and is "material" is mandated by the due process guarantee of a fair trial. See *United States v. Agurs*, 427 U.S. 97, 105 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady* the Court stated:

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice

Id. at 87-88.

51. Act of Aug. 26, 1983.

later decides to give up his confidential status. Thus, even though the defendant will be deprived of the knowledge that the prosecution is aware of this statement, the defendant does not need this information for preparing his case. The prosecutor is prohibited from using this witness at trial.

Finally, the new statute adds the requirement that:

If the statement was made to a person other than a law enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial.⁵²

In so doing, the prosecutor's paperwork burden is eased as he is ensured a certain amount of time before his duty of disclosure is triggered. More importantly, it reduces the likelihood of harassment of witnesses whose identity eventually will become known to the defendant. The prosecutor now can protect his witnesses until the latest practical date. The significance of the "Wednesday prior to the beginning of the week" of trial, and the reason that this is the latest practical date, relates to the statutory deadline for pretrial motions, which falls on such Wednesdays at five o'clock P.M.⁵³ The new statute sets twelve o'clock as the prosecutor's disclosure deadline to permit the defense attorney five hours to move for a continuance in light of this new evidence.⁵⁴

Simultaneously with the amendment of this section of the statute, North Carolina General Statutes Section 15A-908(a) was amended to provide protection in, as specific examples of what may constitute "good cause" for the issuance of a protective order, situations where "there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment."⁵⁵ This amendment apparently was an attempt to add a degree of certainty to the process of obtaining protective orders so that confidential informants can be given guarantees of remaining anonymous. Such guarantees, it is hoped, will help avoid any "chilling effect" on informants.

The August amendment is a compromise. On the one hand, it balances the interests of providing defendants with the broadest possible discovery and avoiding surprise at trial. On the other, it balances the interest of effecting economies in the discovery process by limiting the prosecutor's paperwork burden, and protecting the interests of confidential informants. The compromise is sound. A defendant in North Carolina is in a much better position than he was prior to 1983. He will be allowed discovery of all statements he made that became known to the prosecutor through witnesses who will testify

52. *Id.*

53. See N.C. GEN. STAT. § 15A-952(c) (1983).

54. Act of Aug. 26, 1983. Arguably, five hours is too short a time for this decision to be made by anyone, except possibly an attorney whose single client is this defendant. Delaying disclosure to this late moment may be unfair, as there is no guarantee a continuance will be granted, and, even where one is granted, inconvenience would still result.

55. N.C. GEN. STAT. § 15A-908(a) (1983).

against him at trial. In addition, the defendant's position has been improved with a minimal effect on the prosecutor's burden and use of confidential informants.

It can be argued that all of a defendant's known statements should be discoverable,⁵⁶ and that the North Carolina General Assembly's decision to exclude those made to a confidential informant was based on inconclusive comparisons with a single county in Florida. As long as the protected informants do not testify at trial, however, it is difficult to argue that excluding these statements will hurt the defendant in his trial preparation or in determining whether a guilty plea is advisable. The North Carolina district attorneys' arguments in favor of protecting the identities of confidential informants, though weakly supported in evidence, have some logical appeal. A test period in which the legislature could study the effects of the more liberal discovery rules would have been worthwhile. This test period would have been especially appealing in light of the August amendment to the protective order statute. The safety of confidential informants, however, is a significant concern and justifies the less expansive new statute.

JONATHAN M. POLK

56. See *supra* notes 4-5 and accompanying text.

Compelling Competence Through the Use of Psychotropic Drugs: A Due Process Analysis

The United States Constitution has long been construed to require that criminal defendants be competent to stand trial.¹ Recent advances in the science of psychiatry have clouded significantly the issue of competency by making it possible to compel a defendant to become competent through the forced administration of drugs.² The legal repercussions of compelled competency have been addressed by a significant number of courts, and the issue was raised before the North Carolina Court of Appeals in *State v. Monk*.³ Although the court declined to decide the issue, it noted that compelled competency, when presented squarely, will raise issues of constitutional significance. These issues include the right to bodily integrity free from unwarranted infringement by the state,⁴ the right to control one's own thought processes,⁵ and the right to appear before the jury free from drugs that affect one's thought, expression, and manner.⁶ This note analyzes the issues surrounding compelled competency, and recommends an approach for resolving them. The proposed resolution requires the courts to apply a strict scrutiny due process analysis to determine if the administration of psychiatric drugs has been conducted in the least restrictive manner consistent with bringing the defendant to trial.

The issue of compelled competency in *State v. Monk* arose when James Levone Monk was committed to Dorothea Dix Hospital for a competency examination.⁷ At a hearing following his examination Monk was found incompetent to stand trial.⁸ The court ordered defendant returned to Dorothea Dix for treatment and authorized the administration of drugs.⁹

1. See *infra* notes 19-23 and accompanying text.

2. See generally Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RESEARCH J. 769.

3. 63 N.C. App. 512, 305 S.E.2d 755 (1983).

4. *Id.* at 516, 305 S.E.2d at 758.

5. *Id.*

6. *Id.*

7. Defendant was committed for evaluation pursuant to N.C. GEN. STAT. § 15A-1002 (1983). *Monk*, 63 N.C. App. at 515, 305 S.E.2d at 758. The North Carolina statutory scheme allows the question of a defendant's capacity to proceed to be raised at any time on motion by the defendant, defense counsel, prosecutor, or court. N.C. GEN. STAT. § 15A-1002(a) (1983). Once raised, the judge may commit the defendant to a state mental health facility for observation and treatment for a period not to exceed 60 days. *Id.* § 15A-1002(b)(2). Following the defendant's release from the facility, the judge must hold a competency hearing. *Id.* § 15A-1002(b)(3).

8. *Monk*, 63 N.C. App. at 513, 305 S.E.2d at 757.

9. *Id.* at 513-14, 305 S.E.2d at 757.

The treating physician in his or her discretion shall administer such medication at such times as is necessary to make the defendant likely to become competent to assist in preparation of his defense and to participate in his trial so long as such medications do not create a substantial risk of serious or long term side effects. If the defendant refuses to voluntarily take the required and necessary medication, the attending physician or physicians and their staff assistants, are authorized and are directed by this court to utilize such medically safe procedures as they reasonably believe necessary to compel the patient to take the medication

Id. at 515, 305 S.E.2d at 758.

Monk's second commitment to Dorothea Dix lasted fifty-three days,¹⁰ during which time the drugs Haldol¹¹ and Artane¹² were administered to him by the hospital staff. After this treatment, he was returned to court for a second competency hearing, at which time he was adjudged competent to stand trial.¹³ Following his second commitment, Monk moved for the discontinuance of medication to enable him to appear before the jury free from the influence of drugs.¹⁴ Such a motion was unnecessary, however, because the trial court's order did not contemplate compelled medication following his release from Dorothea Dix.¹⁵ The administration of Haldol and Artane terminated three months prior to Monk's trial.¹⁶ Consequently, the issue raised in Monk's motion, whether he had a right to appear before the jury unmedicated, was rendered moot before it reached the North Carolina Court of Appeals.¹⁷ Monk was tried for slaying his father and was convicted of voluntary manslaughter.¹⁸

When the issue is raised properly the court will be forced to confront the constitutional issues surrounding compelled competency. Competency to stand trial refers to the mental capacity required of a defendant by the due process clause of the fourteenth amendment.¹⁹ In North Carolina the standard for competency is set out in *State v. Buie*.²⁰

"The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate

10. *Id.* at 514, 305 S.E.2d at 757.

11. *Id.* Haldol is one of a group of drugs known as the "major tranquilizers." See, e.g., Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U.L. Rev. 461, 474 n.77 (1978). The major tranquilizers are antipsychotic drugs used primarily to treat schizophrenia. The major tranquilizers (e.g., Thorazine, Stelazine, Trilafon, Prolixin, Navane, Mellaril, and Haldol) together with antidepressant (e.g., Elavil and Aventyl), anti-anxiety (e.g., Vistaril and Valium), and sedative-hypnotic (e.g., chloral hydrate) medications comprise the field of psychotropic or psychoactive drugs. See, e.g., Winick, *supra* note 2, at 778.

Antipsychotic drugs influence the chemical transmissions in the brain, affecting both activity and inhibitory functions. They are mind-altering drugs used to reduce the level of psychotic thinking. See, e.g., Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). The psychotic symptoms suppressed by the major tranquilizers include hallucinations and delusions; the drugs do not affect the cortex—the "thinking" part of the brain. See, e.g., Note, *The Case of the Tranquilized Defendant*, 28 LA. L. REV. 265, 266 (1968).

12. *Monk*, 63 N.C. App. at 514, 305 S.E.2d at 757. Artane is a drug used to control the side effects of psychotropic medication. For a discussion of the side effects associated with chemical competence see *infra* note 57.

13. *Monk*, 63 N.C. App. at 514, 305 S.E.2d at 757.

14. *Id.* at 516, 305 S.E.2d at 758.

15. *Id.* See *supra* note 9.

16. *Monk*, 63 N.C. App. at 516, 305 S.E.2d at 759.

17. *Id.* at 517, 305 S.E.2d at 759.

18. *Id.* at 514, 305 S.E.2d at 757.

19. See, e.g., Dusky v. United States, 362 U.S. 402 (1960); People v. Bilyew, 55 Ill. App. 3d 69, 370 N.E.2d 585 (1977), *rev'd*, 73 Ill. 2d 294, 383 N.E.2d 212 (1978); State v. Buie, 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971 (1979).

20. 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971 (1979).

with his counsel to the end that any available defense may be interposed."²¹

The right to be competent during trial is guaranteed by the sixth amendment's command that the accused be permitted to confront adverse witnesses.²² The right to be present and confront witnesses includes not only physical presence in the courtroom, but mental "presence" as well.²³ An incompetent defendant is afforded no meaningful opportunity to defend himself.

The mental state necessary to defend oneself may be achieved through the use of medication. In spite of some early resistance to "synthetic sanity" and "chemical competence,"²⁴ courts now agree that the method by which the defendant attains the requisite mental standard does not affect the finding of present competency.²⁵ "Any other holding would constitute an atavistic repudiation of the advances made in the treatment of the mentally ill during the past two decades."²⁶

In determining whether a defendant may use a drug to become competent to stand trial, the scope of the court's inquiry should be limited to whether the medication adversely affects the "thought, expression, manner and content of the person using the drugs."²⁷ If the medication has a substantial effect, then the defendant is not competent to stand trial under its influence.²⁸ If the medication administered enhances the defendant's cognitive abilities, however, he

21. *Id.* at 161, 254 S.E.2d at 28 (quoting *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975)). The requirement that the defendant have the capacity to proceed, and the definition of capacity, are codified at N.C. GEN. STAT. § 15A-1001(a) (1983).

22. *See, e.g.*, *State v. Hancock*, 247 Or. 21, 28, 426 P.2d 872, 875 (1967).

23. *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (some view the prohibition against trying an incompetent as a by-product of the ban against trials *in absentia*); *State v. Hancock*, 247 Or. 21, 28, 426 P.2d 872, 875 (1967).

24. *See State v. Hampton*, 253 La. 399, 218 So. 2d 311 (1969); *see generally* Winick, *supra* note 2.

25. *See United States v. Hayes*, 589 F.2d 811 (5th Cir.) (Aventyl and Mellaryl), *reh'g denied*, 591 F.2d 1343, *cert. denied*, 444 U.S. 847 (1979); *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86 (3d Cir.) (Equanil and Thorazine), *cert. denied*, 435 U.S. 928 (1978); *Mines v. State*, 390 So. 2d 332 (Fla.), *cert. denied*, 451 U.S. 916 (1981); *People v. Jackson*, 57 Ill. App. 3d 809, 373 N.E.2d 583 (1978); *State v. Lawrence*, 368 So. 2d 699 (La. 1979) (Mellaryl); *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379 (1978) (Lithium, Stelazine and Valium); *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976) (Thorazine); *State v. Buie*, 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971 (1979); *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974) (Haldol); *State v. Norris*, 40 Or. App. 505, 595 P.2d 1261 (1979); *State v. Hancock*, 247 Or. 21, 426 P.2d 872 (1967) (Valium); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978) (Haldol and Loxatane); *State v. Stacy*, 556 S.W.2d 552 (Tenn. Crim. App. 1977) (Haldol), *aff'd*, 601 S.W.2d 696 (Tenn. 1980); *In re Pray*, 133 Vt. 253, 336 A.2d 174 (1975) (Thorazine, Phenobarbital, Tofranil, and Chlorohydrate); *State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971); *State v. Gwaltney*, 77 Wash. 2d 906, 468 P.2d 433 (1970); *State v. Murphy*, 56 Wash. 2d 761, 355 P.2d 323 (1960) (Equanil and Trancopal).

The principle that drug use does not render one per se incompetent applies to controlled substances as well as psychotropic medication. *See, e.g.*, *Lewis v. United States*, 542 F.2d 50 (8th Cir.) (heroin), *cert. denied*, 429 U.S. 837 (1976); *United States ex rel. Fitzgerald v. LaValle*, 461 F.2d 601 (2d Cir.) (heroin), *cert. denied*, 409 U.S. 885 (1972); *Grennet v. United States*, 403 F.2d 928 (D.C. Cir. 1968) (heroin and methedrine).

26. *State v. Stacy*, 556 S.W.2d 552, 555 (Tenn. Crim. App. 1977) (quoting *People v. Parsons*, 82 Misc. 2d 1090, 1093, 371 N.Y.S.2d 840, 842 (1975)), *aff'd*, 601 S.W.2d 696 (Tenn. 1980).

27. *State v. Maryott*, 6 Wash. App. 96, 97, 492 P.2d 239, 240 (1971).

28. *Id.* *See also Whitehead v. Wainwright*, 447 F. Supp. 898 (M.D. Fla. 1978) (defendant so heavily sedated he fell asleep at counsel table).

is competent to stand trial while medicated.²⁹

The inquiry is more complex, however, when the state seeks to compel the defendant to become competent to stand trial. The first point of inquiry must be the nature of the defendant's interest in being free from medication. The courts that have addressed this issue have found that the defendant's interest in being free from compelled medication is a fundamental right.³⁰ This right has its roots in a number of constitutional protections that the courts have identified.

The most frequently identified source of the right to be free from the compelled administration of psychotropic drugs is the first amendment.³¹ The first amendment protects not only the communication of ideas, but also the freedom to generate ideas.³² Psychotropic drugs are mind-altering chemicals that potentially may infringe on the defendant's right to control his own thought processes.³³

The administration of drugs against the defendant's will also interferes with his right to bodily integrity.³⁴ Although not specifically protected by the Constitution, bodily integrity falls squarely within the right to privacy the Supreme Court has recognized surrounding the first, fourth, fifth, ninth, and fourteenth amendments.³⁵ One court has found that this right to privacy encompasses the right to protect one's mental processes from governmental interference.³⁶ Courts also have noted that the coerced administration of psychotropic drugs may infringe upon the right to freedom of religion³⁷ and

29. See, e.g., *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976) (no evidence presented that Thorazine affected defendant's thought processes or the content of defendant's thoughts); *State v. Hancock*, 247 Or. 21, 426 P.2d 872 (1967) (Valium did not affect defendant's ability to communicate with other people, did not affect his memory, and did not impair his mental functioning); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978) (evidence indicated that the medication was beneficial to defendant's thought processes).

30. See, e.g., *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976) (civil action); *Winters v. Miller*, 446 F.2d 65 (2d Cir.) (civil action), *cert. denied*, 404 U.S. 985 (1971); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979) (civil action), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (civil action), *modified*, 653 F.2d 836 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 3506 (1982); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978); *State v. Mayott*, 6 Wash. App. 96, 492 P.2d 239 (1971); Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331 (1981); Winick, *supra* note 2.

31. See *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976); *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971); *State v. Maryott*, 6 Wash. App. 96, 98, 492 P.2d 239, 240 (1971).

32. *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979) (first amendment's protection of the right to communicate ideas presupposes the capacity to produce ideas), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982).

33. Winick, *supra* note 30, at 366 (psychotropic drugs intrude directly upon mental processes).

34. See *State v. Law*, 270 S.C. 664, 674, 244 S.E.2d 302, 307 (1970); Winick & DeMeo, *Competence to Stand Trial in Florida*, 35 U. MIAMI L. REV. 31, 63-64 (1980).

35. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

36. *Rennie v. Klein*, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("[T]he right of privacy is broad enough to include the right to protect one's mental processes from governmental interference."), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *reheard*, 720 F.2d 266 (3d Cir. 1983).

37. *Winters v. Miller*, 446 F.2d 65 (2d Cir.) (court held that state must have compelling interest to administer psychotropic drugs to an unwilling Christian Scientist), *cert. denied*, 404 U.S. 985 (1971).

the eighth amendment's proscription of cruel and unusual punishment.³⁸

Once the court has determined that the defendant has a fundamental right to be free from compelled psychotropic medication, due process³⁹ requires that any infringement of the right be strictly scrutinized.⁴⁰ Strict scrutiny demands that the state have a compelling interest that is furthered by the restriction,⁴¹ and that the restriction be the least restrictive means to achieve that end.⁴²

The state's interest in compelling the administration of psychotropic drugs is to try currently incompetent defendants. The Supreme Court has noted that the "Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."⁴³ The state's interest in bringing to trial one accused in good faith and with probable cause lies at the very heart of its police power.⁴⁴ If the state is unable to try those accused, it will be forced to release them or institute civil commitment proceedings.⁴⁵ In light of these considerations the state's interest in forcing defendants to become competent is compelling.

Although the presence of a compelling interest does permit the state to infringe upon the fundamental right of an incompetent accused, the infringement must be tailored by the courts to achieve the permissible end in the least restrictive manner.⁴⁶

The method chosen for returning the defendant to competence is the first consideration in determining whether the compelled competence of a defendant comports with the least restrictive means test. If there is any indication

38. See *Scott v. Plante*, 532 F.2d 939, 946-47 (3d Cir. 1976); but see *Rennie v. Klein*, 462 F. Supp. 1131, 1143 (D.N.J. 1978) (no eighth amendment claim because psychotropic drugs are a justifiable method of treatment; side effects of psychotropic drugs not disproportionately harsh compared to benefits), modified, 653 F.2d 836 (3d Cir. 1981), cert. granted, 102 S. Ct. 3506 (1982). For a discussion of the side effects of psychotropic medication see *infra* note 57.

Compelled competency may infringe on a defendant's eighth amendment rights in the situation hypothesized by the Louisiana Supreme Court in *State v. Burrows*, 250 La. 658, 659, 198 So. 2d 393, 394 (1967). The trial judge asked: "Can he be compelled to take drugs that will produce sanity sufficient for him to stand trial and, if found guilty of the death penalty, [sic] compelled to take drugs so that he may remain sane in order that his life may be taken?" *Id.* The court never resolved the issue, however, because the trial court's finding of competency was interlocutory and not appealable. *Id.* at 667, 198 So. 2d at 395-96.

39. "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) or are 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." *Rochin v. California*, 342 U.S. 165, 169 (1952) (footnote omitted).

40. *United States v. O'Brien*, 391 U.S. 367 (1968).

41. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

42. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

43. *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring).

44. *Winick & DeMeo*, *supra* note 34, at 64.

45. See *State v. Stacy*, 556 S.W.2d 552, 558 (Tenn. Crim. App. 1977), *aff'd*, 601 S.W.2d 696 (Tenn. 1980). The state may not deprive indefinitely the incompetent defendant of his liberty without due process. See *Jackson v. Indiana*, 406 U.S. 715 (1972); Steinberg, *Summary Commitment of Defendants Incompetent to Stand Trial: A Violation of Constitutional Safeguards*, 22 St. Louis U.L.J. 1 (1978).

46. *Shelton v. Tucker*, 364 U.S. 479 (1960).

that the defendant can be returned to competence within a reasonable time using a less intrusive method of therapy,⁴⁷ such as traditional verbal psychotherapy, that does not violate the defendant's right to bodily integrity, or a less potent drug, that is less violative of defendant's freedom of thought, then the defendant should be permitted to try that mode of treatment until it is clear that improvement is not being made.⁴⁸ A significant factor that must be weighed in determining the least restrictive mode of treatment is the likelihood and potential severity of side effects from the use of psychotropic medication.⁴⁹

If treatment with psychotropic drugs is the least restrictive means for returning a given defendant to competency,⁵⁰ the trial judge must conduct the defendant's trial in a manner that minimizes the effects of compelled medication. The least restrictive means standard mandates that the medication be used only to effect the defendant's return to competency and not to infringe on any of the defendant's other rights. Consequently, sensitivity to the effects of psychotropic medication is essential when the defendant is to be tried before a jury.⁵¹

At the very least, the jury must be informed that the defendant is receiving psychotropic medication and of the effects of the medication.⁵² This may be done through the defendant's testimony or through an expert witness.⁵³ The jury must be made aware that the demeanor of the defendant in the courtroom, particularly if he appears calm, callous, and incapable of feeling remorse,⁵⁴ does not reflect the defendant's personality, but is a result of the state's action in medicating him against his will.⁵⁵ Because the effect of the medication may go beyond merely returning the defendant to competence and may affect adversely his demeanor before the jury, an explanation that the defendant is medicated should be required to minimize any unnecessary in-

47. For a discussion of the various modes of psychotherapy and an evaluation of the degree of intrusiveness of each method, see Winick, *supra* note 30, at 351-73.

48. Winick & DeMeo, *supra* note 34.

49. See *infra* note 57.

50. The decision to medicate a defendant never should be made without informing counsel. Should the state try a medicated defendant without revealing the details of his medication to counsel, the defendant will have a claim against the state under *Brady v. Maryland*, 373 U.S. 83 (1963), for withholding exculpatory evidence. See *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 93 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978) (court did not reach the *Brady* issue in habeas corpus petition because defendant had not exhausted state remedies).

51. These considerations are no less important in trying a defendant who is voluntarily medicated.

52. *In re Pray*, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975); see also FLA. R. CRIM. P. 3.214(c)(2) (requiring that the jury be instructed before trial and in the charge regarding the medication and its effects).

53. See *United States v. Hayes*, 589 F.2d 811, 824 (5th Cir. 1979); *State v. Jojola*, 89 N.M. 489, 493, 553 P.2d 1296, 1300 (1976); *State v. Gwaltney*, 77 Wash. 2d 906, 909, 468 P.2d 433, 435 (1970) ("The inability of a defendant to effectively express to a judge or jury his true emotional feelings on a subject is a fact that can be adequately explained to a trier of fact by either the defendant himself or another witness.").

54. See Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. FORENSIC SCI. 568, 574 (1972).

55. *State v. Murphy*, 56 Wash. 2d 761, 766, 355 P.2d 323, 326 (1960).

fringement on his right to appear and testify on his own behalf.⁵⁶

The trial judge dealing with a medicated defendant also must familiarize himself with the side effects of psychotropic drugs⁵⁷ so that he can act to minimize any prejudicial effect on the jury that may deprive the defendant of a fair trial.⁵⁸ A liberal recess policy during trial may be sufficient to accommodate minor side effects after administration of medication.⁵⁹ Serious side effects, however, may require more drastic measures. In cases in which the defendant's symptoms from psychotic medication are so severe as to be distracting or prejudicial, the trial court may excuse the defendant's presence during trial.⁶⁰

The defendant's right to testify in his own behalf and present evidence will be infringed most seriously in cases in which the defendant places his mental state in issue by raising the defense of insanity or diminished capacity. When the mental state of the defendant is in issue, it is the mental state at the time of the alleged crime, and not at the time of trial, that is relevant.⁶¹ The

56. The defendant's right to testify in his own behalf derives from statutes that make the defendant competent to testify, contrary to the common-law rule making defendants incompetent because of interest. *See, e.g.*, N.C. GEN. STAT. § 8-54 (1981); *see generally* *Washington v. Texas*, 388 U.S. 14 (1967).

57. The toxic side effects of psychotropic medication vary from individual to individual and with the particular drug, the dosage, and the length of treatment. The most serious side effect of antipsychotic drugs is tardive dyskinesia, which some studies indicate strikes about 50% of chronically hospitalized schizophrenics and about 40% of those treated on an out-patient basis. *Rogers v. Okin*, 478 F. Supp. 1342, 1360 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). Tardive dyskinesia produces involuntary motor movements, particularly of the face and lips. Involuntary movements also may strike the fingers, hands, legs, and pelvic area. *Id.* *See also* Plotkin, *supra* note 11, at 476. "In its most progressive state, the disease can interfere with swallowing and can affect all motor activity. Although in mild cases the disease can simply be a source of embarrassment, it can be physically and psychologically disabling." *Rogers*, 478 F. Supp. at 1360. There is no known effective treatment for tardive dyskinesia. Winick, *supra* note 30, at 366.

A group of less severe neurological side effects of antipsychotic drugs are known as extrapyramidal effects. The symptoms include: akathisia (motor restlessness and agitation); akinesia (physical immobility and lack of spontaneity); dystonic reactions (muscle spasms in face, neck, and arms characterized by irregular flexing or writhing); and pseudoparkinsonian syndrome (mask-like face, drooling, muscle rigidity, and tremors). These extrapyramidal effects cease when the drug is terminated. *See Rogers*, 478 F. Supp. at 1360; Plotkin, *supra* note 11, at 475.

In addition to tardive dyskinesia and the extrapyramidal effects, a variety of nonmuscular side effects may occur. These include drowsiness, blurred vision, lack of sexual desire, frigidity, depression, constipation, diarrhea, rashes, and menstrual changes. *See Scott v. Plante*, 532 F.2d 939, 945 n.8 (3d Cir. 1976); *See Plotkin, supra* note 11, at 476; Winick, *supra* note 30, at 366. More serious nonmuscular side effects include ocular changes, cardiovascular changes, convulsions, and sudden death. *See Plotkin, supra* note 11, at 476; Winick, *supra* note 30, at 366.

58. Due process requires that the defendant receive a fair trial by an impartial jury free from improper influences. *See, e.g.*, *Estell v. Williams*, 425 U.S. 501 (1976) (fourteenth amendment prohibits state from compelling defendant to stand trial in prison garb due to prejudicial effect on jury); *United States v. Garcia*, 456 F. Supp. 1354 (D.P.R. 1978) (right to fair trial requires suppression of right to free speech when trial publicity will prejudice jury or potential jurors).

59. *See Winick, supra* note 2, at 789.

60. *State v. Larson*, 94 N.M. 795, 797, 617 P.2d 1310, 1313 (1980) (although denying defendant's motion to excuse his presence during trial, the court indicated that the trial judge may have discretion to excuse a defendant in appropriate circumstances). *See also In re United States*, 597 F.2d 27, 27-28 (2d Cir. 1979) ("We think, however, that there is a residue of judicial discretion in unusual circumstances where good cause is shown such as physical endangerment of the defendant to permit temporary absence.").

61. *State v. Law*, 270 S.C. 669, 671-72, 244 S.E.2d 302, 306 (1978) (jury was well aware that issue was mental state at time of alleged crime, not time of trial).

demeanor of the defendant at the time of trial, however, is probative evidence of his mental state at the time of the offense.⁶² Consequently, by compelling the defendant to take medication that alters his attitude, appearance, and demeanor, the state can determine the evidence the jury will see on the issue of the defendant's mental state.⁶³

Precluding the defendant from presenting evidence relevant to his mental state does not comport with the least restrictive means standard. Such an imbalance in the adversary system may be remedied in part by permitting the defendant to appear before the jury unmedicated for some portion of the trial⁶⁴ if he so requests.⁶⁵ The Supreme Court of Vermont noted the importance of such an opportunity in *In re Pray*:⁶⁶ "Yet his deportment, demeanor, and day-to-day behavior during the trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity."⁶⁷

The trial judge should arrange for the defendant to be free from medication, to the extent it is consistent with the progress of the trial and the safety of the public,⁶⁸ whenever evidence of the defendant's demeanor will be probative of a fact in issue or help the jury make a decision, including whether to impose the death penalty.⁶⁹ Denial of such a request is an infringement of the defendant's right to testify effectively in his own behalf and is a denial of due process.

Finally, the trial judge should not hesitate to appoint an independent psychiatric expert, at the defendant's request or sua sponte, to review the defendant's medication records to ensure that he is receiving the proper drug, correct dosage, and any medication necessary to combat disabling side effects. This will provide the trial judge with the information necessary to determine if the defendant's competence is being maintained in the least restrictive manner during trial.

In summary, the use of psychotropic drugs to compel competency in-

62. See, e.g., *State v. Babin*, 336 So. 2d 780, 781 (La. 1976); *State v. Bundridge*, 294 N.C. 45, 49, 239 S.E.2d 811, 815 (1978); *In re Pray*, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975); *State v. Maryott*, 6 Wash. App. 96, 101-02, 492 P.2d 239, 242 (1971); 4 J. WIGMORE, EVIDENCE § 1160 (Chadbourn rev. ed. 1972).

63. *State v. Maryott*, 6 Wash. App. 96, 102, 492 P.2d 239, 242 (1971).

64. See, e.g., *State v. Hayes*, 118 N.H. 458, 462, 389 A.2d 1379, 1382 (1978). Of course, a request to appear before the jury unmedicated should be granted only if the defendant was, in fact, unmedicated at the time of the alleged offense. *Id.* at 462, 389 A.2d at 1382. (Hayes had been taking psychotropic drugs until the day before the alleged crime; he requested to be taken off psychotropic medication seven days before trial.)

65. That the defendant will be incompetent for a portion of the trial if his request is granted will not violate due process in this context. If the defendant chooses, while competent, to become incompetent, then he effectively waives his right not to be tried while incompetent. See *State v. Maryott*, 6 Wash. App. 96, 103, 492 P.2d 239, 243 (1971) (construing *Illinois v. Allen*, 397 U.S. 337, 350 (1970)).

66. 133 Vt. 253, 336 A.2d 174 (1975).

67. *Id.* at 257, 336 A.2d at 177.

68. *Id.*

69. *State v. Murphy*, 56 Wash. 2d 761, 766, 355 P.2d 323, 326 (1960) (defendant's demeanor was "casual, cool, [and with a] somewhat lackadaisical attitude"; a new trial was necessary because court could not know to what extent the defendant's appearance as a witness affected the jury).

fringes on the defendant's fundamental rights, including his right to testify in his own behalf. Given the state's compelling interest in bringing the defendant to trial, this infringement will not amount to a denial of due process of law as long as the use of the psychotropic drugs is necessary and is implemented in the least restrictive manner. Reviewing courts must examine each instance of compelled medication to determine whether psychotropic drugs have been used solely to bring the defendant to trial and in the least intrusive manner. If a reviewing court finds that the only effect of the medication is the defendant's return to competence, there has been no denial of due process. If the court finds, however, that, in spite of protective measures, the influence of psychotropic drugs has precluded the defendant from presenting relevant evidence or confronting the witnesses against him, the defendant has been denied due process and his conviction must be reversed.

NANCY PRAHOFER

The Fair Sentencing Act Meets the Tender Mercies of North Carolina Trial Judges

In 1979 the North Carolina General Assembly passed the Fair Sentencing Act.¹ The Act establishes a framework whereby each felony is assigned to a class of offenses.² Each class is assigned a maximum³ and a presumptive⁴ prison term. During the sentencing portion of a criminal trial, the judge, if he imposes a prison term, "must impose the presumptive term provided in [the statute] unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term."⁵ The Act enumerates several aggravating and mitigating circumstances that the judge *must* consider, but also allows the judge to consider any other factors he believes are related to the purposes of sentencing and are supported by a preponderance of the evidence.⁶

In the two and one-half years since the Fair Sentencing Act went into effect, distinct trends have developed in the judicial interpretation of the Act. Foremost among these trends is limited review of both the trial judge's definition of aggravating or mitigating circumstances and his factual determination that these circumstances exist. This note contends that such limited review defeats the Act's original purpose of providing greater certainty in the length of prison sentences and increases the danger of convicting a defendant of a crime with which he never was charged.

The Act had its genesis in several years of study by the General Assembly's Commission on Correctional Programs.⁷ The Commission found that broad disparities in sentences and actual prison terms were a primary cause of prison unrest,⁸ and concluded that sentences certain in length would be more effective deterrents to crime.⁹ The Commission observed that disparities in sentencing generally were caused by the broad discretion allowed to trial judges and parole authorities.¹⁰ Influenced by the report of the Twentieth Century Fund Task Force on Criminal Sentencing,¹¹ the Commission recom-

1. Fair Sentencing Act, ch. 760, 1979 N.C. Sess. Laws 850 (codified at N.C. GEN. STAT. §§ 15A-1340.1 to .7 (1983)). The Act applies to felonies committed on or after July 1, 1981. N.C. GEN. STAT. § 15A-1340.1(a) (1983).

2. N.C. GEN. STAT. § 15A-1340.1(a) (1983). Specific felony classifications are found in each felony subsection of the criminal law section of the North Carolina General Statutes.

3. *Id.* § 14-1.1(a) (1981).

4. *Id.* § 15A-1340.4(f) (1983).

5. *Id.* § 15A-1340.4(a).

6. *Id.*

7. Comment, *The North Carolina Fair Sentencing Act*, 60 N.C.L. REV. 631, 631 (1982).

8. *Id.*

9. *Id.*

10. NORTH CAROLINA ACADEMY OF TRIAL LAWYERS EDUCATION FOUNDATION, HISTORY OF PRESUMPTIVE SENTENCING AND PROVISIONS OF THE NORTH CAROLINA LAW, PRESUMPTIVE SENTENCING AND JURY TRIAL OF A DUI CASE 2 (1979) [hereinafter cited as HISTORY OF PRESUMPTIVE SENTENCING].

11. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

mended the use of a presumptive sentencing system in North Carolina.¹² It theorized that greater uniformity in sentencing would be encouraged by a system that forced a judge wishing to deviate from the presumptive term both to make written findings and to risk reversal on appeal.¹³ In 1977 a bill based on the Commission's findings was introduced in both houses of the General Assembly. In both houses it died in committee.¹⁴ The bill's defeat was caused largely by trial judges and practicing attorneys who feared that the bill would curtail severely judges' sentencing discretion.¹⁵

After the 1977 defeat, the North Carolina Bar Association established a Committee on Sentencing.¹⁶ The bill was revised and renamed the Fair Sentencing Act.¹⁷ The Act contained four stated purposes. The most important purpose of the bill was "to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability."¹⁸ The next two purposes were "to protect the public by restraining offenders" and "to assist the offender toward rehabilitation and restoration to the community as a lawful citizen."¹⁹ The Act's final stated purpose was to deter crime by creating more uniform sentences.²⁰ The bill was enacted with only minor changes by the 1979 General Assembly.²¹ Because of postenactment controversy regarding the Act, its effective date was delayed,²² and, in response to concern over the length of prison terms,²³ the presumptive sentences for several classes of felonies were reduced by as much as one-fourth.²⁴

The North Carolina Supreme Court first fully discussed the Act in 1983. In *State v. Ahearn*²⁵ defendant had battered his girlfriend's child to death.²⁶ At the guilt-determination phase of the trial, defendant entered pleas of guilty to felonious child abuse and voluntary manslaughter.²⁷ The trial judge found three aggravating factors and five mitigating factors.²⁸ He filled out only one

12. HISTORY OF PRESUMPTIVE SENTENCING, *supra* note 10, at 26.

13. Comment, *supra* note 7, at 649-50.

14. *Id.* at 631.

15. *Id.* at 631-32 & n.8.

16. *Id.* at 632.

17. Fair Sentencing Act, ch. 760, 1979 N.C. Sess. Laws 850 (codified at N.C. GEN. STAT. §§ 15A-1340.1 to .7 (1983)).

18. *Id.* at 851.

19. *Id.*

20. *Id.* The fourth purpose stated in the Act was to "provide a general deterrent to criminal behavior." *Id.*

21. Fair Sentencing Act, ch. 760, 1979 N.C. Sess. Laws 850 (codified at N.C. GEN. STAT. §§ 15A-1340.1 to .7 (1983)).

22. Comment, *supra* note 7, at 633. The Act originally was applicable to felonies committed on or after July 1, 1980, but enforcement was delayed until after July 1, 1981. N.C. GEN. STAT. § 15A-1340.1(a) (1983).

23. North Carolina had the third-longest average time served for felonies in the United States. Nat'l L.J., Feb. 23, 1981, at 21, col. 1, 28, col. 3.

24. Comment, *supra* note 7, at 633.

25. 307 N.C. 584, 300 S.E.2d 689 (1983).

26. *Id.* at 586-87, 300 S.E.2d at 691-92.

27. *Id.* at 585, 300 S.E.2d at 690-91.

28. The aggravating factors were: (1) the especially heinous nature of the offense; (2) the age

sentencing form, however, thereby treating the aggravating and mitigating factors together for both child abuse and manslaughter sentencing purposes.²⁹ He then concluded that the aggravating factors outweighed the mitigating factors,³⁰ and sentenced defendant to five years on the child abuse charge and sixteen on the manslaughter charge.³¹ Because both sentences exceeded the presumptive term, defendant was entitled to appeal to the North Carolina Court of Appeals as a matter of right.³² Defendant argued that none of the aggravating factors were supported by the evidence.³³ The court of appeals, lacking any other indication of the trial judge's interpretation, assumed that all factors were relevant to both charges.³⁴ Although the court invalidated several of the factors,³⁵ it refused to find prejudice toward defendant because the trial judge could have determined that the remaining aggravating factors outweighed the mitigating.³⁶ Defendant appealed to the North Carolina Supreme Court, arguing that the court of appeals' refusal to find prejudice was error.³⁷

In reversing the court of appeals and remanding the case,³⁸ the supreme

of the victim; and (3) defendant's dangerousness to himself and others. The mitigating factors were: (1) defendant's lack of a criminal record; (2) defendant's mental and physical conditions; (3) defendant's immaturity or limited mental capacity; (4) defendant's voluntary acknowledgement of wrongdoing; and (5) defendant's good reputation. *State v. Ahearn*, 59 N.C. App. 44, 45-46, 295 S.E.2d 621, 622-23 (1982), *rev'd*, 307 N.C. 584, 300 S.E.2d 689 (1983).

29. *Ahearn*, 307 N.C. at 592, 300 S.E.2d at 694. Because only one sentencing form was completed, it was impossible to determine which aggravating and mitigating factors applied to each charge.

30. *Id.*

31. *Id.* at 585, 300 S.E.2d at 690-91.

32. Appeals are authorized as a matter of right by N.C. GEN. STAT. § 15A-1444(a1) (1983).

33. *State v. Ahearn*, 59 N.C. App. 44, 48, 295 S.E.2d 621, 624 (1982), *rev'd*, 307 N.C. 584, 300 S.E.2d 689 (1983).

34. *Ahearn*, 307 N.C. at 592, 300 S.E.2d at 694 (describing court of appeals' analysis).

35. *State v. Ahearn*, 59 N.C. App. 44, 48-49, 295 S.E.2d 621, 623-25 (1982), *rev'd*, 307 N.C. 584, 300 S.E.2d 689 (1983). The court of appeals invalidated the first aggravating factor—the heinous nature of the offense—as to both charges because defendant's actions were no more heinous than those of others convicted of child abuse and voluntary manslaughter. *Id.* at 49, 295 S.E.2d at 624. The second aggravating factor—the age of the victim—was invalidated as to the child abuse charge because the victim's age was an essential element of the crime. *Id.* at 48-49, 295 S.E.2d at 624.

36. *Id.* at 49-50, 295 S.E.2d at 624-25. The court of appeals had applied more stringent criteria to refuse a finding of prejudice in *State v. Locklear*, 61 N.C. App. 594, 301 S.E.2d 437 (1983). The *Locklear* court held that even though an aggravating factor found by the trial court was improper, defendant had failed to show prejudice because the trial judge, in his discretion, could have ordered defendant to serve his multiple sentences consecutively for an even longer term. *Id.* at 596-97, 301 S.E.2d at 439.

37. *Ahearn*, 307 N.C. at 585-86, 300 S.E.2d at 690-91.

38. The supreme court concluded that the nature of the manslaughter offense was especially heinous, *Ahearn*, 307 N.C. at 606-07, 300 S.E.2d at 703, although it agreed with the court of appeals that the child abuse actions were not. *Id.* at 599, 300 S.E.2d at 698-99. The supreme court also disagreed with the court of appeals' determination that the victim's age could not be an aggravating factor as to the child abuse charge. Although the age of the victim is an essential element of the crime, the court found that the extreme youth of Ahearn's victim (24 months) supported the trial court's aggravation conclusion. *Id.* at 603, 300 S.E.2d at 701. Although defendant's dangerousness to others was upheld as an aggravating factor, defendant's dangerousness to himself was invalidated as an aggravating factor to both charges. *Id.* at 603-04, 300 S.E.2d at 701-02. Finally, the court invalidated defendant's plea of guilty of child abuse as a mitigating

court held that a separate sentencing form is required for each offense.³⁹ This requirement resembles that provided for special verdicts.⁴⁰ Separate listing of factors enables a reviewing court to determine precisely which factors have been found in aggravation or mitigation for each particular crime. Thus, if any factor later is invalidated, the case can be remanded on that count alone.⁴¹ Otherwise, as was the case in *Ahearn*, the case must be remanded for resentencing if any factor is invalidated.⁴²

The *Ahearn* court also held that since the trial judge did not enunciate the weight to be applied to each factor, a reviewing court that struck down an aggravating factor was required to find prejudice to defendant.⁴³ Because that particular violation may have prompted the trial judge to disregard the presumptive sentence, only a remand to the trial judge could result in a redetermination of the proper sentence.

The *Ahearn* court, however, was not satisfied with its settlement of the separate findings and prejudice questions. The court sent an important message to North Carolina trial judges. The court stated that "[t]he Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures [sic] that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted . . . to the particular offender"⁴⁴ and reiterated the language of section 15A-1340.4(b). "The sentencing judge's discretion to impose a sentence . . . greater . . . than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence."⁴⁵

After these statements expressing strong support for the Act, the *Ahearn* court proceeded to undercut its requirements by announcing a narrow standard of appellate review; the Act "was not intended . . . to remove all discretion from our able trial judges."⁴⁶ The court concluded that, although trial

factor to the manslaughter charge because defendant denied wrongdoing in connection with the baby's death. *Id.* at 607-08, 300 S.E.2d at 704.

39. *Id.* at 598, 300 S.E.2d at 698.

40. N.C.R. Civ. P. 49(a). Special verdicts require a specific finding with respect to each element. This process enables a reviewing court to determine exactly what the fact-finder decided and whether any overruled aspect of the case would have affected the holding.

41. The policy of favoring the special verdict is reflected by N.C.R. Civ. P. 40(d), which states: "Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly."

42. *Ahearn*, 307 N.C. at 594, 300 S.E.2d at 696. For example, in *Ahearn* the supreme court agreed with the court of appeals that the nature of the child abuse was not especially heinous. *Ahearn*, 307 N.C. at 599, 300 S.E.2d at 698. It is possible that the trial judge meant only for this aggravating factor to apply to the manslaughter charge, a determination which was upheld. *Id.* at 606-07, 300 S.E.2d at 703-04. The lower court's failure to specify the charge to which the aggravating factor applied forced the appellate courts to examine the factor's relevance to all charges, and to remand for resentencing any charge that was not aggravated by that factor.

43. *Id.* at 601, 300 S.E.2d at 701. See also *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983).

44. *Ahearn*, 307 N.C. at 596, 300 S.E.2d at 696.

45. *Id.*

46. *Id.* at 596, 300 S.E.2d at 697.

judges were required to make written findings about the existence of aggravating and mitigating factors, they "should be permitted wide latitude in arriving at the truth as to [their] existence . . . for it is only [the trial judge] who observes the demeanor of the witnesses and hears the testimony."⁴⁷

The *Ahearn* court confused the trial judge's ability to weigh the credibility of the witnesses—and thereby determine whether or not the factors exist on the evidence—with the trial judge's ability to define the factors that should be considered. Although reviewing courts usually do, and indeed should, defer to trial courts' findings on witness credibility,⁴⁸ there is no reason for them to do so on the definition of aggravating and mitigating circumstances. Determining whether an established fact is "reasonably related to the purposes of sentencing" is a matter of statutory interpretation, and therefore a matter of law, not fact.⁴⁹ After making it clear that the trial court's written findings regarding the existence of aggravating and mitigating circumstances would be reviewed narrowly, the court stated that the trial judge, in determining whether and to what degree the aggravating circumstances outweigh the mitigating, "need not justify the weight he attaches to any factor."⁵⁰

The court should not have reached this conclusion; the statutory language on which the court was relying is subject to a different interpretation. After requiring the trial judge to list specifically the aggravating and mitigating circumstances,⁵¹ the statute states only that in imposing a sentence longer than the presumptive sentence the judge "must find that the factors in aggravation outweigh the factors in mitigation."⁵² This statute could be interpreted either as requiring the judge to state the weight attached to each factor, or as requiring that the balance tips in favor of the aggravating factors. The supreme court, by choosing the latter interpretation, effectively foreclosed judicial review of the weight attached to each factor.⁵³

Trial and appellate judges have taken the *Ahearn* court's narrow review standard to heart. Appellate courts have upheld determinations of the following as aggravating circumstances: lying on the witness stand,⁵⁴ prior offenses bearing no relation to the crime charged,⁵⁵ and premeditation in a second-

47. *Id.*

48. *See* General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

49. *See* Young v. AAA Realty Co., 350 F. Supp. 1382 (M.D.N.C. 1972) (statutory interpretation is duty of higher courts).

50. *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697.

51. N.C. GEN. STAT. § 15A-1340.1(a) (1983).

52. *Id.* § 15A-1340.4(a).

53. *Ahearn* concluded that the trial judge could assign the same factor a different weight in different cases. Thus, the court did not require him to state the weight given. *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697. The two concepts, however, are not synonymous. The trial judge need not be required to give the same factor equal weight in all cases and yet could be required to make a written finding as to the weight given the factor in each case. The reviewing court then could ensure that undue weight was not placed on any single factor to avoid the intent of the legislature.

54. *See* State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983). *See infra* text accompanying notes 83-93.

55. *See* State v. Teague, 60 N.C. App. 755, 300 S.E.2d 6 (1983) (minor financial crimes considered by judge during a trial on attempted sodomy charges).

degree murder case.⁵⁶ All findings of aggravating circumstances that have been invalidated, except one,⁵⁷ involved factors that were essential elements of the crime for which the defendant was convicted⁵⁸—a result mandated by statute.⁵⁹ Narrow review seriously undermines one of the theoretical bases for presumptive sentencing—that the trial judge will be reluctant to sentence for longer than the presumptive term when by so doing he runs a significant risk of reversal.⁶⁰

There are more difficulties raised by the developing trend of narrow review than simply the defeat of the Act's attempts to limit the trial judge's discretion. To the extent that unbridled judicial discretion exists, past disparate sentencing is perpetuated. When narrow review of the definition of aggravating factors is coupled with the Act's preponderance of the evidence standard, possibilities of new abuse arise.

An example of such abuse occurred in *State v. Melton*.⁶¹ In *Melton* defendant borrowed a pistol, purchased bullets, and test-fired the gun in a remote area.⁶² Defendant then drove to the victim's home, had a beer with the victim, presumably to quell the victim's suspicions, and shot the victim through the heart.⁶³ He then drove to a police station and turned himself in.⁶⁴ In exchange for the State's promise not to prosecute for first-degree murder, defendant entered a plea of guilty to second-degree murder.⁶⁵ A Class C felony, second-degree murder carries a presumptive sentence of fifteen years.⁶⁶ At the sentencing hearing, the trial judge found only one aggravating factor—that the killing had been committed with premeditation⁶⁷—and sentenced defendant to life in prison.⁶⁸ Defendant appealed to the North Carolina Supreme Court. He argued that facts supporting a charge that has been dismissed pursuant to a plea bargain may not be considered as aggravating factors of the lesser admitted charge⁶⁹ and that the judge could have found premeditation only by relying on the evidence presented at trial. This

56. See *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983). See *infra* text accompanying notes 61-82.

57. See *State v. Setzer*, 61 N.C. App. 500, 301 S.E.2d 107 (factor that defendant had lied on *voir dire* invalid), *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983). See *infra* text accompanying notes 94-99.

58. See, e.g., *State v. Thompson*, 62 N.C. App. 38, 302 S.E.2d 310 (1983) (facts that defendant armed and seeking pecuniary gain disallowed as aggravating factors in an armed robbery case); *State v. Massey*, 62 N.C. App. 66, 302 S.E.2d 262 (1983) (fact that defendant travelled to apartment with a shotgun to seek revenge disallowed as an aggravating factor in attempted burglary case).

59. N.C. GEN. STAT. § 15A-1340.4(a)(1) (1983) ("[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation").

60. See *supra* text accompanying note 13.

61. 307 N.C. 370, 298 S.E.2d 673 (1983).

62. *Id.* at 371, 298 S.E.2d at 675.

63. *Id.*

64. *Id.*

65. *Id.* at 372-73, 298 S.E.2d at 676.

66. *Id.* at 373, 298 S.E.2d at 676.

67. *Id.* at 372, 298 S.E.2d at 675.

68. *Id.*

69. *Id.* at 373, 298 S.E.2d at 676.

"amounted to the use of the same evidence to prove the elements of murder in the second degree as well as the aggravating factor of premeditation and deliberation."⁷⁰ Defendant argued that the trial judge effectively had convicted him of the higher crime.⁷¹

Although the Act specifically exempts sentences to which both sides agree pursuant to a plea arrangement,⁷² there had been confusion about whether bargained-for guilty pleas implicitly included an agreement to the presumptive term for the crime.⁷³ The supreme court ended this confusion and rejected defendant's assertion that he had bargained for a fifteen-year sentence by agreeing to plead guilty to second-degree murder.⁷⁴ Thus, after *Melton* defense attorneys should be careful in agreeing to have their clients plead guilty to specific sentences.

More importantly, *Melton* rejected defendant's argument that the trial court incorrectly had included an essential element of the crime of first-degree murder as an aggravating circumstance to the charge of second-degree murder.⁷⁵ The court grounded its decision on the fact that premeditation is not an essential element of second-degree murder and, therefore, its inclusion is not prohibited by the Act.⁷⁶ The court asserted that such a factor is reasonably related to the stated purposes of the Act.⁷⁷ Although *Melton* noted that some difficulties might arise, the court stated that the bargained plea situation differed from the situation in which a jury acquitted defendant of first-degree murder but convicted him of second-degree murder.⁷⁸ The court, however, refused to conclude that premeditation could not constitute an aggravating circumstance even in that situation,⁷⁹ despite the fact that the court seemingly would be invading the province of the jury.

A more subtle problem than invading the province of the jury arises with allowing the essential elements of a higher crime to be used in aggravation of the lower one. Ordinarily, each essential element of the crime must be proved beyond a reasonable doubt.⁸⁰ In finding the existence of an aggravating factor, however, the trial judge is held only to a preponderance of the evidence standard.⁸¹ Under *Melton*, it is not difficult to envision a situation in which a prosecutor, uncertain of his ability to sway a jury to find all the elements of the higher crime beyond a reasonable doubt, could charge defendant with the lower crime and hope that, at the sentencing hearing, he could convince the trial judge of any remaining elements of the higher crime under the lower

70. *Id.* at 373-74, 298 S.E.2d at 676.

71. *Id.*

72. N.C. GEN. STAT. § 15A-1340.4(b) (1983).

73. Comment, *supra* note 7, at 637.

74. *Id.*

75. *Melton*, 307 N.C. at 373-74, 298 S.E.2d at 676.

76. *Id.* at 375, 298 S.E.2d at 677. See N.C. GEN. STAT. § 15A-1340.4(a) (1983).

77. *Melton*, 307 N.C. at 376, 298 S.E.2d at 678.

78. *Id.* at 375 n.2, 298 S.E.2d at 677 n.2.

79. *Id.*

80. See, e.g., *State v. Batts*, 269 N.C. 694, 153 S.E.2d 379 (1967).

81. N.C. GEN. STAT. § 15A-1340.4(a) (1983).

standard of proof. Such presentation to the judge during sentencing could result in surprise to defense counsel, with the end result being inadequate defense to the additional essential elements.⁸²

*State v. Thompson*⁸³ is illustrative of the worst scenario that has occurred under the Act. In *Thompson* defendant was convicted of armed robbery.⁸⁴ The trial judge found four aggravating factors.⁸⁵ The fourth factor was that "defendant deliberately presented, during the course of the trial, evidence which he knew to be false about his presence on the day in question and deliberately presented false evidence concerning the statement attributed to him and *obviously found* by the jury to be false."⁸⁶ After finding that the aggravating circumstances outweighed the mitigating, the trial judge sentenced defendant to twenty years in prison.⁸⁷

Defendant sought relief in the North Carolina Court of Appeals on the ground that all four aggravating factors were improper.⁸⁸ The court concluded that two of the factors were essential elements of the armed robbery charge,⁸⁹ and that defendant had waived his objection to the third.⁹⁰ Finally, the court, emphasizing the stated purpose of the Act, held that the fourth aggravating factor was:

[a]cceptable as an aggravating factor because it is reasonably related to the purposes of the statute and the rehabilitation of the offender and provides a general deterrent to criminal behavior. A defendant's truthfulness under oath is probative of his attitudes toward society and his prospects for rehabilitation and is therefore relevant to sentencing.⁹¹

Although defendant contended that by allowing lying on the stand to be an aggravating circumstance the court had enabled the trial judge to convict defendant of perjury, a crime with which he was not charged,⁹² the court concluded that, "[t]he fact that defendant could be tried for perjury at another trial before another judge and jury pales in the face of the immediate need for truth at the initial trial."⁹³ This conclusion, however, ignores the significance of defendant effectively having been convicted of perjury without the benefit of a jury or any of the other safeguards of a criminal trial, such as cross-examination of the witnesses. The court attempted to distinguish *State v.*

82. In addition, when a crime lower than a Class A or B felony is charged, such action may avoid the additional safeguards reserved for these felonies by N.C. GEN. STAT. § 15A-2000 (1983). These safeguards include jury determination of aggravating and mitigating circumstances and stricter appellate review. See *infra* note 106.

83. 62 N.C. App. 38, 302 S.E.2d 310 (1983).

84. *Id.* at 39, 302 S.E.2d at 311.

85. *Id.* at 42, 302 S.E.2d at 313.

86. *Id.* (emphasis added).

87. See *id.* at 39, 43, 302 S.E.2d at 311, 313.

88. See *id.* at 42, 302 S.E.2d at 313.

89. *Id.* at 42-43, 302 S.E.2d at 313.

90. *Id.* at 43, 302 S.E.2d at 313.

91. *Id.*

92. *Id.* at 43, 302 S.E.2d at 314.

93. *Id.*

Setzer,⁹⁴ a case that the court of appeals remanded because of an improper finding that lying on *voir dire* was aggravating, by stating that *Setzer* "involved contradicted testimony at a *voir dire* hearing which is a far cry from a finding of perjured testimony before a judge and jury."⁹⁵ In *Thompson*, however, no finding of perjury ever was made by a jury, nor was the issue debated in open court.

Sound objections to this reasoning in *Thompson* were raised by Judge Becton, who concurred in the result.⁹⁶ Judge Becton first noted that *Setzer* held that "a judge cannot find as an aggravating factor that the defendant did not testify truthfully when the only evidence of his untruthfulness is his contradicted testimony at a *voir dire* hearing or during trial."⁹⁷ Any other holding would increase defendant's sentence based on an alleged crime with which he was not charged.⁹⁸ Judge Becton noted:

In adopting the Fair Sentencing Act, our legislature rejected the prevalent sentencing philosophy of fitting the punishment to the offender through long statutory maximum terms and broad judicial discretion and adopted a sentencing philosophy of fitting punishment to the crime by application of presumptive sentences. Therefore, as suggested by defendant, if the Fair Sentencing Act is to achieve its goal of eliminating disparate sentencing, it must be read to limit the myriad of factors that were considered appropriate when fitting the punishment to the offender was the watchword.⁹⁹

In addition, in finding that lying on the stand was an acceptable aggravating circumstance, the majority relied heavily upon the United States Supreme Court decision in *United States v. Grayson*.¹⁰⁰ In *Grayson* the Court refused to overturn the use of a finding of false testimony as an aggravating circumstance. Argument, however, centered on the constitutionality of sentencing a criminal defendant for false testimony—to do so arguably "chills" defendants' first amendment rights to testify on their own behalf.¹⁰¹ The lack of a charge and a jury finding was addressed directly only in the dissent.¹⁰² Justice Stewart, refusing to join the majority, stated:

The Court begins its consideration of this case . . . with the assumption that the respondent gave false testimony at his trial. But there was no determination that his testimony was false. This respondent was given a greater sentence than he would otherwise have re-

94. 61 N.C. App. 500, 301 S.E.2d 107, *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983).

95. *Thompson*, 62 N.C. App. at 44, 302 S.E.2d at 314.

96. *Id.* at 44, 302 S.E.2d at 314 (Becton, J., concurring). Judge Becton concurred in the remand to resentence defendant, naming the incorrect use of untruthfulness as an additional aggravating factor.

97. *Id.* (Becton, J., concurring) (quoting *State v. Setzer*, 61 N.C. App. 500, 505, 301 S.E.2d 107, 110, *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983)).

98. *Id.* at 45, 302 S.E.2d at 314 (Becton, J., concurring).

99. *Id.* (Becton, J., concurring).

100. 438 U.S. 41 (1978).

101. *Id.* at 52-53. The Court held that the right guaranteed defendant was the right to testify truthfully; therefore, punishment for lying under oath was not a first amendment violation. *Id.*

102. *Id.* at 55-56 (Stewart, J., dissenting).

ceived—how much greater we have no way of knowing—solely because a single judge thought that he had not testified truthfully.¹⁰³

Thus, the *Grayson* case is inadequate support for the *Thompson* court's holding that separate crimes should be considered aggravating factors.¹⁰⁴

The Fair Sentencing Act is in danger of being "interpreted away." Judicial emasculation of the Act's effectiveness would represent a loss to North Carolina. To the extent that judges' discretion is upheld uniformly, the problems sought to be remedied by the General Assembly's Commission on Correctional Programs¹⁰⁵ will be perpetuated. The Act's deterrent effect will be lost as the certainty of sentence terms erodes. Finally, as trial judges have shown themselves more willing to find aggravating than mitigating factors, North Carolina's burdensome prison population will not be reduced. There is, however, more at stake than the General Assembly's stated goals. All too often the criminal justice system focuses on the individual rather than the crime. This focus raises the possibility of personal prejudice. Since the physical freedom of the defendant is dependent on the expansive exercise of the trial judge's discretion, outside safeguards are necessary to protect both the defendant and the integrity of the criminal justice system. Such safeguards are in place for North Carolina capital defendants,¹⁰⁶ but also are necessary to protect noncapital defendants' rights. The Fair Sentencing Act erected safeguards by shifting the focus away from the individual and by requiring a reviewable trial record. Unless these safeguards are defended, trial judges will continue to focus on individual defendants rather than on the crimes with which they were charged.

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103. *Id.*

104. The North Carolina courts probably will not abandon this position on their own, but will continue to construe the Act with the same hostility demonstrated by the General Assembly's first attempt at passage. Legislative clarification would be helpful.

105. *See supra* notes 7-10 and accompanying text.

106. *See* N.C. GEN. STAT. § 15A-2000 (1983). These protections include jury determination of aggravating and mitigating factors. *Id.* § 15A-2000(b). Section 15A-2000(c)(2) requires that the jury make a written finding that the aggravating factors themselves are substantial enough for imposition of the death penalty, not merely that they outweigh the mitigating factors. Section 15A-2000(d) provides for automatic review of the jury's written findings, including a review of whether the findings were made as a result of passion or prejudice. Finally, § 15A-2000(e) limits aggravating factors to eleven enumerated areas.

The New North Carolina Rules of Evidence: Privileges, Relevancy, Competency, Impeachment, and Expert Opinion

On July 7, 1983 the North Carolina General Assembly adopted the North Carolina Rules of Evidence and Official Commentary. The Code became effective July 1, 1984.¹ The major impetus for the adoption of an evidence code was the concern that North Carolina evidence law had become unwieldy.² Having developed over the years through a number of narrow statutes and conflicting judicial decisions, North Carolina evidence law was confusing and difficult to master.³ The advantages of the Code will be its clarity and accessibility.⁴

Despite codification, the law of evidence in North Carolina will not be changed substantially.⁵ Such changes would have defeated the utility of the Code by forcing trial judges and lawyers to relearn the law of evidence. Although there are important differences between the Code and previous North Carolina law, the transition should be manageable.

The drafters based the Code on the Federal Rules of Evidence⁶ for two reasons. First, the federal rules are familiar to practitioners in North Carolina.⁷ They consist of generally accepted rules that have been followed in North Carolina and other states,⁸ and are typically the basis of instruction in

1. STATE OF NORTH CAROLINA LEGISLATIVE RESEARCH COMMISSION EVIDENCE LAWS STUDY COMMITTEE REPORT TO 1983 GENERAL ASSEMBLY (Jan. 12, 1982) at v. [hereinafter cited as Committee Report]. The lapse between the adoption and effective dates was necessary to allow practitioners to become familiar with the rules. *Id.* at v-vi. The effectiveness of evidence rules depends on their familiarity, because attorneys and judges must make decisions in court within seconds. Blakey, *Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 5 (1981).

2. Committee Report, *supra* note 1, at iii.

3. Patrick, *Toward a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669 (1980).

4. *Id.* at 670.

5. 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 2, at 2 n.6 (1982 & Supp. 1983).

6. Committee Report, *supra* note 1, at iv.

7. Blakey, *supra* note 1, at 4, 9.

8. *Id.* at 4. There have been cases in which the federal rule differed from the North Carolina rule, but the trial court applied the federal rule. For example, under FED. R. EVID. 405, on cross-examination of a character witness, inquiry is allowed into specific acts of the person whose character is in issue. Prior to the enactment of the new North Carolina Rules of Evidence, however, the North Carolina rule had been that such cross-examination into specific acts was not allowed. In *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), a homicide case, the trial court had allowed the prosecuting attorney to cross-examine defendant's mother, a character witness, as to defendant's participation in two gang shootings. The North Carolina Supreme Court held that the trial court had erred by permitting such inquiry into prior acts of misconduct, but that the error had not prejudiced defendant. *Id.* at 573-74, 247 S.E.2d at 912-13.

In *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978), a prosecution for felonious assault, the court held that it was error to allow the prosecutor to ask defendant's character witness about an occasion when defendant "got his gun and went after some black people in Charlotte." *Id.* at

law school evidence classes.⁹ Second, the Federal Rules of Evidence were used as a model because they have proved both thorough and manageable.¹⁰

The first major change under the new code is rule 301, *Presumptions in General in Civil Actions and Proceedings*.¹¹ Under prior North Carolina law, a presumption shifted the burden of persuasion in some cases,¹² and the burden of going forward with evidence in others.¹³ Under new rule 301, unless a court decides otherwise, a presumption shifts the burden of going forward with evidence rather than shifting the burden of persuasion.¹⁴ The new North Carolina rule differs from the majority rule, which shifts the burden of persuasion.¹⁵ Shifting only the burden of production of evidence has been criticized because it "gives too little weight to the concerns that cause the initial creation of presumptions."¹⁶ Those who support shifting only the burden of production, however, assert that presumptions are artificial rules to cope with difficult problems of proof, and that they should not compel one conclusion if evidence to the contrary exists.¹⁷

Rule 301 differs from the corresponding federal rule by recognizing judicially created presumptions.¹⁸ The Official Commentary to the North Caro-

416, 241 S.E.2d at 673. The error, however, was not prejudicial because defendant admitted his guilt at the trial. *Id.*

In *State v. Hunt*, 287 N.C. 360, 215 S.E.2d 40 (1975), a prosecution for rape, felonious assault, and armed robbery, it was held prejudicial error to permit the prosecuting attorney to ask defendant's character witness about defendant's prior convictions for crimes, including assault.

9. Blakey, *supra* note 1, at 9.

10. Committee Report, *supra* note 1, at v. (citing Mueller, *Symposium on the Federal Rules of Evidence*, 12 LAND & WATER L. REV. 585 (1977)).

11. For a discussion of presumptions in general and a specific proposal for a different presumption rule in North Carolina, see Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C.L. REV. 697 (1984).

12. 2 H. BRANDIS, *supra* note 5, § 218 at 276-80. See, e.g., *id.* § 246, at 256 (presumption that child born in wedlock is legitimate is "one of the strongest known to law" and "can be rebutted only by proof that the husband could not have been the father"). If a presumption shifts the burden of persuasion, rule 301 does not apply. N.C. R. EVID. 301 comment. The "burden of persuasion" means that if the party having the burden fails to persuade the trier of fact, the issue must be found against that party. C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 336 (E. Cleary 2d ed. 1972).

13. 2 H. BRANDIS, *supra* note 5, § 218. See, e.g., *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978). A bank has the burden of going forward with evidence that there was no active loss when a customer shows that the bank paid a check despite a stop order. *Id.* at 104, 239 S.E.2d at 869. The "burden of going forward with evidence" means that the party having the burden must produce evidence "such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved" or the trier of fact must find against him. C. McCORMICK, *supra* note 12, § 338, at 789.

14. N.C. R. EVID. 301. McCormick defines "presumption" as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." C. McCORMICK, *supra* note 12, § 342, at 803. Rule 301 states clearly that once the presumption is rebutted the issue goes to the jury and the jury may, but does not have to, infer the existence of the presumed fact.

15. 1 J. WEINSTEIN & M. BERGER, EVIDENCE at T-16 to -19 (1979); Patrick, *supra* note 3, at 681.

16. Patrick, *supra* note 3, at 681.

17. IX J. WIGMORE, WIGMORE ON EVIDENCE § 2491 (J. Chadbourn rev. ed. 1981).

18. The new North Carolina rule governs presumptions "not otherwise provided for by statute, by judicial decision, or by [the North Carolina Rules of Evidence]." N.C. R. EVID. 301, the federal rule covers presumptions "not otherwise provided for by Act of Congress or by [the Federal Rules of Evidence]." FED. R. EVID. 301.

lina Rules of Evidence states that "the General Assembly and the courts retain power to create presumptions having an effect different from that provided for in this rule";¹⁹ however, "a presumption created by a prior statute or judicial decision should be construed to come within the scope of this rule unless it is clear that the presumption was not intended to be a 'mandatory presumption' [—a presumption that a court *must* follow a finding of a preliminary fact unless there is sufficient evidence that the presumed fact does not exist]."²⁰ The commentary has been criticized for favoring uniformity at the expense of the policies underlying previous judicial decisions.²¹ This rule probably will have little impact, however, because courts have the discretion to adopt those rules existing before rule 301.²²

Article Four deals with relevancy.²³ Rule 404, *Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes*,²⁴ is virtually the same as Federal Rule of Evidence 404.²⁵ The general rule that character evidence is not admissible as circumstantial evidence of conduct²⁶ is consistent with prior North Carolina practice.²⁷ There also remains an exception allowing the accused to offer evidence of his character and allowing the prosecution to rebut this evidence;²⁸ however, the type of evidence permitted under this exception has been changed by rule 404(a)(1).²⁹ Previously, North Carolina would allow evidence of the accused's general character to be admitted in evidence under this exception,³⁰ but rule 404(a)(1) limits the character evidence to "pertinent trait[s] of his character,"³¹ or those character traits relevant to the conduct being investigated. The old North Carolina rule had originated in the ambiguous language of an earlier opinion, which subsequently was misinterpreted.³² The old rule was construed to allow the witness to testify about rep-

19. N.C. R. EVID. 301 comment.

20. *Id.* Another limitation on the scope of the rule is that, "[i]f by statute or judicial decision a particular presumption shifts the burden of [persuasion], Rule 301 does not apply." *Id.*

21. 2 H. BRANDIS, *supra* note 5, § 215, at 173-74, nn.93-95 (Supp. 1983).

22. There is some benefit in uniformity. A uniform rule is easier to learn and apply. *See supra* note 1. Furthermore, the strongest policies that underly presumptions probably will be those shifting the burden of persuasion; for those presumptions, rule 301 will not apply. *See supra* note 20.

23. Relevancy, when used to describe evidence, means "render[ing] the desired inference *more probable than it would be without the evidence.*" C. McCORMICK, *supra* note 12, § 185, at 437.

24. N.C. R. EVID. Rule 404.

25. The North Carolina rule adds the word "entrapment" to the nonexclusion list of "crimes, wrongs, or acts" that may be admitted for a purpose other than to prove the conduct of a person. *Id.* 404(b).

26. *Id.* 404(a).

27. *Id.* 404 comment.

28. Patrick, *supra* note 3, at 684.

29. N.C. R. EVID. 404(a)(1).

30. *Id.* 404 comment.

31. *Id.* 404(a)(1).

32. 1 H. BRANDIS, *supra* note 5, § 114 (1982). In *State v. Perkins*, 66 N.C. 126 (1872), the court spoke in terms of "general character" but clearly meant "reputation" when it held that "a witness who swears to the general bad character of another witness on the other side, may, upon cross-examination, be asked to name the individual whom he heard speak disparagingly of the witness and what was said." *Id.* at 127. In a later decision, *State v. Hairston*, 121 N.C. 429, 28 S.E.

utation for specific traits of character, whether relevant to an issue in the case.³³ The new rule eliminates the danger that the prosecution will use the exception to introduce irrelevant evidence prejudicial to the defendant.³⁴

Rule 405, *Methods of Proving Character*, which is very similar to federal rule 405, changes North Carolina law by allowing opinion evidence to prove character.³⁵ Previously, questions concerning character had to be stated in terms of "reputation."³⁶ Questions phrased with the terms "general character" or "reputation and character" also were permissible because it was understood that the question dealt with reputation.³⁷ The practical result of such leniency in the framing of questions, however, was the admission of opinion evidence, despite the prohibition against it.³⁸ Witnesses did not understand the distinction between reputation and personal opinion of character.³⁹ The old rule was also criticized for admitting "the second-hand, irresponsible product of multi-

492 (1897), the court used the term "general character" but did not mean "reputation." The court held that, "[a] party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad." *Id.* at 431, 28 S.E. at 494. Although the *Hairston* court did not cite *Perkins*, the contrast between uses of the term "general character" in these cases demonstrates that the exception evolved from allowing only evidence of reputation to allowing evidence of character.

33. 1 H. BRANDIS, *supra* note 5, § 114 (1982). In *State v. Reagan*, 185 N.C. 710, 117 S.E. 1 (1923), the witness was allowed to testify that defendant had a bad reputation for making liquor, although he was accused of larceny. Similarly, in *State v. Fleming*, 194 N.C. 42, 138 S.E. 342 (1927), an unlawful entry case, the witness was allowed to testify that defendant had a bad reputation for making liquor.

34. 1 H. BRANDIS, *supra* note 5, § 114, at 423 n.91 (1982).

[The old rule] open[ed] the door to evidence of character traits which [were] irrelevant and prejudicial, and permit[ed] the prosecution, under the guise of impeaching the defendant as a witness, to prove traits having no relation to veracity but which [were] relevant on the issue of guilt, thus evading the rule (see § 104) prohibiting the State from attacking the defendant's character unless he first puts it in issue.

35. N.C. R. EVID. 405. The North Carolina rule is identical to FED. R. EVID. 405, except for North Carolina's explicit limitation on expert testimony: "Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." N.C. R. EVID. 405(a). Allowing opinion evidence to prove character opened the door for a new type of character evidence: expert testimony to prove character. 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 149 (1977 & Supp. 1978). The Official Commentary to the North Carolina rules explains that the rule's limitation "is not intended to exclude expert testimony of a personality or character change as it relates to the issue of damages," but only "to prohibit expert testimony as it relates to the likelihood of whether or not the defendant committed the act he is accused of." N.C. R. EVID. 405 comment. This limitation is based on the drafters' fear that in most cases such expert testimony would not be helpful and would waste time. *Id.*

36. N.C. R. EVID. 405 comment.

37. *Id.* (citing *State v. King*, 224 N.C. 329, 30 S.E.2d 230 (1944)). In *King* the court stated that "the test ordinarily applied here [is] that of general character, which with us means reputation." *King*, 224 N.C. at 331, 330 S.E.2d at 231. See also *State v. Hicks*, 200 N.C. 539, 540, 157 S.E. 851, 852 (1933) ("The rule is that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify."); *State v. Cathey*, 170 N.C. 794, 796, 87 S.E. 532, 533 (1916) ("[A] character witness may be asked on cross-examination if there was not a general reputation as to particular matters.").

38. Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competence, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L. REV. 227, 265 (1978) (quoting 2 J. WEINSTEIN & M. BERGER, *EVIDENCE* § 405[02], at 405-20 (1978). "The average witness is unable to understand the admonition not to give his opinion, but that of others. He came to give his opinion and, despite some wrangling among attorneys and judges, that is what he usually manages to do.").

39. See 1 H. BRANDIS, *supra* note 5, § 110, at 403 n.13 (1982). In *State v. Barbour*, 295 N.C.

plied guesses and gossip which we term reputation,"⁴⁰ but excluding evidence based "on first hand knowledge and belief."⁴¹ Underlying the old rule was the questionable assumption that a witness' bias could affect his opinion of the character of a person, but not his view of that person's reputation.⁴² Rule 405 is an improvement over the old rule because, rather than allowing opinion evidence in disguise, it admits clearly labelled opinion evidence that the trier of fact can evaluate as such.

A further change in the rules of character testimony is that, contrary to prior North Carolina law⁴³ but consistent with the federal rule,⁴⁴ new North Carolina rule 405(a) permits inquiry on cross-examination into relevant specific acts of the person whose character is in question.⁴⁵ The rationale underlying this rule is that evidence of specific examples of conduct is necessary to evaluate the witness' testimony, which is based only on what he has heard.⁴⁶ The rule has been criticized because "[t]he probative value of such evidence to impeach a character witness seldom outweighs the prejudice suffered by the opponent."⁴⁷ Because the rule differs from prior case law,⁴⁸ however, North Carolina courts are likely to interpret it strictly to prevent abuse.

Article Six deals with witnesses.⁴⁹ Rule 601, *General Rule of Competency; Disqualification of Witness*,⁵⁰ revises the Dead Man's Statute that, in certain situations, disqualified persons interested in a transaction when the other party to the transaction subsequently had died or become insane.⁵¹ Rule 601 nar-

66, 243 S.E.2d 380 (1978), the witness answered a question calling for "character" with her own opinion of the person's character when his reputation was in issue.

40. 1 J. WIGMORE, *supra* note 17, § 1986.

41. Patrick, *supra* note 3, at 685.

42. *Id.*

43. N.C. R. EVID. 405 comment.

44. FED. R. EVID. 405(a).

45. N.C. R. EVID. 405(a).

46. FED. R. EVID. 405 comment.

47. Patrick, *supra* note 3, at 686.

48. See 1 H. BRANDIS, *supra* note 5, § 115, at 425-26 (1982) & 122 (Supp. 1983). See also *id.* § 115, at 123 n.3.6 (Supp. 1983) ("Of course, it is inconceivable that the Rules intend that questions about specific conduct may be phrased in any way a master of insinuation may concoct.").

Further support for the federal rule is that it can be remembered more easily. Blakey, *supra* note 1, at 8. A rule cannot be effective unless it is sufficiently familiar to be followed. See *supra* note 1. A number of North Carolina trial judges and lawyers had demonstrated that they believed the federal rule already was the law in North Carolina. Blakey, *supra* note 1, at 7. See also *supra* note 8.

49. One notable but relatively minor change in North Carolina law occurs under article 6. Rule 607, *Who May Impeach*, identical to FED. R. EVID. 607, allows the credibility of a witness to be attacked by "any party, including the party calling him." N.C. R. EVID. 607. The common-law rule was that a party could not impeach his own witness. *Id.* 607 comment. The new rule should have little impact, because previous decisions and statutes almost had eliminated the common-law rule in North Carolina. Patrick, *supra* note 3, at 691-92. The Advisory Committee on the Federal Rules of Evidence explained that the common-law rule that a party vouches for the witnesses he calls was unrealistic: "A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them." FED. R. EVID. 607 comment (quoted in N.C. R. EVID. 607 comment).

50. N.C. R. EVID. 601.

51. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall

rows the scope of excluded evidence under the Dead Man's Statute from "personal transactions or communications"⁵² to "oral communications"⁵³ between the interested party and the deceased or insane person. The original Dead Man's Statute had been intended to prevent fraud against those unable to testify in their own behalf.⁵⁴ The concern that fraud might result was based on the assumption that a deceased or insane person would be unable to protect his own interests against a living adversary. This rationale is faulty, however, because the representatives of a decedent or a lunatic generally will have a sufficiently strong stake in the outcome to defend the incompetent's interests.⁵⁵ The Legislative Research Commission as well as several commentators had recommended the elimination of the Dead Man's Statute,⁵⁶ which "has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel."⁵⁷ Dissatisfaction with the Dead Man's Statute has led to suggestions of better ways to protect the dead and the insane against fraud; one suggestion was the "creat[ion of] a hearsay exception for statements about the matter in dispute by the deceased or insane person."⁵⁸ The Dead Man's Statute was preserved in its newly restricted form,

not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. Nothing in this section shall preclude testimony as to the identity of the operator of a motor vehicle in any case.

Id.

52. *Id.*

53. *Id.* 601(c)(1). The rule does not change any cases that have held the Dead Man's Statute inapplicable. *Id.* 601 comment.

54. *McCanless v. Reynolds*, 74 N.C. 301, 314 (1876) (neither parties nor assigness to deed executed by dead man competent as witness in dispute over rights under deed).

55. 1 H. BRANDIS, *supra* note 5, § 66, at 258-59 n.621 (1982):

[I]t seems that much of the argument in defense of the statute is based on a tendency to identify the deceased with his living representatives, and a resultant feeling that in some manner the controversy is between the dead man whose mouth is closed and his living adversary whose mouth ought also to be closed as a matter of fair play and sportsmanship. If the contest is viewed realistically as one between living individuals who in most cases are pure donees of the deceased on the one hand, and other living individuals who, if their stories are true, have parted with value and are asking only the promised equivalent, one's sympathies are likely to veer in the other direction. Viewed in this light, it is hard to see any better reason for silencing witnesses in the cases covered by this statute than in any other case where a party's evidence has been lost by the death, disappearance or forgetfulness of essential witnesses.

56. See *Blakey*, *supra* note 1, at 17-18; *Patrick*, *supra* note 3, at 691; see also *Survey of Developments in North Carolina Law, 1982—Evidence*, 61 N.C.L. REV. 1126, 1141-43 (1983).

57. 1 H. BRANDIS, *supra* note 5, § 66, at 259 n.62 (1982).

58. *Blakey*, *supra* note 1, at 18 (citing *Proposals for Legislation in North Carolina*, 11 N.C.L. REV. 51, 63 (1932)). The proposed legislation was as follows:

No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, or the committee of a lunatic, including proceedings for the probate of wills, no statement of the deceased, or lunatic, whether oral or written, shall be excluded as hear-

however, because "of a concern that fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased or lunatic."⁵⁹ The Dead Man's Statute should have been abolished entirely, because the dangers it addresses are exaggerated and because the statute may make proof of honest claims impossible. Although the risk of perjury remains, the function of the judge and jury is to evaluate the credibility of the witness' testimony. The new North Carolina rule restricting the scope of the Dead Man's Statute is a step in the right direction.

Rule 608, *Evidence of Character and Conduct of Witness*,⁶⁰ is very similar to Federal Rule of Evidence 608. The only difference is that North Carolina rule 608(a),⁶¹ to prevent expert testimony on the credibility of a witness,⁶² includes a reference to rule 405(a).⁶³ Rule 608(a) allows a witness' credibility to be attacked by reputation or opinion of character for untruthfulness, and supported—only after attack—by reputation or opinion of character for truthfulness.⁶⁴ Before this rule was enacted, opinion evidence was not admissible to prove a witness' character in North Carolina. Opinion evidence, however, was inadvertently admitted because questions could be phrased in terms of "general character" or "reputation and character."⁶⁵ The new rule will make clear to the trier of fact whether testimony is based on opinion. Furthermore, under the old North Carolina rule, evidence of specific traits of character was admissible whether or not relevant to the credibility of the witness.⁶⁶ Rule 608(a)(1) wisely limits evidence to character for truthfulness or untruthfulness.

Rule 608(b) states the general rule, already adopted in North Carolina,⁶⁷ that evidence of specific instances of conduct is not admissible to support or attack a witness' credibility.⁶⁸ One exception created by this subsection, however, extends North Carolina law. On cross-examination, specific acts of a witness relevant to his character for truthfulness or untruthfulness⁶⁹ are ad-

say provided that the trial judge shall find as a fact that the statement was made, and that it was made in good faith and on the declarant's personal knowledge.

Proposals for Legislation in North Carolina, 11 N.C.L. REV. 51, 63 (1932).

59. N.C. R. EVID. 601 comment.

60. *Id.* 608.

61. *Id.* 608(a).

62. *Id.* 608 comment. The concern that led to the express prohibition of expert testimony on the credibility of a witness was that such testimony usually would not be helpful and would waste time. See *supra* note 35.

63. N.C. R. EVID. 405(a).

64. *Id.* 608(a).

65. Witnesses did not understand the distinction between reputation and personal opinions of character. See *supra* notes 37-39 and accompanying text.

66. The rule in North Carolina had been that evidence of a specific trait of character was admissible only if asked on cross-examination, or if "volunteered" by the witness on direct examination in answer to a question whether the witness knew the subject's general reputation or reputation and character. N.C. R. EVID. 608 comment.

67. 1 H. BRANDIS, *supra* note 5, § 111 (1982).

68. N.C. R. EVID. 608(b).

69. The practice in North Carolina had been to allow inquiry into any "prior bad acts" of the principal witness. See *State v. Purcell*, 296 N.C. 728, 733, 252 S.E.2d 772, 775 (1979). Under the language of rule 608(b), this practice should be limited to questions concerning acts relevant to character for truthfulness or untruthfulness. N.C. R. EVID. 608(b). The danger exists, however,

missible at the discretion of the trial judge.⁷⁰ Previous North Carolina law had restricted this type of evidence to acts of the principal witness;⁷¹ the new rule allows evidence of acts bearing on the credibility of any witness testifying about the credibility of the principal witness. The Advisory Committee recognized the possibility of abuse of this rule and created safeguards to prevent such abuse.⁷² Subdivision (b) makes clear that a witness does not waive his privilege against self-incrimination merely by testifying about matters of credibility.⁷³ This rule rejects earlier North Carolina decisions that allowed cross-examination concerning past criminal acts reflecting on a witness' credibility.⁷⁴

Rule 609, *Impeachment by Evidence of Conviction of Crime*, deals with impeachment by evidence of criminal convictions.⁷⁵ Generally, under 609(a), evidence of a crime punishable by more than sixty day's confinement is admissible. Previously, North Carolina would allow inquiry into any criminal offense to attack the credibility of an witness.⁷⁶ In contrast, Federal Rule of Evidence 609 allows impeachment by evidence of conviction of a crime involving dishonesty or false statement, regardless of the punishment,⁷⁷ or evidence of conviction of any crime punishable by a sentence more severe than one year's imprisonment if the court finds that the probative value of the evidence outweighs its prejudicial effect.⁷⁸ Subsection (a) of the North Carolina rule requires no such balancing of the probative value and the potential prejudice of the evidence.⁷⁹ Thus, the new rule could be criticized for admitting evidence that may have no relation to the credibility of the witness. Rule 403, however, provides that any evidence may be excluded if the danger of prejudice outweighs its probative value. The new North Carolina rule has the advantage of being clear and simple to apply;⁸⁰ the federal rule has created ambiguity by its use of the term "dishonesty."⁸¹

that in interpreting rule 608(b), North Carolina courts will read "acts concerning character for truthfulness or untruthfulness" so broadly as to continue much of the current practice. This interpretation would be unfortunate and contrary to the spirit with which the rules were enacted.

70. N.C. R. EVID. 608(b).

71. 1 H. BRANDIS, *supra* note 5, § 111 (1982).

72. N.C. R. EVID. 608 comment. The safeguards mentioned are: that the instances of conduct must be probative of truthfulness; that the danger of prejudice or confusion must not outweigh the probative value; and that there must not be harassment or undue embarrassment. With these safeguards, the rule can be useful because the credibility of every witness is important to consider.

73. N.C. R. EVID. 608(b).

74. *Id.* 608 comment. It is likely that this provision of the rule is constitutionally mandated. The accused's right to testify would be restricted severely if exercising this right would allow inquiry into all past criminal acts, in disregard of the privilege against self-incrimination. *Id.* (citing FED. R. EVID. 608 comment).

75. *Id.* 609.

76. 1 H. BRANDIS, *supra* note 5, § 112 (1982).

77. FED. R. EVID. 609(a)(2).

78. *Id.* 609(a)(1).

79. N.C. R. EVID. 609(a).

80. See *supra* note 1.

81. FED. R. EVID. 609(a)(2). The Conference Report to the federal rule explains that crimes involving dishonesty or false statement include: "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature

Article Seven provides for opinion and expert testimony. Rule 703, *Bases of Opinion Testimony by Experts*,⁸² identical to Federal Rule of Evidence 703, is consistent with the North Carolina Supreme Court decision in *State v. Wade*,⁸³ which allowed an expert to rely on data he observed outside of court. Rule 703 allows expert reliance on outside data that would not be admissible in evidence, if the data is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."⁸⁴ Although the *Wade* court used the term "inherently reliable"⁸⁵ rather than "reasonably relied upon by experts,"⁸⁶ the Official Commentary says that the new rule does not change the holding in *Wade*.⁸⁷ Prior to *Wade*, North Carolina Supreme Court decisions concerning whether an expert witness could base his decision on such data were in conflict.⁸⁸ Rule 703 appears to adopt any clarification of North Carolina law contributed by the *Wade* opinion; however, use of the ambiguous phrase "reasonably relied upon by experts"⁸⁹ does not resolve the question of what can be the basis for the expert's opinion.⁹⁰

Rule 704, *Opinion on Ultimate Issue*, allows an expert to give his opinion about the "ultimate issue to be decided by the trier of fact."⁹¹ This rule is identical to Federal Rule of Evidence 704. The common-law rule precluded a

of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7103. The extent to which "dishonesty" extends the scope of convictions admitted into evidence has been a source of conflict under the federal rule. C. MCCORMICK, *supra* note 12, § 43, at 12 n.60.4 (Supp. 1978) (citing *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976) (conviction for attempted robbery excluded for not involving "dishonesty"); *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976) (conviction for petty larceny admitted as involving "dishonesty")).

82. N.C. R. EVID. 703.

83. 296 N.C. 454, 251 S.E.2d 407 (1979). The court in *Wade* held that a "physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence." *Id.* at 462, 251 S.E.2d at 412.

84. N.C. R. EVID. 703.

85. *Wade*, 296 N.C. at 462, 251 S.E.2d at 412.

86. N.C. R. EVID. 703.

87. *Id.* comment.

88. See Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L. REV. 1, 21 (1982); Note, *State v. Wade—Expert Testimony and the Dual Reliability Test*, 58 N.C.L. REV. 1161 (1980). Some pre-*Wade* cases admitted doctors' opinions derived from patients' out of court statements. See, e.g., *Penland v. Bird Coal Co.*, 246 N.C. 26, 97 S.E.2d 432 (1957) (doctor's testimony that plaintiff had been disabled was based on statements made outside of court by plaintiff that would have been inadmissible as hearsay); *State v. Alexander*, 179 N.C. 759, 103 S.E. 383 (1920) (psychiatrist's testimony that defendant was insane was based on conversations with defendant outside of court, which conversations would have been inadmissible as hearsay).

Another case excluded doctors' opinions based on statements made outside of court. *Todd v. Watts*, 269 N.C. 417, 152 S.E.2d 448 (1967) (doctors' opinions about plaintiff's injuries, based in part on conversations with plaintiff, excluded because not based on personal knowledge of accident and consequential injuries).

89. N.C. R. EVID. 703.

90. Blakey, *supra* note 88, at 26-32. Professor Blakey explores some of the questions remaining after the *Wade* decision on the subject of the proper bases for physicians' opinions. *Id.* at 29-32. One question, with respect to doctors, is whether information from persons who are not patients would be sufficiently reliable.

91. N.C. R. EVID. Rule 704.

witness from giving such an opinion.⁹² North Carolina courts had abrogated the common-law rule to some extent by allowing expert opinion whenever "the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."⁹³ The basis for the common-law rule was that the witness otherwise would be invading the province of the jury, or telling the jury how the case should be decided.⁹⁴ Problems arose in defining the province of the jury, however, because the jury must resolve a number of issues with the help of all available evidence before reaching its final decision. To preclude opinions on every issue to be considered by the jury would eliminate a great deal of relevant opinion evidence.⁹⁵ Furthermore, the common-law rule overlooked the more important concern whether the witness' opinion would help the trier of fact reach a conclusion.⁹⁶ Safeguards exist in rules 701⁹⁷ and 702⁹⁸ to exclude opinion evidence that would not be helpful to the trier of fact, and rule 403 excludes evidence if there is substantial danger of confusing the issues or wasting time.⁹⁹ Thus, an opinion that does no more than tell the jury how to resolve the ultimate issue would be excluded because the opinion would not help the jury and would waste time.¹⁰⁰

An important rule that does not change North Carolina law is rule 705, *Disclosure of Facts or Data Underlying Expert Opinion*,¹⁰¹ which preserves a recent statutory change. North Carolina General Statutes section 8-58.14, enacted in 1981, abolished the requirement of prior disclosure of facts underlying an expert's opinion; thereafter, hypothetical questions to avoid prior disclosure became unnecessary.¹⁰² Rule 705, which replaces section 8-58.14,¹⁰³ however, does not permit an opinion based on inadequate data. Rule 705 and its predecessor were enacted in response to the confusion created by conflicting explanations of the basis for the expert's opinion.¹⁰⁴ Disclosure of underlying facts, however, will be required if requested by an adverse party.¹⁰⁵ In this respect, rule 705 differs from Federal Rule of Evidence 705

92. 1 H. BRANDIS, *supra* note 5, § 126 (1982).

93. *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1975).

94. C. McCORMICK, *supra* note 12, § 12. The fear was that the jury merely would adopt the expert's opinion without independent analysis of all the evidence. *Id.*

95. 1 H. BRANDIS, *supra* note 5, § 126 (1982) (witness could invade jury's province with factual, as well as opinion evidence, and jury is free to reject either.)

96. See Patrick, *supra* note 3, at 696. Professor Stansbury proposed an alternative rule: "Opinion is inadmissible whenever the witness can relate facts so that . . . the jury is as well qualified as the witness to draw inferences and conclusions from the facts." 1 D. STANSBURY, *THE NORTH CAROLINA LAW OF EVIDENCE* § 124 (Brandis rev. 3d ed. 1973). Professor Stansbury's concern is addressed adequately by rules 701 and 702, which limit opinion evidence to that which would be helpful to the trier of fact.

97. N.C. R. EVID. 701(b).

98. *Id.* 702.

99. *Id.* 403.

100. N.C. R. EVID. 704 comment (quoting FED. R. EVID. 704 comment).

101. *Id.* 705.

102. N.C. GEN. STAT. § 8-58.14 (1981).

103. N.C. R. EVID. 705 comment.

104. See, e.g., C. McCORMICK, *supra* note 12, § 17.

105. N.C. R. EVID. 705.

which gives the court, not the adverse party, the discretion to require such prior disclosure.¹⁰⁶

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106. FED. R. EVID. 705.

The New North Carolina Rules of Evidence: Hearsay, Authentication, and the Best Evidence Rule.

Article VIII of the North Carolina Evidence Code establishes six rules that govern the admissibility of hearsay. Rule 801 defines hearsay,¹ statement,² and declarant,³ and specifies that admissions of a party-opponent are an exception to the hearsay rule.⁴ Rule 802 provides that hearsay is inadmissible unless an exception is applicable.⁵ Rule 803 lists exceptions to the hearsay rule that apply regardless of the availability of the declarant.⁶ Rule 804 lists five hearsay exceptions that apply only if the declarant is unavailable.⁷ Rule 805 provides for the admissibility of hearsay within hearsay if an available exception applies to each part of the combined statements.⁸ Rule 806 permits the credibility of the declarant to be attacked or supported by any evidence that would be admissible had the declarant testified as a witness.⁹

Rule 801(a) defines the "statement" required for hearsay¹⁰ as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."¹¹ This definition is identical to the federal rule and excludes from the definition of hearsay all nonverbal conduct not intended as an assertion.¹² A literal reading of the rule leaves unclear whether verbal conduct

1. N.C. R. EVID. 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

2. *Id.* 801(a) ("A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."). For a discussion of the effect of the definition of 'statement' in North Carolina, see *infra* notes 10-30 and accompanying text.

3. N.C. R. EVID. 801(b) ("A 'declarant' is a person who makes a statement.").

4. A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he had manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

Id. 801(d). For a discussion of the exception for admissions by a party-opponent, see *infra* notes 45-53.

5. See N.C. R. EVID. Rule 802. This rule is in accord with North Carolina practice. See *id.* comment.

6. See N.C. R. EVID. 803. FED. R. EVID. 803 lists 24 exceptions to the hearsay rule. There are 24 exceptions listed under the North Carolina rule, but North Carolina did not adopt the exception in FED. R. EVID. 803(22) (judgment of previous conviction). This exception is reserved for future codification. N.C. R. EVID. 802(22). For a discussion of the various hearsay exceptions that apply under rule 803, see *infra* notes 54-81 and accompanying text.

7. See N.C. R. EVID. 804. For a discussion of the exceptions that apply under rule 804, see *infra* notes 82-104 and accompanying text.

8. See N.C. R. EVID. 805. This rule is consistent with current North Carolina practice. See *id.* comment (citing *State v. Connley*, 295 N.C. 327, 245 S.E.2d 663 (1978)).

9. See *id.* 806.

10. The definition of "hearsay" under rule 801(c) requires that "hearsay" be a "statement." See *supra* note 1.

11. N.C. R. EVID. 801(a).

12. *Id.* comment (quoting FED. R. EVID. 801 comment). See 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 142 (1982 & Supp. 1983).

not intended as an assertion is hearsay.¹³ It is likely, however, that courts will characterize nonassertive verbal conduct as nonhearsay and therefore admissible evidence.¹⁴ Prior to the adoption of rule 801(a), North Carolina decisions as to whether nonassertive conduct should be excluded as hearsay were inconsistent.¹⁵ Some cases designated as hearsay both verbal and nonverbal conduct not intended by the declarant to be an assertion.¹⁶ Thus, the conduct was not admissible evidence. Other courts, however, admitted similar evidence, either as nonhearsay or without recognizing its possible hearsay nature.¹⁷ The trend has been to classify nonassertive conduct as nonhearsay,¹⁸ a result that may have been influenced by the treatment of nonassertive conduct in the federal rules.¹⁹ The extent to which the definition of "statement" will change North Carolina law will depend on the courts' willingness to find that conduct was an intentional assertion,²⁰ and on their willingness to hold that evidence is irrelevant or excludable under principles of unfair prejudice, undue consumption of time, or confusion of issues.²¹

By excluding from the definition of hearsay all nonverbal conduct not intended as an assertion, the Study Committee recognized that the declarant's perception, memory, and narration of the conduct would be untested.²² The Committee, however, determined that in the absence of an intent to make an assertion, these hearsay dangers and the danger of insincerity would be minimal, and, therefore, the evidence should not be excluded on hearsay grounds.²³ A number of objections were raised to the adoption of this rule.²⁴

13. See 1 H. BRANDIS, *supra* note 12, § 142 n.56.3 (Supp. 1983). A literal reading of rule 801, sections (a) and (c), indicates that the phrase "if it is intended by him as an assertion" modifies "an oral or written assertion."

14. See N.C. R. EVID. 801 comment (quoting FED. R. EVID. 801 comment). "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion." *Id.*

15. See 1 H. BRANDIS, *supra* note 12, § 142.

16. See *id.* § 142 at 565 nn.54-55 (1982).

17. See *id.* § 142 at 565-66 n.56.

18. *Id.* § 142, at 566 n.57 (citing *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977) (defendant's act in carrying pistol not intended as assertion and was admissible in defendant's trial for murder and conspiracy); *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 268 S.E.2d 1 (1980) (deceased's act of walking around subdivision during trip not intended as assertion and was admissible to show business nature of trip)).

19. See Blakey, *Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 11-12 (1981). Professor Blakey states that, prior to the adoption of the federal rules in 1975, North Carolina did not recognize an exception to the hearsay rule for nonassertive conduct. *Id.* at 11.

20. See 1 H. BRANDIS *supra* note 12, § 142. "The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility." N.C. R. EVID. 801 comment.

21. N.C. R. EVID. 403. See 1 H. BRANDIS, *supra* note 12, § 142. See also Blakey, *supra* note 19, at 15-16. Professor Blakey argues that it is difficult for a court to weigh the probative value of hearsay, especially when the evidence is as weak as nonassertive conduct.

22. See N.C. R. EVID. 801 comment (quoting FED. R. EVID. 801 comment).

23. See *id.*

24. See, e.g., Blakey, *supra* note 19, at 10-21, 24-30. Professor Blakey argues that describing evidence that is admitted for a testimonial purpose as "not hearsay" complicates the definition of hearsay. He suggests that North Carolina reject any hearsay exception for nonassertive conduct used for a testimonial purpose and proposes the following definition of "statement": "The term

First, by classifying as nonhearsay all nonverbal conduct not intended as an assertion, such conduct becomes admissible without cross-examination of the declarant.²⁵ The Committee concluded that, because the declarant had not intended the conduct as an assertion, there would be little danger of dishonesty.²⁶ This rationale, however, ignores the fact that the declarants' knowledge of the truth will go untested; he may have an honest belief in something totally false. Second, the nature of nonassertive, nonverbal conduct is ambiguous. Thus, it is difficult to determine what the declarant believed to be true.²⁷ Since it also is difficult for a court to assess nonassertiveness, there is a danger that assertive conduct may be admitted improperly into evidence.²⁸ Third, weighing the probative value of the evidence is difficult when the evidence is vague, nonassertive conduct. The danger exists that courts will admit evidence with insufficient probative value to outweigh its prejudicial effect.²⁹ Finally, by classifying as nonhearsay evidence that actually is hearsay, the Committee overlooked the testimonial character of the evidence being admitted.³⁰ Although each of these objections was raised before the rule was adopted, the Committee determined that the probative value of the evidence outweighed the possible hearsay dangers.

'statement' includes both written or spoken words and nonverbal conduct by a person when such words or conduct make an assertion either directly or by implication." *Id.* at 21.

25. *Id.* at 25 ("[T]he effect of a hearsay exception for nonassertive conduct would be to admit evidence of conduct to prove belief in situations in which a direct statement by the same person of the same belief would be excluded as inadmissible hearsay.").

26. N.C. R. EVID. 801 comment (quoting FED. R. EVID. 801 comment).

27. See Blakey, *supra* note 19, at 26-28. Professor Blakey argues that the difficulties involved in reaching conclusions about the beliefs of the declarant from the nonassertive conduct have been overlooked because the discussions have centered upon a few, isolated theoretical examples, such as the crowd of "passers-by with their umbrellas up [offered to prove it was raining]." *Id.* at 26. He stated that *Wright v. Tatham*, 7 Adolph & E. 313, 317-20, 112 Eng. Rep. 488, 490-91 (Ex. 1837) (three letters written to testator offered to prove persons who wrote the letters considered testator competent) and *People v. Clark*, 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (1970) (wife of murder suspect fainted when suspect asked her to corroborate his statement to police officer that he did not own certain type coat) were more representative situations. The conduct in both of these cases could have more than one explanation. Blakey, *supra* note 19, at 27-28.

28. Blakey, *supra* note 19, at 15. Professor Blakey argues that the first two federal cases to apply the nonassertive conduct exception applied it to assertive conduct. See *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1181 n.6 (5th Cir. 1975) (FAA regulation requiring every pilot, before beginning a flight, to familiarize himself with all available information concerning that flight was deemed admissible to show FAA's belief that the procedures recommended were safer than other procedures); *United States v. Snow*, 517 F.2d 441 (9th Cir. 1975) (name tag affixed to case in which gun was found declared not hearsay and was admissible to show defendant knowingly possessed the unregistered weapon).

29. Blakey, *supra* note 19, at 15-16. Professor Blakey argues that *State v. Garner*, 34 N.C. App. 498, 238 S.E.2d 653 (1977), *cert. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978), was a case in which the evidence of nonassertive conduct should have been excluded on relevancy grounds. In *Garner* defendant appealed a finding that he was the father of an illegitimate child. To suggest that defendant's mother believed that defendant was the father of the child, the prosecution introduced evidence that defendant's mother gave the prosecution a check. *Id.* at 499, 238 S.E.2d at 654. Professor Blakey argues that the court should have excluded the evidence on relevancy grounds because the mother's opinion would not have been admissible if she had been a witness at the trial. Blakey, *supra* note 19, at 16. Professor Brandis also disagreed with the result and analysis in *Garner*. He stated that the court's conclusion that the mother's credibility was not at stake was "most doubtful." See 1 H. BRANDIS, *supra* note 12, § 142, at 566 n.56.

30. Blakey, *supra* note 19, at 11.

Rule 801(d), *Exception for Admissions by a Party-Opponent*,³¹ differs significantly from its federal rule counterpart.³² Federal rule 801(d)(1) excludes from the definition of hearsay, and allows as substantive evidence, three categories of prior statements made by a witness who is subject to cross-examination at trial.³³ The statements excluded are: (1) a prior inconsistent statement given "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition";³⁴ (2) a prior consistent statement offered to rebut an express or implied charge of recent fabrication or improper influence; and (3) an identification of a person made after the witness perceived the person.³⁵ The North Carolina common law allowed the use of prior inconsistent statements, not as substantive evidence, but for purpose of impeachment of the witness.³⁶ North Carolina admitted, without prior impeachment of the witness, a wide range of corroborative statements to support a witness' credibility.³⁷ Thus, prior identification is admissible either to corroborate or to impeach a witness's identification in court.³⁸ Because the federal rule differed substantially from the North Carolina common law, the Study Committee did not incorporate federal rule 801(d)(1) in the North Carolina rule.³⁹ Although not expressed, one concern may have been the fear of a criminal conviction or

31. N.C. R. EVID. 801(d).

32. *Id.* comment.

33. FED. R. EVID. 801(d)(1). The argument against use of prior statements as substantive evidence is based upon the fact that "the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination." *Id.* 801 comment. In adopting the rule for prior statements, however, Congress took the view that the hearsay dangers of these statements are eliminated because the witness is available for cross-examination at the trial.

34. *Id.* 801 comment. There was some support expressed to Congress for this view because of the concern for witness intimidation in criminal cases. *See id.* Congress, however, decided to compromise and limit the admissible statements to those made under oath, including statements made before a grand jury. *Id.* The rationale for allowing these statements is that there is no dispute that the prior statement was made and there was an opportunity to cross-examine the witness at the formal proceeding. *Id.*

35. The basis for this rule is the uncertainty and unsatisfactory nature of courtroom identifications compared to identifications made earlier under less suggestive circumstances. *See id.*

36. *See* 1 H. BRANDIS, *supra* note 12, § 46.

37. The rule in North Carolina concerning corroborative statements was less restrictive than the rule in other jurisdictions, which admitted evidence to support a witness' credibility only when the witness had been impeached directly. *See id.* § 50. Although North Carolina courts often recognized the necessity of impeachment, the requirement was more theoretical than real. *Id.* This liberal practice in North Carolina had been subject to severe criticism, but unrestricted use of corroborative evidence continued. *Id.* § 52. Professor Brandis approved of the liberal rule for corroboration in North Carolina. *Id.* *See also* Patrick, *Toward a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669, 700-01 (1980).

38. *See, e.g.,* State v. Neville, 175 N.C. 731, 95 S.E. 55 (1918).

39. *See* N.C. R. EVID. 801 comment. In keeping with his theory that North Carolina should simplify the federal definition of hearsay, Professor Blakey argued that the North Carolina Rules of Evidence should not include FED. R. EVID. 801(d)(1). He stated that the concept of hearsay would be misunderstood if hearsay statements were defined as nonhearsay. Blakey, *supra* note 19, at 20-21. Professor Blakey took the view that the federal rule classifications of prior consistent statements and statements of identification largely were meaningless. Blakey argued that testimonial use of a prior consistent statement is unimportant and testimonial use of a prior identification only becomes important if a witness repudiates a prior identification. In the event of repudiation, Professor Blakey stated that the arguments against testimonial use of the prior identification are even stronger because, under the federal rule, there is no requirement that the prior identification be under oath. *Id.* at 23.

civil judgment based solely upon an alleged prior statement by a witness.⁴⁰

Had the Committee adopted federal rule 801(d)(1)(B), the North Carolina corroboration rule would have been restricted to cases in which the opposing party charged the witness with recent fabrication or improper influence. Because the Committee did not adopt the rule, however, there will be no change in the North Carolina law on corroboration, except to the extent that rule 608(a) requires that a character witness' character for truthfulness be attacked before reputation or opinion evidence of his truthfulness can be admitted.⁴¹ Since North Carolina already admitted prior inconsistent statements and prior identification for impeachment purposes, the effect of North Carolina's failure to adopt the federal rule will be limited. Although a party opposing a statement is entitled to a jury instruction that the statement cannot be used substantively, it is doubtful that the instruction will have a significant effect.⁴² The limitation, however, will have a practical effect when the inconsistent statement or identification is required to satisfy a party's burden of proving an essential element of the case. If the court admits the inconsistent statement or identification solely for impeachment purposes, and there is no other evidence to support a party's claim or defense, the party offering the statement will fail to meet its burden of proof.⁴³ The Study Committee should have adopted a hearsay exception for prior inconsistent statements given under oath. The oath provides an assurance that the witness made the statement, and the formal proceeding and opportunity for cross-examination provide additional assurances of reliability.⁴⁴

Federal rule 801(d)(2) excludes from the definition of hearsay admissions by a party opponent statements offered against him if the statements are (A) the party's own statement, either in an individual or representative capacity; (B) a statement that the party adopted or manifested a belief in the truth of; (C) a statement by a person authorized to make a statement concerning the subject; (D) a statement by an agent or employee concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator made during the course of and in furtherance of the conspiracy.⁴⁵ The North Carolina rule also provides for admissibility of the evidence, but treats it as an exception to the hearsay rule.⁴⁶ The North Carolina rule 801(d)(2) exceptions for a statement made by a party-opponent and a statement adopted by a party are in accord with North Carolina practice.⁴⁷ North Carolina courts also admitted statements made by an agent authorized to speak for the principal,⁴⁸ but new rule 801(d)(2)(C) will

40. See Blakey, *supra* note 19, at 22.

41. See 1 H. BRANDIS, *supra* note 12, § 50.

42. See T. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 52 (1978).

43. *Id.*

44. See FED. R. EVID. 801 comment.

45. See *id.* 801(d)(2).

46. See N.C. R. EVID. 801 comment. See also Blakey, *supra* note 19, at 23.

47. 2 H. BRANDIS, *supra* note 12, § 167.

48. *Id.* § 169.

clarify North Carolina law by including statements made by an agent either to the principal or to a third party.⁴⁹ Rule 801(d)(2)(D) represents a welcome change from a much criticized North Carolina practice.⁵⁰ North Carolina traditionally excluded statements made by an agent or employee if the statements were narrative of a past event, even though the agency relationship continued. The courts reasoned that the principal had not authorized the agent or employee to subject the principal to liability.⁵¹ Rule 801(d)(2)(D) adopts a more logical approach, and makes admissible any statement related to a matter within the scope of the agency or employment as long as the agent made the statement during the existence of the relationship.⁵² Rule 801(d)(2)(E) limits the admissibility of statements made by co-conspirators to those made "during the course and in furtherance of the conspiracy." This accords with current North Carolina practice.⁵³

Rule 803, *Hearsay Exceptions, Availability of Declarant Immaterial*,⁵⁴ is almost identical to its federal counterpart.⁵⁵ The theory underlying the exceptions is that hearsay exceptions possess "circumstantial guarantees of trustworthiness" sufficient to dispense with the requirement that the declarant testify in person even though he is available.⁵⁶ The most important of these exceptions are for excited utterances, present sense impressions, then existing mental, emotional, or physical conditions, statements for purposes of medical diagnosis or treatment, recorded recollections, business records, and public records.⁵⁷ Although North Carolina common law and statutory law already provided for most of the exceptions contained in rule 803, the rule will change the law in North Carolina by expanding the scope of some of the hearsay exceptions and clarifying uncertain points that existed in the law.⁵⁸ The most significant dif-

49. N.C. R. EVID. 801 comment. See also 2 H. BRANDIS, *supra* note 12, § 169, at 17 n.53. There was some question whether statements by an employee to the principal or a fellow employee were admissible. See *Bixler Co. v. Britton*, 192 N.C. 199, 134 S.E. 488 (1926) (letter from general manager to salesperson); *Willis v. Atlantic & Danville R.R.*, 120 N.C. 508, 26 S.E. 784 (1897) (conversation between section master and conductor). Although the evidence was excluded in these cases, Professor Brandis took the view that, in both instances, the court believed there was no adequate proof of the declarant's authority to speak for the principal. 2 H. BRANDIS, *supra* note 12, § 167, at 17 n.53.

50. See *Pearce v. Southern Bell Tel. & Tel. Co.*, 299 N.C. 64, 69, 261 S.E.2d 176, 179 (1980) (Copeland, J., dissenting) (record showed implied authority to make the statement even though agent who made the statement was not present at time of plaintiff's injury); *Branch v. Dempsey*, 265 N.C. 733, 756, 145 S.E.2d 395, 411 (1965) (Sharp, J., dissenting) (authority to drive should include authority to make statements to officer). See also 2 H. BRANDIS, *supra* note 12, § 169.

51. [W]hat an agent or employee says, relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestae*, and may be offered in evidence either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters . . . is only hearsay and is not competent as against the principal or employer.

Hubbard v. Southern R.R., 203 N.C. 675, 678, 166 S.E. 802, 804 (1932).

52. N.C. R. EVID. 801(d)(2)(D). See also *id.* 801 comment.

53. *Id.* 801 comment (quoting FED. R. EVID. 801 comment).

54. *Id.* 803.

55. See *id.* comment.

56. *Id.*

57. *Id.* 803

58. See Patrick, *supra* note 37, at 702.

ference between the North Carolina rules and their federal counterparts is in rule 803(22). Federal rule 803(22) admits evidence of a final judgment, entered after or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment.⁵⁹ Under the new North Carolina law, a party cannot use a judgment or finding of a court in another case unless the principle of *res judicata* applies to make the former judgment conclusive or unless a common-law or statutory exception is applicable.⁶⁰ The Study Committee suggested that this precedent be retained by not adopting the exception in federal rule 803(22).⁶¹

Exception (1) under rule 803 concerns present sense impressions; exception (2) concerns excited utterances. Although these exceptions overlap considerably, and the basis for each exception is that the spontaneity of a statement decreases the likelihood of fabrication,⁶² they differ in their approach to the time allowed between the event and the statement.⁶³ The exception for present sense impressions recognizes that a statement usually is not contemporaneous with an event and allows a slight time lapse between the event and the statement.⁶⁴ The time lapse allowed for excited utterances, however, is the duration of the state of excitement, which is determined by the nature of each event.⁶⁵ The North Carolina common law recognized an exception for excited utterances,⁶⁶ but did not recognize an exception for present sense impressions. Thus, rule 803(1) creates a new exception in North Carolina.⁶⁷ Under the spontaneous declaration exception, many courts admitted declarations made shortly after the event. Other courts, however, insisted that the statement be contemporaneous with the event, excluding narrative statements made after the event.⁶⁸ Rule 803(2) should harmonize the discordant case law regarding the permissible time lapse for the exception to apply.⁶⁹

Exception (3) of rule 803 concerns statements of the declarant's then existing mental, emotional, or physical condition. The rule excludes statements of memory or belief to prove the fact remembered or believed because the inclusion of these statements within the hearsay exception would virtually de-

59. FED. R. EVID. 803(22). The rule admits into evidence a former judgment, but excludes minor offenses. The Federal Advisory Committee realized that the rule might leave a jury with evidence of a conviction and no means to evaluate the evidence, but the Committee assumed that the jury would give the evidence substantial effect unless the defendant offered a satisfactory explanation. See *id.* 803 comment. The rule was drafted to avoid violation of constitutional issues, therefore, the exception does not include evidence of the conviction of a third party offered against the accused in a criminal prosecution. To admit the evidence would be to violate the defendant's right of confrontation. *Id.*

60. See 1 H. BRANDIS, *supra* note 12, § 143; see also Patrick, *supra* note 37, at 702.

61. N.C. R. EVID. 803(22) comment. Rule 803(22) was reserved for future codification.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See 2 H. BRANDIS, *supra* note 12, § 164.

67. N.C. R. EVID. 803(1) comment.

68. See 2 H. BRANDIS, *supra* note 12, § 164.

69. N.C. R. EVID. 803(2) comment.

stroy the hearsay rule.⁷⁰ Exception (3) is identical to its federal counterpart and is similar to an exception previously recognized in North Carolina.⁷¹ The North Carolina common law, however, did not admit declarations made by an accused after the commission of a crime. The courts believed that to admit those statements would allow the accused to fabricate evidence in his favor.⁷² Although the federal rules do not deal specifically with this issue, new rule 803(3) is sufficiently broad to include the statements, and the Official Commentary indicates that the rule makes them admissible.⁷³

Rule 803(24) is a catch-all exception that admits hearsay statements not covered specifically by any of the other exceptions if the statement has "equivalent guarantees of trustworthiness"⁷⁴ and the court makes certain determinations regarding the statement's evidentiary value.⁷⁵ Although at common law North Carolina did not provide a catch-all exception to the hearsay rule, the North Carolina courts often admitted hearsay evidence under the general principle of "*res gestae*."⁷⁶ Courts first used the principle to admit statements relating to a particular event and did not examine closely the hearsay aspects of the statements.⁷⁷ Courts eventually expanded the use of the principle to include nonverbal acts and circumstances that aided a jury in evaluating an event.⁷⁸ Unfortunately, when courts used the "*res gestae*" concept, they emphasized a requirement of concurrence in time of the hearsay evidence with the event, and excluded evidence that would have been admitted under independent exceptions.⁷⁹ Because of confusion that resulted from use of the "*res gestae*" concept, courts and commentators advocated not using the principle as a basis for a hearsay exception.⁸⁰ Under the new rules, the "*res gestae*" concept no longer creates an exception to the hearsay rule; however, evidence previously admitted under the "*res gestae*" formula probably will fall within the catch-all provision or within specific hearsay exceptions, such as excited utterances or then existing mental, emotional, or physical conditions.⁸¹

70. *Id.* 803(3).

71. *See* 2 H. BRANDIS, *supra* note 12, § 161.

72. *Id.*

73. *See* 2 H. BRANDIS, *supra* note 12, § 161, at 175 n.16.

74. N.C. R. EVID. 803(24).

75. The court must determine that: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative than any other evidence that the proponent can procure through reasonable means; and (C) the general purposes of the rules and the interest of justice will be best served by admission of the statement into evidence. *Id.* The North Carolina rule differs from the federal rule in that the North Carolina rule requires that the proponent of the evidence give written notice of his intention to offer the evidence in advance of offering the statement. *Id.* comment. The federal rule requires only that the proponent of the evidence make known to the adverse party sufficiently in advance of the trial or hearing the intention to introduce the evidence.

76. 2 H. BRANDIS, *supra* note 12, § 158. "*Res gestae*" literally means "things done."

77. *Id.*

78. *Id.*

79. *Id.*

80. *See, e.g.,* United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (*res gestae* "has been accountable for so much confusion that it had best be denied any place whatever in legal terminology").

81. N.C. R. EVID. 803(24) comment.

Rule 804, *Hearsay Exceptions: Declarant Unavailable*,⁸² expands similar exceptions under the common law and expands the North Carolina definition of unavailability.⁸³ Under rule 804(a), a declarant is unavailable under the following circumstances: (1) a court exempts the declarant on the ground of privilege; (2) the declarant refuses to testify despite a court order requiring him to do so; (3) the declarant testifies to a lack of memory; (4) the declarant cannot be present due to death, physical or mental illness, or infirmity; and (5) the declarant is absent from the hearing, and the proponent of the statement cannot compel his attendance by process or other reasonable means.⁸⁴ Under the North Carolina common law, the grounds that satisfied the requirement for unavailability varied with the different exceptions.⁸⁵ With the adoption of rule 804, however, the grounds for unavailability now apply uniformly to all rule 804(b) exceptions.⁸⁶

Exception (1) to rule 804(b) admits testimony given by a witness either at another hearing of the same or a different proceeding, or in a deposition, if the party against whom the testimony is now offered⁸⁷ had the motive and opportunity to develop the testimony by direct, cross, or redirect examination.⁸⁸ This exception is similar to the common-law rule in North Carolina.⁸⁹ Exception (4), which admits statements concerning the declarant's personal or family history, or statements concerning the personal or family history of another closely related person,⁹⁰ also is similar to the North Carolina common law.⁹¹

Rule 804(b)(2) admits statements made by a declarant who believed his death was imminent, if the statement concerned the cause or circumstances of what he believed to be his impending death.⁹² The rule is in accord with the statutory law in North Carolina,⁹³ but differs from its federal counterpart, which admits the statements only in prosecutions for homicides and in a civil proceedings.⁹⁴ Since dying declarations are not inherently more reliable in

82. *Id.* 804.

83. See Patrick, *supra* note 37, at 702.

84. N.C. R. EVID. 804(a).

85. Under the hearsay exception for testimony at a formal trial, North Carolina recognized unavailability grounds (1), (4), and (5). See 1 H. BRANDIS, *supra* note 12, § 145. Grounds (2) and (3) were neither accepted nor rejected, but Professor Brandis stated that North Carolina courts should accept these grounds when the occasion arises. *Id.* In contrast to the federal rule for statements made under a belief in impending death now adopted in North Carolina, however, prior North Carolina law required that the declarant be dead. *Id.* § 146. Under the exception for statements against interest, any legitimate reason for unavailability was sufficient. *Id.* § 147, at 589 n.80. Under the exception for statements of family history, older cases in North Carolina held that the declarant must be dead. Professor Brandis, however, argued that any legitimate reason for unavailability was sufficient. *Id.* § 149.

86. See N.C. R. EVID. 804 comment (quoting FED. R. EVID. 804 comment).

87. Or, in a civil action or proceeding, testimony against a predecessor in interest may be admitted.

88. N.C. R. EVID. 804(b)(1).

89. See 1 H. BRANDIS, *supra* note 12, § 145; see also Patrick, *supra* note 37, at 703.

90. N.C. R. EVID. 804(b)(4).

91. See 1 H. BRANDIS, *supra* note 12, § 149; see also Patrick, *supra* note 37, at 703.

92. N.C. R. EVID. 804(b)(2).

93. See 1 H. BRANDIS, *supra* note 12, § 146.

94. See FED. R. EVID. 804(b)(2). See also N.C. R. EVID. 804 comment. The new North

homicide prosecutions and in civil actions than in other prosecutions, the Study Committee was justified in eliminating the restriction.⁹⁵

Exception (3) under both North Carolina and federal rule 804(b) admits into evidence a statement that at the time of its making was so much contrary to the declarant's pecuniary or proprietary interest that a reasonable man would not have made the statement unless he believed it to be true.⁹⁶ The new North Carolina rule differs from both the federal rule and older North Carolina common law. The last sentence of federal rule 804(b)(3) states that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."⁹⁷ North Carolina exception (3) differs from the federal rules by imposing the requirement of corroborating circumstances on both exculpating and implicating statements.⁹⁸ Traditionally, North Carolina admitted statements made against the pecuniary or proprietary interest of the declarant, but excluded statements made against the penal interest of the declarant.⁹⁹ In 1978, however, the North Carolina Supreme Court abandoned the rigid common-law rule in *State v. Haywood*¹⁰⁰ and listed seven requirements that a declaration against penal interest must satisfy: (1) the declarant must be unavailable; (2) the declaration must be an admission that the declarant committed the crime for which the defendant is on trial, and the admission must be inconsistent with the defendant's guilt; (3) the declaration must have had the potential of jeopardizing the personal liberty of the declarant at the time it was made, and the declarant must have understood the damaging potential of the statement; (4) the declarant must have been in a position to have committed the crime to which the statement refers; (5) the declaration must have been voluntary; (6) there must have been no probable motive for the declarant to make a false statement; and (7) the facts and circumstances surrounding the declaration and the crime must corroborate the declaration and indicate the trustworthiness of the statement.¹⁰¹ Although the new rule does not restate the specific requirements listed in *Haywood*, most of them probably will still apply under new rule 804(b)(3).¹⁰²

The Official Commentary makes clear that the rule 804(b)(3) exception should not be construed to add any requirements beyond "corroborating cir-

Carolina rule 804(b)(2) is in accord with N.C. GEN. STAT. § 8-51.1 (1981). Some statements not admissible under the prior statute, however, are now admissible because North Carolina adopted the federal definition of a qualifying statement and the federal definition of unavailability. For the changes in the prior statutory law, see 1 H. BRANDIS, *supra* note 12, § 146.

95. See Patrick, *supra* note 37, at 702.

96. N.C. R. EVID. 804(b)(3).

97. FED. R. EVID. 804(b)(3).

98. Compare N.C. R. EVID. 804(b)(3) with FED. R. EVID. 804(b)(3) (last sentence). See N.C. R. EVID. 804 comment.

99. See 1 H. BRANDIS, *supra* note 12, § 147, at 590 n.86.

100. 295 N.C. 709, 249 S.E.2d 429 (1978).

101. See *State v. Haywood*, 295 N.C. 709, 730, 249 S.E.2d 429, 442 (1978); see also Patrick, *supra* note 37, at 704.

102. See 1 H. BRANDIS, *supra* note 12, § 147, at 164 n.79.4 (Supp. 1983).

cumstances clearly indicat[ing] the trustworthiness of the statement.”¹⁰³ The purpose of requiring corroboration is to eliminate fabrication,¹⁰⁴ and the rule should be interpreted accordingly.

Article IX, *Authentication and Identification*,¹⁰⁵ is similar to existing North Carolina law. Rule 901(a) states that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”¹⁰⁶ Under rule 901(a), the requirement of authentication or identification is a matter of relevancy and is governed by the procedure set forth in rule 104(b).¹⁰⁷ Rule 104(b) makes authenticity and identification questions for the jury once the judge makes a preliminary determination that the foundation evidence is sufficient to support a finding of fulfillment of the condition.¹⁰⁸ Rule 901(b) lists examples of evidence that conform to the requirement of the rule, including handwriting, distinctive characteristics, voice identification, telephone conversations, public records or reports, and ancient documents.¹⁰⁹ The methods of proving authenticity or identity of the examples set out in rule 901(b) are, with minor exceptions, in accord with North Carolina practice.¹¹⁰ Exception (3) provides for comparison of specimens, by the trier of fact or by expert witnesses, with specimens that have been authenticated.¹¹¹ Prior North Carolina statutory law permitted witnesses to make “a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine.”¹¹² Rule 901(b)(3), in conjunction with rule 104(b), makes this question one for the jury, subject to the sufficiency-of-evidence requirement of rule 901(a).¹¹³

Rule 902 lists ten categories of writings that do not require extrinsic evidence of authenticity as a condition precedent to admissibility. The rule applies to domestic public documents under seal and not under seal, foreign public documents, certified copies of public records, official publications, newspapers and periodicals, trade inscriptions, and other writings whose authenticity generally is assured.¹¹⁴ Most of the methods of self-authentication are in accord with North Carolina practice, but rule 902 increases the number of writings that are self authenticating. For example, rule 902(6) provides that newspapers and periodicals are self authenticating,¹¹⁵ and rule 902(7) provides

103. N.C. R. EVID. 804 comment.

104. *Id.* comment.

105. *Id.* 901-903.

106. *Id.* 901(a).

107. *Id.* 901 comment (quoting FED. R. EVID. 901 comment).

108. *Id.* 104(b) (“When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”).

109. *Id.* 901(b).

110. See Patrick, *supra* note 37, at 706.

111. N.C. R. EVID. 901(b)(3).

112. N.C. GEN. STAT. § 8-40 (1981).

113. N.C. R. EVID. 901 comment. See also Patrick, *supra* note 37, at 706.

114. N.C. R. EVID. 902.

115. *Id.* 902(6).

that commercial and mercantile labels and inscriptions are self authenticating.¹¹⁶

Article X, *Contents of Writings, Recordings, and Photographs*,¹¹⁷ with a few exceptions, merely restates or clarifies North Carolina law.¹¹⁸ Rule 1001 defines writings and recordings,¹¹⁹ photographs,¹²⁰ originals,¹²¹ and duplicates.¹²² Since no authority in North Carolina had defined the original of a recording or photograph, it was unclear whether the best evidence rule¹²³ applied to recordings and photographs.¹²⁴ Rule 1001(1), however, clarifies North Carolina law by providing that the best evidence rule applies to recordings and photographs.¹²⁵ Rule 1002 is the best evidence rule and requires a party, except as otherwise provided, to produce the original writing, recording, or photograph to prove the content of a writing, recording, or photograph.¹²⁶ An important exception to the requirement of rule 1002 is rule 1003, which admits a duplicate to the same extent as the original unless an opponent raises a genuine question concerning the authenticity of the original, or circumstances make it unfair to admit the duplicate in place of the original.¹²⁷ Rule 1003 departs from the law in North Carolina that allowed an opponent of the evidence to require the original.¹²⁸ There were, however, several statutory and common-law exceptions that admitted duplicates.¹²⁹ Rule 1003 eliminates both the need for the exceptions and the technical requirement that a party produce an original even though no question exists concerning the authenticity of the duplicate.¹³⁰

116. *Id.* 902(7).

117. *Id.* 1001-1008.

118. See Patrick, *supra* note 37, at 706.

119. N.C. R. EVID. 1001(1) ("‘Writings’ and ‘recordings’ consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.").

120. *Id.* 1001(2) ("‘Photographs’ include still photographs, x-ray films, video tapes, and motion pictures.").

121. *Id.* 1001(3) ("An ‘original’ of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ‘original’ of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’").

122. *Id.* 1001(3) ("A ‘duplicate’ is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.").

123. The best evidence rule is codified at *id.* 1002.

124. See 2 H. BRANDIS, *supra* note 12, § 190, at 100 nn.8-9.

125. N.C. R. EVID. 1001 comment.

126. *Id.* 1002; see Patrick, *supra* note 37, at 707.

127. *Id.* 1003; see Patrick, *supra* note 37, at 707.

128. See 2 H. BRANDIS, *supra* note 12, § 190.

129. See, e.g., *State v. Schumaker*, 251 N.C. 678, 680-81, 111 S.E.2d 878, 879-90 (1960) (deposit slips in duplicate); *Standard Sand & Gravel Corp. v. McClay*, 191 N.C. 313, 316-17, 131 S.E. 754, 756 (1926) (carbon copies of freight waybills). See also N.C. GEN. STAT. § 8-45.1 (1981) (photographic copies of business and public records).

130. See Patrick, *supra* note 37, at 707. The commentary to rule 1003 states that courts "should be liberal in permitting questions of genuineness to be raised." N.C. R. EVID. 1003 com-

Rule 1004, which is consistent with North Carolina practice,¹³¹ describes four situations in which a party is not required to produce an original.¹³² Rules 1005 through 1007 describe additional circumstances in which the original is not required. These exceptions also are consistent with North Carolina practice.¹³³ Rule 1008 states that it is for the court to determine whether the required condition of fact has been fulfilled in accordance with rule 104, but it is for the trier of fact to determine questions of fact concerning the writing.¹³⁴ This rule also is consistent with North Carolina practice.¹³⁵

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ment. Professor Brandis asserted that the commentary is "attempting to narrow the considerable modification of the best evidence rule." 2 H. BRANDIS, *supra* note 12, § 190, at 103 nn.21-23.

131. See 2 H. BRANDIS, *supra* note 12, § 192.

132. The four situations are when: (1) all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith; (2) the original is not obtainable by judicial process; (3) the original is in the possession of the opponent; and (4) the evidence is a collateral matter. N.C. R. EVID. 1004.

133. Rule 1005 admits copies of public records that are certified as correct in accordance with rule 902. Rule 1006 admits summaries of the contents of writings, recordings, or photographs that are too voluminous to examine in court. Rule 1007 admits the contents of writings, recordings, or photographs when the opponent admits that the copy is correct. *Id.* 1005-07

134. *Id.* 1008. The trier of fact determines: (1) whether the writing ever existed; (2) whether another writing, recording, or photograph at the trial is the original; and (3) whether other evidence of contents correctly reflects the contents. *Id.*

135. See 1 H. BRANDIS, *supra* note 12, § 8. North Carolina traditionally admitted photographic evidence that illustrated a witness' testimony, but only as illustrative evidence and not as substantive evidence. *Id.* § 34. One commentator asserts that an additional rule needs to be drafted to clarify the admissibility of substantive photographic evidence. See Patrick, *supra* note 37, at 709 n.194. The commentator states that a rule admitting photographic evidence substantively is needed to put this "illustrative evidence rule" to rest. *Id.* at 708-09.

Privileges: 1983 Revisions to Evidence Law in North Carolina

As of October 1, 1983 any resident judge or presiding judge, if necessary for the proper administration of justice, may compel physicians, psychologists, school counselors, and marital therapists to disclose confidential information either at or before trial.¹ *House Bill 235* amended the provisos to North Carolina General Statutes sections 8-53 to 8-53.5—the physician-patient privilege;² the psychologist-client privilege;³ the school counselor privilege;⁴ and the marital therapist-client privilege.⁵ The provisos give judges discretion to override these privileges and compel disclosure of confidential information. The bill clarifies when a judge has jurisdiction to exercise his discretion to order disclosure, and specifically authorizes compelled pretrial disclosure. A new statutory provision, however, limits the judge's discretion to compel disclosure of confidential communications in divorce and alimony proceedings.⁶ An additional amendment,⁷ *House Bill 66*, made a more sweeping change in the law of privileges by declaring that a defendant's spouse is competent to testify against the defendant in criminal prosecutions.⁸ This note examines the amendments made by *House Bills 235* and *66*.

Privileges are recognized based on society's determination that certain confidential relationships are important and that preservation of their integrity outweighs society's interest in learning the truth.⁹ There are two general privilege categories: absolute privileges, such as the attorney-client privilege, and qualified privileges, such as the physician-patient privilege.¹⁰ In each privilege category, the interest in protection of the relationship is balanced against

1. Act of June 1, 1983, ch. 410, 1983 N.C. Sess. Laws 235 (amending N.C. GEN. STAT. §§ 8-53, -53.3, -53.4, and -53.5 (1981) and adding *id.* § 8-53.6) [hereinafter referred to as *House Bill 235*].

2. N.C. GEN. STAT. § 8-53 (Supp. 1983). For a general discussion of the physician-patient privilege see 1 H. BRANDIS, *BRANDIS ON NORTH CAROLINA EVIDENCE* § 63 (2d rev. ed. 1982).

3. N.C. GEN. STAT. § 8-53.3 (Supp. 1983).

4. *Id.* § 8-53.4.

5. *Id.* § 8-53.5.

6. *Id.* § 8-53.6.

7. Act of Apr. 13, 1983, ch. 170, 1983 Sess. Laws 66 (amending N.C. GEN. STAT. § 8-57 (1981)) [hereinafter referred to as *House Bill 66*].

8. N.C. GEN. STAT. § 8-57 (Supp. 1983). In most instances, however, the court may not compel the spouse to testify. *Id.*

9. Note, *Privileged Communications between Husband and Wife*, 15 N.C.L. REV. 282, 282-83 (1937) [hereinafter cited as Note, *Privileged Communications*]; see Note, *A Survey of the North Carolina Law of Relational Privilege*, 50 N.C.L. REV. 630, 630-31 (1972) [hereinafter cited as Note, *Relational Privileges*].

10. Note, *Relational Privileges*, *supra* note 9, at 631. See, e.g., N.C. GEN. STAT. § 8-53 (Supp. 1983). Qualified privileges generally are statutory privileges. See 1 H. BRANDIS, *supra* note 2, § 54, at 200 nn.93, 95 (psychologist-client and marital therapist-client privileges created by statute); *id.* § 63 at 250-51 nn.22-23 (no physician-patient privilege at common law—privilege created by statute); C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 98, at 212 & nn.1-3 and accompanying text (E. Cleary ed. 1972) (no physician-patient privilege at common law; New York passed the first statutory privilege in 1828). Absolute privileges, however, have their roots in long-standing common-law doctrines. See 1 H. BRANDIS, *supra* note 2 § 58, at 229 & nn.12-14; see also *infra* note 50 (discussing the common-law origins of the husband-wife privilege).

the need to discover the truth.¹¹ The absolute privilege gives priority to the importance of the relationship and does not waive it in the interests of justice.¹² The qualified privilege recognizes that the relationship is important, but that in some instances society's interest in learning the truth requires that the privilege be waived.¹³

Reflecting this balancing process, the North Carolina legislature long ago codified the physician-patient,¹⁴ psychologist-client,¹⁵ school counselor-student,¹⁶ and marital therapist-client¹⁷ privileges as qualified privileges.¹⁸ After defining what information is privileged and in what circumstances the privilege attaches,¹⁹ each privilege statute concludes with a qualifying or disclosure proviso that permits a judge to compel disclosure if he believes it necessary to

11. Note, *Relational Privileges*, *supra* note 9, at 630. See *Trammel v. United States*, 445 U.S. 40, 50 (1980) (testimonial exclusionary rules and privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth.'") (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

The balancing of these interests is one of the factors in Dean Wigmore's test for the validity of any confidential communications privilege. To be valid the privilege must meet all of the following criteria:

- 1) The communication must originate in a *confidence* that they [sic] will not be disclosed.
- 2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- 3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- 4) The injury that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of the litigation.

Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 135 (1980) (quoting 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (J. McNaughton rev. ed. 1961)) (the author contends that the marital communications privilege, considered *infra* at text accompanying note 50, fails the Wigmore test) [hereinafter cited as Note, *Pillow Talk*].

12. Note, *Relational Privileges*, *supra* note 9, at 631.

13. *Id.* See Note, *Physician-Patient Privilege—Compelling Disclosure of Privileged Information—Discretion of the Trial Judge*, 41 N.C.L. REV. 627, 628 (1963). See also N.C. GEN. STAT. §§ 8-53, -53.3, -53.4, -53.5 (Supp. 1983) (permitting judges to compel disclosure of information privileged under physician-patient, psychologist-client, school counselor, and marital therapist-client privileges when "necessary to a proper administration of justice").

14. N.C. GEN. STAT. § 8-53 (Supp. 1983).

15. *Id.* § 8-53.3.

16. *Id.* § 8-53.4.

17. *Id.* § 8-53.5.

18. At common law none of these relational privileges existed. See *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962); *State v. Bryant*, 5 N.C. App. 21, 25, 167 S.E.2d 841, 845 (1969); see also H. BRANDIS, *supra* note 2, §§ 54, 63; Note, *supra* note 13, at 627.

19. Generally, the relational privileges can be invoked only when the communications sought to be excluded are necessary for the professional to effectively render his services. 1 H. BRANDIS, *supra* note 2, § 63, at 252 & n.28; see *Metropolitan Life Ins. v. Boddie*, 194 N.C. 199, 139 S.E. 228 (1927); *In Re Johnson*, 36 N.C. App. 133, 243 S.E.2d 386 (1978). This necessitates that there be a valid confidential or professional relationship at the time the information was acquired. 1 H. BRANDIS, *supra* § 63, at 251-52 n.27; see *State v. Hollingsworth*, 263 N.C. 158, 139 S.E.2d 235 (1964); Barnhart, *Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377, 403-04 (1950). Because the communications must be confidential to qualify for the privilege, the presence of a third party invalidates the privilege. C. McCORMICK, *supra* note 10, § 101. The privilege belongs to the recipient of the services and only he can waive or assert it. 1 H. BRANDIS, *supra* note 2, § 63 at 251 nn.24-25; C. McCORMICK, *supra* note 10, § 102; Barnhart, *supra*, at 404-05. See

a proper administration of justice.²⁰ *House Bill 235* amended these provisos, clarifying under what circumstances a judge may exercise his discretion to compel disclosure and which judges have jurisdiction to so compel disclosure.²¹ In addition, by making physicians, psychologists, and marital therapists incompetent to testify in divorce and alimony proceedings "concerning information acquired while rendering [marital] counseling,"²² the bill limits a judge's discretion to compel disclosure in such actions.

The qualifying proviso to the pre-1983 section 8-53 stated that "the court . . . or the Industrial Commission" may order disclosure of privileged information.²³ Because only the trial judge "[was] so involved in the case as to be able adequately to protect the rights of a party who asserts his privilege,"²⁴ the courts held that this language applied only to the judge or Industrial Commission before which the action was pending.²⁵ As amended in 1983, however, section 8-53 permits any resident or presiding judge or the Industrial Commission to compel disclosure at or before trial.²⁶

House Bill 235's amendments to sections 8-53.3, 8-53.4, and 8-53.5 also permit compelled disclosure at or before trial.²⁷ This is a significant change. Although the old sections did not prohibit pretrial disclosure, they did not authorize it expressly.²⁸ There is little authority interpreting the pre-1983 sections, but they may have been subject to the same limitation imposed on section 8-53 prior to the 1969 amendment expressly permitting pretrial disclosure.²⁹ Courts had held that since section 8-53 did not authorize pretrial disclosure, there could be none.³⁰ When section 8-53 was amended in 1969, the other privilege sections were not. The court of appeals, however, determined that, by allowing pretrial disclosure under section 8-53, the legislature also had intended to allow disclosure under section 8-53.3.³¹ The 1983

Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962). See generally N.C. GEN. STAT. §§ 8-53 to -53.5 (Supp. 1983).

20. See N.C. GEN. STAT. §§ 8-53, -53.3 to -53.5 (Supp. 1983).

21. See *supra* note 1. See *infra* notes 26-37 and accompanying text.

22. See *supra* note 1. This act subjects the disclosure provisos in the physician-patient, psychologist-client, and marital therapist-client privileges to the limitations of § 8-53.6. Section 8-53.6 bars the testimony of these witnesses when their testimony concerns information gained while rendering marital counseling in divorce and alimony proceedings.

23. As amended in 1969 the disclosure proviso of N.C. GEN. STAT. § 8-53 (1981), amended by *id.* § 8-53 (Supp. 1983) provided that "the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure if in his opinion the same is necessary to a proper administration of justice." (emphasis added) The 1969 amendment added the words "or prior thereto."

24. Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 528, 278 S.E.2d 893, 897, *disc. rev. denied*, 304 N.C. 193, 285 S.E.2d 96 (1981).

25. See, e.g., *id.*

26. N.C. GEN. STAT. § 8-53 (Supp. 1983).

27. See *supra* note 1.

28. See N.C. GEN. STAT. §§ 8-53.3 to -53.5 (1981).

29. Act of June 19, 1969, ch. 914, 1969 N.C. Sess. Laws 1134 at 1059.

30. See, e.g., Johnston v. United Ins. Co. of Am., 262 N.C. 253, 256, 136 S.E.2d 587, 590 (1964); Lockwood v. McCaskill, 261 N.C. 754, 758-59, 136 S.E.2d 67, 70 (1964); Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 527-28, 278 S.E.2d 893, 897, *disc. rev. denied*, 304 N.C. 193, 285 S.E.2d 96 (1981).

31. *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 299-300, 256 S.E.2d 818, 823

amendment removes any doubt that judges have discretion under each section to compel pretrial disclosure.

Unlike the proviso to section 8-53, the new provisos to sections 8-53.3, 8-53.4, and 8-53.5 do not grant the Industrial Commission power to compel disclosure; rather, they limit this power to resident or presiding judges in the district where the case is pending.³² Since section 8-53 does not use the words "in the district where the case is pending," it may permit an independent action to compel disclosure of privileged information.³³ On the other hand, sections 8-53.3 to 8-53.5 limit jurisdiction to the "judge in the district in which the action is pending."³⁴ Thus, these sections may foreclose independent actions to compel psychologists, school counselors, and marital therapists to make pretrial disclosure of confidential communications.³⁵ The limitation also may negate or restrict the express grant of authority to compel disclosure prior to trial.³⁶

The jurisdiction to compel disclosure granted in amended sections 8-53, 8-53.3, 8-53.4, and 8-53.5 may not be as broad as it appears. Each of the new disclosure provisos concludes: "[I]f the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge."³⁷ This language further restricts a judge's discretion to compel disclosure once an action has been commenced.

Although *House Bill 235* expanded the grant of jurisdiction in the disclosure provisos to sections 8-53, 8-53.3, and 8-53.5, the Bill also severely limited

(1979). The court thought it "wholly inconsistent to allow disclosure in the case of a physician-patient relationship while, in . . . the psychologist-patient relationship, precluding the required disclosure until the time of trial." *Id.* at 297, 256 S.E.2d at 822.

Without pretrial compelled disclosure, preparation for trial is difficult. The normal practice probably has been for parties to waive the privileges before trial to facilitate discovery and settlement negotiations. Blakey, *New Statutes and Old Problems in Marital and in Doctor-Patient and Psychologist-Patient and Other Therapist Privileges* in SECOND ANNUAL NORTH CAROLINA EVIDENCE SEMINAR JUNE 17-18, 1983 § 8 (available at University of North Carolina at Chapel Hill, Law Library).

32. See N.C. GEN. STAT. §§ 8-53.3 to -53.5 (Supp. 1983).

33. Blakey, *supra* note 31, § 8, at 13.

34. See *supra* note 32.

35. Prior to the current amendment, the court of appeals approved use of an *in camera* hearing to determine whether disclosure of confidential information by staff of a mental health center was "necessary to a proper administration of justice." *In re Albemarle Mental Health Center*, 42 N.C. App. at 298, 256 S.E.2d at 822; see *supra* note 31. The court stated that the use of a separate hearing to determine whether the administration of justice required disclosure was the most effective and practical way "to effectuate the intent of the [disclosure] proviso." *In re Albemarle Mental Health Center*, 42 N.C. App. at 296, 256 S.E.2d at 822.

36. Since only judges in the district where the action is pending can compel disclosure under §§ 8-53.3 to -53.5, it is implied that the action must be commenced before there can be any compulsion of disclosure. Consequently, pretrial disclosure may be restricted to actions that have been filed but have not yet come to trial.

37. N.C. GEN. STAT. §§ 8-53, -53.3, -53.5 (Supp. 1983). The statement of this restriction in § 8-53.4 differs slightly by substituting "the" for "a" in the phrase limiting cases in the district court. See *id.* §§ 8-53, -53.3 to -53.5. The phrase in § 8-53.4 addressing cases in superior court is identical to the limitations in the other sections. No explanation is given for this difference in treatment of cases in district and superior court. It illogically implies that only the judge before whom the case is pending may compel disclosure when the case is in district court, while any superior court judge may compel disclosure when the case is in superior court.

a judge's discretion to compel disclosure in divorce and alimony proceedings. *House Bill 235* added section 8-53.6, which provides:

No disclosure in alimony and divorce actions.—

In an action pursuant to G.S. 50-5, 50-6, 50-7, 50-16.2 and 50-16.3 if either or both parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, or certified marital family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counselling.³⁸

This section expressly applies to sections 8-53, 8-53.3, and 8-53.5.³⁹

Incompetency to testify differs from privilege. Incompetency can be raised by either party to an action, while a privilege can be asserted only by the holder of the privilege.⁴⁰ Making physicians, psychologists, and marital therapists *incompetent* to testify in divorce proceedings will have two effects. First, objection now may be made by either party to prevent the witness from testifying about information acquired while giving marital counseling.⁴¹ Second, not only will the witness be prohibited from disclosing information concerning the marital relations, he also will be precluded from disclosing any information acquired as a marriage counselor.⁴²

Although codified as a privilege, section 8-53.6 is defined in terms of competency. Thus, it does not belong solely to the person receiving counseling; either spouse may invoke it regardless of whether he or she participated in the counseling session.⁴³ Nor may one spouse waive the privilege over the objection of the other. Even if there is no objection to the witness' testimony, the court may exclude the testimony on its own initiative.⁴⁴ Note also, the ordinary physician-patient or other relational privilege can be raised only if the information sought to be excluded was acquired in a valid physician-patient or

38. N.C. GEN. STAT. § 8-53.6 (Supp. 1983); *supra* note 1. Although § 8-53.6 is stated in terms of "competency," the courts may treat it as a privilege. If N.C. R. EVID. 601(a) is interpreted as abolishing all rules of competency—as making all persons competent to be witnesses—§ 8-53.6 could be interpreted as creating a privilege. Rule 601(a) provides that all persons are competent to be witnesses unless one of the new rules of evidence makes them incompetent. There is no rule of incompetency comparable to § 8-53.6. New rule 501, however, explicitly preserves the current statutory and common-law privileges; thus, § 8-53.6 may fall under this heading. *See* N.C. R. EVID. 501. It is significant, however, that § 8-53.6 makes witnesses incompetent to testify, rather than merely granting a privilege to exclude the counselor's testimony. This indicates that the section should be treated as a rule of exclusion instead of as a mere privilege.

39. The provisos to these sections allow compulsion of disclosure subject to § 8-53.6. The school counselor privilege § 8-53.4, however, is not subject expressly to § 8-53.6.

40. C. McCORMICK, *supra* note 10, § 73. Although it makes the witnesses incompetent to testify, N.C. GEN. STAT. § 8-53.6 (1983) resembles a rule of privilege more than a rule of competency or exclusion—it rests upon the desire to protect and foster the confidentiality of a special relationship—rather than the desire to bar irrelevant or unreliable evidence.

41. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.25 (Supp. 1983).

42. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.27.

43. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.25.

44. The judge can exclude the testimony because the section makes the witness incompetent as opposed to merely granting a privilege. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.24 (Supp. 1983). Admission of testimony if neither objects, however, is not prejudicial error. *Id.* *See also* Barnhart, *supra* note 19, at 404-05.

other professional relationship.⁴⁵ Section 8-53.6, however, probably can be used to exclude marriage counseling confidences irrespective of whether there was a formal physician-patient relationship.⁴⁶ The statute is silent about whether in actions other than divorce and alimony proceedings a judge may compel disclosure of information acquired during marital counseling. Presumably, such disclosure would be within a judge's discretion since the statute does not prohibit it.⁴⁷

House Bill 235 makes significant changes in the relational privileges statutes. It does not, however, resolve all the issues that have arisen under these privileges. Foremost among these issues is the scope of judicial discretion to compel disclosure.⁴⁸ Delineation of the bounds of a judge's discretion turns on the meaning of "necessary to a proper administration of justice." This definition has been left to the courts.

In addition to amending certain privileges, in 1983 the General Assembly rewrote the statute governing spousal testimony in criminal actions. *House Bill 66*⁴⁹ radically changed the scope of spousal testimony in criminal actions by permitting a defendant's spouse to testify against him. At common law, spouses could not testify for or against each other in a criminal action.⁵⁰ Exceptions to this rule permit spouses to testify for each other, and in some instances against one another.⁵¹ Nearly all the exceptions, judicial and

45. See 1 H. BRANDIS, *supra* note 2, § 63, at 251-52 nn.27-28.

46. 1 H. BRANDIS, *supra* note 2, § 63, at 75 n.27 (Supp. 1983).

47. If the privilege exists to encourage people to seek marital counseling and to make a complete and full disclosure of their marital and personal problems, then the privilege should be absolute. On the other hand, if society's interest in learning the truth outweighs the importance of this relationship, then the privilege should be qualified in all actions, even divorce and alimony proceedings.

48. The North Carolina Supreme Court has held that it is not abuse of discretion for a judge to refuse to compel disclosure of hospital records and medical reports that would have shown the insured had falsified her claim of good health and medical history on an application for a life insurance policy. See *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962). A student note criticizing this decision argues that it is abuse of discretion not to compel "disclosure of evidence which would materially alter the outcome of the litigation involved." Note, *supra* note 13, at 633. In *Sims* the jury found for the beneficiaries of the life insurance policy. *Sims*, 257 N.C. at 34, 125 S.E.2d at 328.

On occasion, the courts have held that a trial judge must enter a finding of necessity to justify compelling disclosure. *Id.* at 38, 128 S.E.2d at 321; *Metropolitan Life Ins. Co. v. Boddie*, 194 N.C. 199, 139 S.E. 228 (1927). Other decisions presume a finding of necessity when a judge compels disclosure and reject the premise that a judge must make such an entry in the record. *In re Johnson*, 36 N.C. App. 133, 243 S.E.2d 386 (1978); *State v. Bryant* 5 N.C. App. 21, 167 S.E.2d 841 (1969). See 1 H. BRANDIS, *supra* note 2, § 63, at 253 n.33.

49. Act of Apr. 13, 1983, ch. 170, 1983 N.C. Sess. Laws 39 (amending N.C. GEN. STAT. § 8-57 (1981)).

50. At common law the husband-wife privilege was absolute; neither could testify in a civil or criminal action in which the other was a party. See *State v. Hussey*, 44 N.C. 124, 127 (1852) ("[A] contrary rule would break down or weaken the great principles which protect the sanctities of the marriage state."). See also 1 H. BRANDIS, *supra* note 2, §§ 58-59; C. McCORMICK, *supra* note 10, § 78. For a discussion of the origins and evolution of the husband-wife privileges, see Trammel v. United States, 445 U.S. 40, 43-44 (1980); *State v. Freeman*, 302 N.C. 591, 593-94, 276 S.E.2d 450, 452-53 (1981); C. McCORMICK, *supra* note 10, § 78; Note, *State v. Freeman: Adverse Marital Testimony in a North Carolina Criminal Action—Can Spousal Testimony Be Compelled?*, 60 N.C.L. REV. 874, 877-78 (1982).

51. Spouses were made competent to testify on behalf of one another by statute. See N.C. GEN. STAT. § 8-57 (1981); 1 H. BRANDIS, *supra* note 2, § 59; C. McCORMICK, *supra* note 10, § 78

statutory, preserve in some form a privilege making spouses incompetent to testify as to confidential communications between them.⁵²

Typical of the statutory exceptions to the common-law prohibition on spousal testimony is former North Carolina General Statutes section 8-57,⁵³ which made a defendant's spouse competent to testify on his behalf, while allowing the defendant to prevent disclosure of confidential communications made during the marriage.⁵⁴ Section 8-57 also made a defendant's spouse compellable to testify against him regarding certain crimes against their children or the witness spouse.⁵⁵ Otherwise a defendant's spouse remained

(English Act of 1853). Adverse spousal testimony, however, continued to be prohibited although exceptions evolved making defendants' spouses competent to testify against them in a few situations. *See, e.g.*, *State v. Alford*, 274 N.C. 125, 129-30, 161 S.E.2d 575, 578 (1968) (adverse spousal testimony was permitted at common law when husband struck wife with ax; when wife tried to murder husband by poisoning; and when wife was charged with assault and battery with a dangerous weapon); *State v. Hussey*, 44 N.C. 127 (1852) (wife may be a witness against her husband in prosecution for felonies or attempted felonies perpetrated on her and for assault and battery, but only for those which inflict lasting and great bodily harm).

52. 1 H. BRANDIS, *supra* note 2, § 60; C. McCORMICK, *supra* note 10, § 78. *See State v. Brittain*, 117 N.C. 623, 625, 23 S.E. 433, 433 (1895) Communications before or after the marriage, however, are not protected. C. McCORMICK, *supra* note 10, § 81; *see* 1 H. BRANDIS, *supra* note 2, § 60. This protection of confidential communications is permanent and survives divorce and even death of one spouse. *Id.* § 60, at 240 n.72; C. McCORMICK, *supra* note 10, § 85; Note, *Pillow Talk*, *supra* note 11, at 132.

McCormick argues that the privilege should safeguard only those expressions (acts or statements) "intended by one spouse to convey a meaning or message to the other." C. McCORMICK, *supra* note 10, § 79, at 163-64 n.18. As McCormick points out, however, many courts let the privilege protect almost any acts done by one spouse solely in the presence of the other, regardless of whether intended to be communications and any information that would not have been acquired, but for the marriage. *Id.* § 79, at 164 nn.21-24; Note, *Pillow Talk*, *supra* note 11, at 128. *See State v. Alford*, 274 N.C. 125, 130, 161 S.E.2d 575, 579 (1968) (privilege protects all matters that occurred during the marriage). Despite the fact that the confidential communications shield is a privilege, many courts treat it as a rule of competency and allow any party to object and prohibit the revelation of confidential communications. *See, e.g.*, *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976) (treating privilege as competency); *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976) (failure to exclude evidence inadmissible because of this privilege is reversible error even if no objection made). When treated as a privilege it usually is held that the communicating spouse is the holder of the privilege and therefore the only one who can assert or waive it. 1 H. BRANDIS, *supra* note 2, § 60, at 240-41 nn.74-76; C. McCORMICK, *supra* note 10, § 83, at 169 nn.62-64; Note, *Pillow Talk*, *supra* note 11, at 130-31. *See Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967) (privilege belongs to communicating spouse and only he can waive); *see also infra* note 84 and accompanying text. *But see Hagedorn v. Hagedorn*, 211 N.C. 175, 179 S.E. 507, 509 (1937) (privilege belongs to witness spouse and she may waive); *see also* Note, *Privileged Communications*, *supra* note 9, at 282-85; *infra* note 54 & 77 and accompanying text.

53. *See generally* Note, *Relational Privileges*, *supra* note 9, at 636-38; Note, *Spousal Testimony in Criminal Proceedings—State v. Freeman*, 17 WAKE FOREST L. REV. 990, 999-1001 (1981).

54. N.C. GEN. STAT. § 8-57 (1981) only prohibits compulsion of confidential communications made during the marriage. It is not clear whether the privilege belongs to the communicating or hearing spouse, or both. *See supra* note 52; *infra* notes 77-79 and accompanying text. The witness spouse should be able to reveal confidential communications when testifying for the defendant spouse. When courts treat this privilege as a rule of competency, however, the State may be able to prevent such testimony even though both spouses are willing to waive the privilege. *See supra* note 52.

55. N.C. GEN. STAT. § 8-57 (1981) made a defendant's spouse competent and compellable to give evidence against the defendant in any criminal action or proceeding,

to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation . . . and . . . for an assault upon the other spouse . . . for communicating a threat to the other spouse . . . for trespass upon the separate residence of the other spouse . . . for any criminal offense

neither competent nor compellable to give evidence against him in any criminal prosecution.⁵⁶ The rationale for excluding adverse spousal testimony was to preserve marital harmony.⁵⁷

The 1983 revision of section 8-57⁵⁸ makes a defendant's spouse competent to testify for the State in any criminal action. Although subsection (a) was reworded slightly, it continues the rule of old section 8-57—competence to testify on behalf of a defendant spouse—and preserves the prohibition against prejudicial use of a defendant's failure to call his spouse as a witness.⁵⁹ As in former section 8-57,⁶⁰ subsection (a) of the revised section subjects a defendant's spouse who testifies on behalf of the defendant to potential cross-examination.⁶¹

Before the current amendment, section 8-57 had been interpreted as preserving, except for the statutory exceptions, the common-law rules against adverse spousal testimony.⁶² It followed from this interpretation that the common-law exceptions were preserved as well.⁶³ Consequently, in *State v.*

against a . . . minor child of either spouse or . . . for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse

Id. See 1 H. BRANDIS, *supra* note 2, § 59.

The purpose of these exceptions was to permit a spouse to testify when one spouse committed a felony against the other or a child of either of them. The narrowness of the exceptions, however, caused the anomalous result of preventing adverse spousal testimony in many cases involving serious crimes perpetrated by one against the other. See Blakey, *Moving Towards An Evidence Law of General Principles: Several Suggestions Concerning An Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 32 (1981). See, e.g., *State v. Reavis*, 19 N.C. App. 497, 199 S.E.2d 139 (1973) (because arson is not one of the exceptions to § 8-57 it was error to permit wife to testify against her husband for allegedly burning her mobile home even though they had been living apart).

56. N.C. GEN. STAT. § 8-57 (1981).

57. See *State v. Freeman*, 302 N.C. 591, 595, 276 S.E.2d 450, 452 (1981). This privilege, it is argued, protects society from the distasteful drama of a wife testifying against her husband. See C. McCORMICK, *supra* note 10, § 78; Note, *Pillow Talk*, *supra* note 11, at 125.

58. See *supra* note 7.

59. N.C. GEN. STAT. § 8-57 (Supp. 1983). Section 8-57 contains two privileges: one against compulsion of adverse spousal testimony and one for confidential communications.

60. Compare *id.* § 8-57 (1981) ("but the failure of such witness to be examined shall not be used to the prejudice of the defense") with *id.* § 8-57 (Supp. 1983) ("but the failure of the defendant to call such spouse as a witness shall not be used against him"). Although the language has been changed, the meaning seems to be the same. 1 H. BRANDIS, *supra* note 2, § 59, at 70 n.59 (Supp. 1983). This language prohibits the prosecution from commenting on a spouse's failure to testify for the defendant. See *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976); *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976); 1 H. BRANDIS, *supra* note 2, § 59, at 238-39 nn.59-64. N.C. GEN. STAT. § 8-57 (1981) (defendant not authorized to compel his spouse to testify for him—neither before nor after the current amendment). 1 H. BRANDIS, *supra* note 2, § 59, at 70 n.59 (Supp. 1983).

61. See N.C. GEN. STAT. § 8-57 (1981); *id.* (Supp. 1983); 1 H. BRANDIS, *supra* note 2, § 59, at 239 nn.65-66. Both versions of § 8-57 provide that a spouse called as a witness is subject to cross-examination.

62. No statute provides that a wife is not a competent witness against her husband in any criminal action or proceeding. Section 8-57, and statutes on which it is based, simply provide that rules of the common law with reference to whether a husband is competent to testify against his wife or a wife is competent to testify against her husband in a criminal action or proceeding are unaffected by those statutes. *State v. Alford*, 274 N.C. 125, 129, 161 S.E.2d 575, 577-78 (1968). See also *State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981); 1 H. BRANDIS, *supra* note 2, § 59, at 234 n.45.

63. *State v. Overton*, 60 N.C. App. 1, 38, 298 S.E.2d 695, 717 (1982) (§ 8-57 "is a codification of a common-law rule" and, therefore, subject to common-law exceptions).

*Freeman*⁶⁴ the North Carolina Supreme Court determined that the common-law rule against adverse spousal testimony no longer complied "with the purposes for which it was created,"⁶⁵ and held that "spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage."⁶⁶ This decision abolished all rights of a criminal defendant to prevent adverse spousal testimony except with regard to confidential communications.⁶⁷ The *Freeman* court approved the reasoning of the United States Supreme Court in *Trammel v. United States*,⁶⁸ but adopted a different rule.⁶⁹ In *Trammel*, a spouse was willing to testify against her husband,⁷⁰ and the Court altered the common-law rule against adverse spousal testimony by holding that the spouse was competent but not compellable to testify.⁷¹

The *Freeman* court did not explain its reasoning, perhaps because the question of compellability was not directly before it.⁷² As a result, although *Freeman* clarified that a witness spouse was only incompetent to testify to "confidential communications," the decision left unclear whether the spouse could be compelled to testify.

64. 302 N.C. 591, 276 S.E.2d 450 (1981).

65. *Id.* at 594, 276 S.E.2d at 452.

66. *Id.* at 596, 276 S.E.2d at 453.

67. See 1 H. BRANDIS, *supra* note 2, § 59, at 234-35 n.46-48; Blakey, *supra* note 58, at 33; Note, *supra* note 50, at 874. The *Freeman* court's interpretation of § 8-57 and its assertion of authority to change the common-law privilege against adverse spousal testimony is criticized in Note, *supra* note 53, at 990.

68. 445 U.S. 40 (1980).

69. The Supreme Court changed the rule of *Hawkins v. United States*, 358 U.S. 74 (1958) (defendant can bar his spouse's adverse testimony) by vesting the adverse spousal testimony privilege in the witness spouse. "[T]he witness spouse alone has a privilege to refuse to testify [adversely]; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel*, 445 U.S. at 53. The court reasoned that:

When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

Id. at 52.

The North Carolina court also determined that the rule "sweeps more broadly than its justification." *Freeman*, 302 N.C. at 595, 276 S.E.2d at 453. See *Trammel*, 445 U.S. at 51. The court was not convinced that refusing to allow Mrs. Freeman to testify that her husband shot her brother would bolster defendant's marriage. Unlike the rule in *Trammel*, the rule announced by the court in *Freeman* adopted no position as to whether the adverse spousal testimony was compellable.

70. Their reasons for testifying, however, differed. Mrs. Freeman was estranged from her husband and was present when he shot her brother. *Freeman*, 302 N.C. at 592, 276 S.E.2d at 451. Mrs. Trammel agreed to testify against her husband in exchange for a grant of immunity in a narcotics prosecution. *Trammel*, 445 U.S. at 42.

71. *Trammel*, 445 U.S. at 53; see *supra* note 71.

72. See 1 H. BRANDIS, *supra* note 2, § 59, at 235 n.48; Blakey, *supra* note 31, at 4; Note, *supra* note 50, at 876.

In the recent case of *State v. Waters*, 308 N.C. 348, 302 S.E.2d 188 (1983), the court again was faced with a spouse willing to testify against her husband. The court reaffirmed the *Freeman* rule and stated that it would not address the issue of whether the spouse could be compelled to testify for the prosecution. *Id.* at 356, 302 S.E.2d at 193-94. Thus, compulsion of adverse spousal testimony remained an open question.

Subsection (b) of the new section 8-57 resolved this question by vesting the privilege in the witness spouse.⁷³ A defendant's spouse remains competent and compellable to testify against the defendant in the same instances as under former section 8-57. Under the new rule, however, the spouse of a defendant is competent, but not compellable, to testify for the State in a criminal trial. A witness now can choose whether to testify against his or her spouse. Like the rule announced in *Trammel*, subsection (b) brings the privilege within the scope of its justification. If the privilege against adverse spousal testimony exists to promote and preserve marital harmony,⁷⁴ it is now available to the person best able to determine whether there is any harmony to preserve. No longer is adverse testimony prohibited to promote marital harmony regardless of whether such harmony exists.

Section 8-57(b) has been criticized for allowing a spouse to choose whether to testify in most actions for crimes of which she was the victim, while making her compellable only in cases of assault, threat, or trespass upon her separate residence.⁷⁵ Making a witness compellable to testify to crimes against the children or failure to support them is sound policy; society's interest in ensuring the safety and support of children outweighs concern for the preservation of marital harmony.⁷⁶

Although it abolishes a defendant's absolute privilege to prevent adverse spousal testimony, revised section 8-57 fortifies the confidential communications privilege.⁷⁷ Subsection (c) provides that "[n]o husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage."⁷⁸ The "in any event" language makes it clear that the confidential communications privilege applies in all circumstances.⁷⁹ In another change, the confidential communications privilege is

73. By making a defendant's spouse competent but not compellable to testify against him, *House Bill 66* prevents a defendant from barring his spouse's testimony, and gives the decision to testify to the witness spouse. The defendant, however, still has a privilege for confidential communications. See N.C. GEN. STAT. § 8-57 (Supp. 1983).

74. See *Trammel*, 445 U.S. at 52; *Freeman*, 302 N.C. at 595, 276 S.E.2d at 452-53; *supra* notes 60, 67.

75. Blakey, *supra* note 31, at 5. The effect of giving the spouse the option of testifying may make the spouse compellable to testify adversely. When spouses are codefendants, the offer of leniency or immunity in exchange for adverse testimony leaves a spouse with little choice at all. See, e.g., *Trammel*, 445 U.S. at 42; *supra* note 70.

76. *Id.*

77. See N.C. GEN. STAT. § 8-57 (Supp. 1983); 1 H. BRANDIS, *supra* note 2, § 60, at 70 n.67 (Supp. 1983); Blakey, *supra* note 31, at 5. The test for whether something is a confidential communication is "whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454. See *supra* notes 52-54.

78. N.C. GEN. STAT. § 8-57 (Supp. 1983).

79. See 1 H. BRANDIS, *supra* note 2, § 60, at 71 n.79 (Supp. 1983) (" 'in any event' was intended to make it clear that this privilege still applies in the situations in which . . . testimony of a spouse is compellable").

If confidential communications are not subject to the compulsion exceptions there is a direct conflict between § 8-57 and the child abuse statute. N.C. GEN. STAT. § 8-57.1 (1981). Under § 8-57.1 the confidential communications privilege cannot be claimed in actions for the neglect or abuse of a child. *Id.* § 8-57.1; 1 H. BRANDIS, *supra* note 2, § 60, at 241 n.79. Since *House Bill 66* does not repeal § 8-57.1, confidential communications still should be subject to the limitation in

now codified after rather than before the exceptions making spouses compellable to testify in certain criminal prosecutions. From this change in placement, it can be inferred that the privilege remains in effect even when the testimony of the spouse is compellable; thus, a spouse never can be compelled to reveal confidential communications made during the marriage.

Because section 8-57 gives a defendant's spouse the option to testify in most instances, the statute arguably can be read as vesting the confidential communications privilege in the witness spouse as well.⁸⁰ Under this interpretation the witness spouse could testify about confidential communications if she chose to; only compulsion of confidential communication, not voluntary disclosure, would be prohibited by revised section 8-57. In *Hagedorn v. Hagedorn*,⁸¹ decided under an earlier version of section 8-57, the North Carolina Supreme Court adopted just such a position, giving the witness spouse alone the choice of testifying about confidential communications.⁸² For seventy-five years prior to *Hagedorn*, the court consistently had interpreted the statute as preserving the common-law rule that only the communicating spouse could waive the privilege, and that the hearing spouse could not reveal such communications over the objection of the communicating spouse.⁸³ Subsequent decisions have refused to follow *Hagedorn* and have held that the privilege belongs solely to the communicating spouse; the hearing spouse cannot waive the privilege over his objection.⁸⁴ This interpretation is consistent with the rule in most jurisdictions,⁸⁵ and appears correct in view of the justification of the privilege—to allow "marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation."⁸⁶

The full impact of the changes in section 8-57 will not be known until the courts interpret them. One possible effect is that "confidential communications" will be given a broader meaning to afford the defendant some protection since he can no longer prevent his spouse from testifying against him.⁸⁷

that section. See 1 H. BRANDIS, *supra* note 2, § 59, at 69-70 n.51, § 60, at 71 n.79 (Supp. 1983) (there is no repeal clause but statutes creating exceptions to § 8-57 may be repealed to the extent they are inconsistent); Blakey, *supra* 31, at 5 (even if confidential communications are not subject to the subsection (b) exceptions they are subject to § 8-57.1).

80. Blakey, *supra* note 31, at 5-6.

81. 211 N.C. 175, 189 S.E. 507 (1937).

82. *Id.* at 177, 189 S.E. at 509.

83. 1 H. BRANDIS, *supra* note 2, § 60; Note, *Privileged Communications*, *supra* note 9, at 284-85.

84. *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967). See 1 H. BRANDIS, *supra* note 2, § 60, at 240 n.76 ("For all practical purposes, *Hicks* . . . overruled *Hagedorn*."); Blakey, *supra* note 31, at 6. But see *Biggs v. Biggs*, 253 N.C. 10, 116 S.E.2d 178 (1960) (approves rule of *Hagedorn*) (dictum).

85. 1 H. BRANDIS, *supra* note 2, § 60. See, e.g., ARIZ. STAT. ANN. §§ 12-2231, -2232 (1980); FLA. STAT. ANN. §§ 90:509, :504 (West 1979); N.H. REV. STAT. ANN. § 516: 27 (1974). See also *Freeman*, 302 N.C. at 594 n.1, 276 S.E.2d at 453 n.1 (statutes collected); *Trammel*, 445 U.S. at 40.

86. *Freeman*, 302 N.C. at 594-95, 276 S.E.2d at 453-54.

87. See Blakey, *supra* note 55, at 33 (privilege for confidential communications not broad enough); Blakey, *supra* note 31, at 7 ("It is possible . . . that the abolition of the separate privilege for criminal defendants by *Freeman* and new N.C.G.S. § 8-57 will lead to a broad interpretation of the term 'confidential communication' in marital situations.").

This will depend on how the courts interpret the choice given to a spouse in subsection (b) and the function of the confidential communications privilege in subsection (c). If the courts adopt a position similar to *Hagedorn*⁸⁸ and allow the witness spouse to choose to reveal confidential communications, a broader definition of such communications will have little effect unless the spouse was compelled to testify. On the other hand, if section 8-57 continues to vest the privilege in the communicating spouse, a broader definition of "confidential communications" will go far in limiting a spouse's choice under subsection (b).

Although the biggest change in North Carolina evidence law in 1983 was the adoption of a code of evidence, certain lesser changes may have a major impact on North Carolina law. *House Bill 235* revised the statutory privileges accorded certain professionals and clarified when a judge may override those privileges in the interest of justice. The bill also limited the judge's discretion to compel disclosure of confidential communications in proceedings for divorce or alimony. *House Bill 66* articulated a revised standard for when a person can choose to testify, or be compelled to testify, against his spouse. These statutes eliminate some of the confusion surrounding the prior law. At the same time, however, they create new uncertainties.

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88. See *supra* notes 81-85 and accompanying text.

Continued Resistance to the Inclusion of Personnel Policies in Contracts of Employment: *Griffin v. Housing Authority of Durham*

The United States Supreme Court has long recognized the inequality of bargaining power between employers and employees that often leaves employees helpless against their employers' arbitrary and reprehensible treatment.¹ Under the employment-at-will doctrine, however, unless an employment contract specifies a definite term of employment, an employer may discharge an employee for "good cause, or for no cause, or even for bad cause."² This doctrine was applied uniformly³ until strong criticism from commentators persuaded some courts to develop exceptions.⁴ Recently, some courts have found an implied contract right to continued employment, absent a good faith reason for termination.⁵ Others have created a cause of action in tort protecting employees against abusive or retaliatory discharges in contravention of public policy.⁶ The North Carolina courts, however, have been reluctant to follow the modern trend relaxing the employment-at-will doctrine. In *Griffin v. Housing Authority of Durham*⁷ the North Carolina Court of Appeals again refused to adopt a rule that would have diminished the harshness of the at-will doctrine.

In *Griffin* the city of Durham discharged plaintiff from his position as Director of Operations as part of a reorganization plan. Plaintiff alleged that the discharge breached his employment contract because it did not comply with the procedures for discharge set forth in defendant's personnel policy.⁸ Although the court of appeals concluded that the Authority had complied with

1. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1936). See generally, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

2. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884). See *Hutton v. Waters*, 132 Tenn. 527, 540-44, 179 S.W. 134, 137-38 (1915) (upholding employer's right to fire at will).

3. "The rule's influence on the employment relationship in this country has been so pervasive that modern legal writing frequently accepts the doctrine without inquiring into its logic or its applicability to current employment conditions." Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 335' (1974).

4. See, e.g., Blades, *supra* note 1; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *supra* note 3.

5. E.g., *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

6. E.g., *Peterman v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusal to give perjured testimony); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge for filing workers' compensation claim); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (discharge for reporting for jury service in violation of employer's orders).

7. 62 N.C. App. 556, 303 S.E.2d 200 (1983).

8. Plaintiff alleged that defendant failed to do the following as required by defendant's personnel policies: (1) dismiss plaintiff pursuant to proper action by defendant's Board of Commissioners; (2) offer plaintiff a position of similar or lower pay with defendant; (3) indicate clearly on plaintiff's papers that his dismissal in no way reflected his ability or performance, so as not to hinder his ability to obtain gainful employment elsewhere; and (4) give plaintiff notice and a hearing prior to being dismissed. Record at 2-3, *Griffin*, 62 N.C. App. 556, 303 S.E.2d 200 (1983).

its personnel policies, it held that defendant was not obligated to follow its personnel policies because they were amended after plaintiff was hired and were not incorporated expressly in plaintiff's contract.⁹

Griffin denies employees an important protection from the employment-at-will rule. The proposition that personnel policies may establish terms and conditions of the employment contract is supported by modern contract theory and has been adopted by several courts.¹⁰ Further analysis of the case law and commentary concerning incorporation of personnel policies in contracts of employment should persuade North Carolina courts to reconsider this question. Recognition of personnel policies as part of the employment contract would constitute an important first step toward the goal of eliminating the employment-at-will doctrine and provide employees needed protection against the arbitrariness of the doctrine.

Supporters of the doctrine argue that employer power to discharge at will is essential to the efficient and profitable operation of a business.¹¹ To abolish the doctrine would ignore employers' legitimate interest in hiring and retaining the best personnel available.¹² Employers also question whether judges and juries should be allowed to question business judgments.¹³ Evaluation of high ranking employees crucial to a business' success often involves highly personal and intuitive judgments that are not translated easily into concrete justifications.¹⁴

In addition, some commentators fear that restriction of the employment-at-will rule will bring a flood of vexatious and costly litigation¹⁵ before juries sympathetic to employee's "fabricated tales" of employer unfairness.¹⁶ Fear of litigation will discourage personnel termination decisions and reduce business efficiency.¹⁷ This chilling effect is increased by the lack of standards defining what employer conduct violates public policy or implied promises of good faith.¹⁸

Opponents of the employment-at-will doctrine have stressed the doctrine's severe effects on employee interests, emphasizing the employee's depen-

9. *Griffin*, 62 N.C. App. at 557, 303 S.E.2d at 201.

10. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).

11. Note, *Recognizing the Employee's Interests in Continued Employment—The California Cause of Action for Unjust Dismissal*, 12 PAC. L.J. 69, 79 (1980). See also *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 341, 399 A.2d 1023, 1026 (1979).

12. *Geary v. United States Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974).

13. See Note, *The Development of Exceptions to At-Will Employment: A Review of the Case Law from Management's Viewpoint*, 51 CIN. L. REV. 616, 631-32 (1982) (The traditional refusal to review the wisdom of decisions made by corporate boards—the business judgment rule—should be applied to employment decisions.).

14. See *Blades*, *supra* note 1, at 1428; Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 331 (1982).

15. See Note, *supra* note 13, at 630; Note, *Limiting The Right to Terminate at Will—Have The Courts Forgotten The Employer*, 35 VAND. L. REV. 201, 228 (1982).

16. See *Blades*, *supra* note 1, at 1428.

17. *Geary v. United States Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974).

18. See Note, *supra* note 13, at 631; Note, *supra* note 15, at 228-29.

dence on his job as his sole source of income,¹⁹ the loss of self esteem associated with termination of employment,²⁰ and the lack of mobility that limits alternative employment opportunities.²¹ In addition, abandonment of the employment-at-will rule may improve long-run business productivity by promoting a stable and loyal workforce, which would reduce the inefficiency and training costs that arise from employee turnover.²² The experience of other industrial countries that protect employees against unlawful discharge suggests that employer concerns over the impact of expanded job security may be exaggerated.²³ In sum, the employer's absolute right to discharge, "when weighed against the interests of the employee as an individual, [is] clearly not justified by the employer's legitimate concerns."²⁴

The leading case affirming the employment-at-will doctrine in North Carolina is *Still v. Lance*,²⁵ in which the supreme court upheld a school board's termination of a teacher's contract without cause and reaffirmed employers' rights to terminate at will "irrespective of the quality of performance by the other party."²⁶ The court did qualify its holding, stating in dictum that:

Where . . . there is a business usage, or other circumstance, appearing on the record, . . . which shows that, at the time the parties contracted, they intended the employment to continue through a fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent.²⁷

The federal district court in *Thomas v. Ward*²⁸ relied on the *Still* dictum in holding that language in an employee handbook "served as prima facie evidence which could lead a teacher to believe that he had tenure after three years service in the school system."²⁹ *Thomas* concluded that this language entitled the teacher to a hearing prior to discharge.³⁰ No state court, however, has relied on the *Still* dictum to find an unlawful discharge,³¹ and the employ-

19. "We have become a nation of employees. We are dependent upon others for our means of livelihood and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation the substance of life is in another man's hands."

F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

20. See Note, *supra* note 3, at 339.

21. This decreasing mobility arises from decreasing opportunities as employees grow older and seniority and pension plans pursued by employers increasingly encourage work force stability. *Id.* at 338-339. Furthermore, advancing technology leads employees to acquire specialized skills not readily transferable to other jobs. See *Blades, supra* note 1, at 1405.

22. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1830-31 (1980).

23. *Id.* at 1835-36 (noting the experiences of West Germany and Japan).

24. *Blades, supra* note 1, at 1407.

25. 279 N.C. 254, 182 S.E.2d 403 (1971).

26. *Id.* at 259, 182 S.E.2d at 406.

27. *Id.*

28. 374 F. Supp. 206 (M.D.N.C. 1974), *rev'd in part*, 529 F.2d 916 (4th Cir. 1975).

29. *Id.* at 210 n.4.

30. *Id.* at 210.

31. Business custom or usage must establish a definite, fixed term of employment and gener-

ment-at-will doctrine remains firmly entrenched in the common law of North Carolina.³²

Enforcement of personnel policies as contractual rights is the most reasonable method of limiting the harshness of the employment-at-will doctrine, particularly since employers benefit from the personnel policies they enact. Many personnel policies result from a company's desire to keep unions out of its plants.³³ Personnel policies also can build employee morale and consequently increase employee efficiency.³⁴ In this way, they benefit both the employer and employee, increasing employees' contentment with their jobs, causing employees to forego their rights to seek other employment, and helping to avoid labor turnover.³⁵ The impracticality and high costs of negotiating individual employment contracts containing job security provisions have led employees to rely on standard employment-at-will contracts,³⁶ but personnel policies allow the employer to avoid these transaction costs and provide a contract that satisfies the needs of employees.

Nevertheless, in *Griffin* the North Carolina Court of Appeals chose not to enforce personnel policies. Other courts generally have given three reasons for not enforcing personnel policies: the lack of mutuality of obligation; the lack of necessary additional consideration; and the employment-at-will rule's precedence over any personnel policy restrictions.³⁷ Recently, courts have been more willing to discard these traditional contract requirements in favor of modern contract theories that protect the reasonable expectations of employees and employers alike.³⁸

The primary legal underpinning of the employment-at-will doctrine was the principle of mutuality of obligation.³⁹ Courts following this principle reasoned that if an employee could quit his job at will, the employer must have a

ally cannot limit an employer's right to terminate for good cause only. See *Roberts v. Wake Forest Univ.*, 55 N.C. App. 430, 435-36, 286 S.E.2d 120, 123-24 (custom for golf coaches to serve long terms and personnel policy statements that employment became permanent after three months insufficient to establish a "fixed term"), *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

32. See *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1975); *Dyer v. Bradshaw*, 54 N.C. App. 136, 139-40, 282 S.E.2d 548, 551 (1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 297, 244 S.E.2d 272, 275, *disc. rev. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978).

33. Some companies not only duplicate much of union contracts, but also impose on themselves policies that are more restrictive than those that may emerge under union contract arrangements. F. FOULKES, *PERSONNEL POLICIES IN LARGE NON UNION COMPANIES* 341 (1980).

34. R. Machol & E. Button, *HANDBOOK OF MODERN PERSONNEL ADMINISTRATION* § 74-1 (1972).

35. *Chinn v. China Nat'l Aviation Corp.*, 138 Cal. App. 2d 98, 99-100, 291 P.2d 91, 92 (1955). See also *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408, 411 (1978).

36. See Note, *supra* note 22, at 1830-31.

37. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 628-29 (Minn.1983); Comment, *Wrongful Termination of Employees at Will: The California Trend*, 78 NW. U.L. REV. 259, 264 (1983).

38. See Note, *Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J.L. REF., 449, 455 (1983).

39. Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 555 (1980).

corresponding right to terminate the relationship for any or no reason.⁴⁰ Thus, the employers should not be bound by promises not to terminate except for good cause or unless certain procedures were followed.⁴¹

*Hablas v. Armour & Co.*⁴² demonstrates the inequitable consequences of adherence to mutuality requirements. In *Hablas* plaintiff was fired one year before retirement, losing all company pension rights after forty-five years of service to defendant. Plaintiff argued that he had been dissuaded from accepting more lucrative job offers because of repeated reminders from defendant's managers of the retirement benefits he would lose. Plaintiff further contended that these inducements constituted an implied promise that he would be retained until retirement, but the court held that because plaintiff was "at all times free to terminate his employment at will . . . the purported employment contract [was] void for want of mutuality."⁴³

The North Carolina Court of Appeals has applied similar reasoning. In *Williams v. Biscuitville*⁴⁴ plaintiff alleged that defendant had breached its employment contract by failing to give a verbal and written warning prior to discharge, as provided by the company personnel manual. The court held that since the warning provisions were part of a policy unilaterally implemented by the employer, the employer could discharge plaintiff in ways other than as set forth in the policy manual.⁴⁵

The notion that either both parties are bound or neither is bound has been discredited by recognition of the validity of the unilateral contract.⁴⁶ In a unilateral contract the offeree's bargained for performance is the detriment that makes the offeror's promise an enforceable contract, despite the absence of mutuality.⁴⁷ In response to a defendant's claim of lack of mutuality in an employment contract context, the Michigan Supreme Court in *Toussaint v.*

40. *Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 69, 139 So. 760, 761 (1932). See also *Gollberg v. Branson Publishing Co.*, 685 F.2d 224, 228 (7th Cir. 1982) (specific performance would constitute a form of involuntary servitude).

41. "It is ironic that application of the mutuality notion to the employment relationships has been expressed as arising out of a primary concern for the freedom of employees . . ." *Blades*, *supra* note 1, at 1419 n.71.

42. 270 F.2d 71 (8th Cir. 1959).

43. *Id.* at 78. This principle was followed in *Shaw v. S.S. Kresge Co.*, 165 Ind. App. 1, 328 N.E.2d 775 (1975), in which the court held that a personnel policy providing for three warnings before discharge was unenforceable for want of mutuality of obligation. The court stated that "[t]here being no binding promise on the part of the employee that he would continue in the employment, it must also be regarded as terminable at [the employer's] discretion as well." *Id.* at 5, 328 N.E.2d at 779. See also *Edwards v. Citibank*, 100 Misc. 2d 59, 60, 418 N.Y.S.2d 269, 270 (1979) (right to just-cause dismissal in personnel policy held unenforceable as being "utterly lacking in mutuality"), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 237 (1980).

44. 40 N.C. App 405, 253 S.E.2d 18 (1979).

45. *Id.* at 408, 253 S.E.2d at 20.

46. *J. CALAMARI & J. PERILLO, CONTRACTS* § 4-14 (1977); See also *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 108, 133 N.E. 711, 714 (1921) (if mutuality were held to be an essential element in every contract, there could be no such thing as a valid unilateral or option contract); *Scott v. J. F. Duthie & Co.*, 125 Wash. 470, 216 P. 853 (1923) (principle of mutuality has no place in the consideration of a unilateral contract).

47. The typical example of an offer of a unilateral contract is: "If you walk across the Brooklyn Bridge, I will pay you ten dollars." In this example, the offeree has not been requested to bind himself to do anything. *J. CALAMARI & J. PERILLO, supra* note 46, § 4-15.

*Blue Cross & Blue Shield*⁴⁸ stated:

[W]hile defendant's analysis has validity with respect to bilateral contracts or agreements, we note that the typical employment agreement is unilateral in nature . . . the employer makes an offer or promise which the employee accepts by performing the act upon which the promise is expressly or impliedly based . . . there is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor.⁴⁹

Thus, the *Toussaint* court's unilateral contract analysis allows a finding of promissory liability of the employer without the necessity of finding a return promise by the employee.⁵⁰

Several courts, including the North Carolina Court of Appeals in *Biscuitville*,⁵¹ have concluded that personnel policies are not enforceable provisions of an employment contract because they are unilateral, gratuitous offerings.⁵² Yet, as noted by the *Toussaint* court, employment contracts are unilateral by nature. Bilateral agreements are impractical because of the high costs of negotiating and monitoring individual contracts with a large number of employees.⁵³ Employee acceptance of unilaterally decided terms spares employers the expense and uncertainty of bargaining by allowing employers to calculate terms before entering into contracts.⁵⁴ Thus, denying employees the protection of job security provisions voluntarily offered by employers through personnel policies on the basis of technical requirements of mutuality of obligation ignores the existence of unilateral contract analysis.⁵⁵

Lack of consideration has been cited as a second reason for refusing to include personnel policies in employment contracts.⁵⁶ This rationale is based

48. 408 Mich. 599, 292 N.W.2d 880 (1980).

49. *Id.* at 630, 292 N.W.2d at 900.

50. Difficulty with this analysis arises in light of RESTATEMENT (SECOND) OF CONTRACTS § 62 (1981) which states that beginning of performance operates as a promise to render complete performance. What constitutes complete performance by an employee is unclear. Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 566 (1983).

51. See *supra* notes 44-45 and accompanying text.

52. See, e.g., *Sargent v. Illinois Inst. of Tech.*, 78 Ill. App. 3d 117, 121, 397 N.E.2d 443, 446 (1979); *Johnson v. National Beef Packing*, 220 Kan. 52, 54-55, 551 P.2d 779, 782 (1976); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982).

53. See *supra* text accompanying note 36.

54. Note, *supra* note 39, at 456.

55. As stated by Professor Corbin, "denial of enforcement [of an employment contract] cannot be justified by a mere statement that the contract is lacking in mutuality." 1A A. CORBIN, CORBIN ON CONTRACTS § 152 (1963). Counsel facing a jurisdiction still clinging to the mutuality principle should examine closely the personnel policy in question. Some limitations on employee behavior may be construed as the necessary return promise. See *Carter v. Kaskaskia Community Action Agency*, 24 Ill. App. 3d 1056, 1059, 322 N.E.2d 574, 576 (1974) (policy requiring employee to give 30 days notice of resignation or face loss of vacation pay constituted mutuality of obligation).

56. See *Sargent v. Illinois Inst. of Tech.*, 78 Ill. App. 3d 117, 121, 397 N.E.2d 443, 446 (1979); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982). One commentator has noted that the difficulty of relaxing rigid rules of consideration made it unlikely that the employer's right to terminate the at will relationship could be limited under contract law. Blades, *supra* note 1, at 1421. Consequently, Professor Blades turned to the law of torts for limitations on employers' rights to terminate at will.

on the assertion that limitations on employers' termination powers must be supported by some independent consideration since the employee is regarded as fully recompensed for his services by wages.⁵⁷ This requirement also stems from a concern for ensuring that the parties intended a continuing relationship.⁵⁸ This rigid consideration requirement also has been criticized. In *Pugh v. See's Candies, Inc.*⁵⁹ plaintiff alleged that his unexplained discharge after thirty-two years of service had violated oral assurances that he would not be discharged except for good cause. The court agreed, and found "no analytical reason why an employee's promise to render services, or his actual rendition of services over time may not support an employer's promise both to pay a particular wage . . . and to refrain from arbitrary dismissal."⁶⁰ The court noted that the requirement of independent consideration was contrary to the general principle that courts should not inquire into the adequacy of consideration, and concluded that the employee's services were sufficient consideration.⁶¹

Similarly, in *Pine River State Bank v. Mettelle*⁶² the Minnesota Supreme Court enforced procedural discharge provisions of an employee handbook.

The requirement of additional consideration . . . does not preclude the parties, if they make clear their intent to do so, from agreeing that the employment will not be terminable by the employer except pursuant to their agreement, even though no consideration other than services to be performed is expected by the employer or promised by the employee.⁶³

The court noted that the employer had issued an employee handbook to promote a more stable and productive workforce, and that plaintiff had continued working despite his freedom to leave.⁶⁴ These factors indicated that handbook provisions on disciplinary procedures had become part of the contract.⁶⁵

Thus, under modern contract theory, the consideration provided by an employee's services may support employer promises of job security expressed in personnel policies. The detriment an employee suffers by continuing to work for an employer despite his freedom to leave is not just a creative characterization of the facts. There seems to be much truth in the assertion that "an employee has suffered real detriment in the irretrievable loss of productive

57. *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28, 31 (La. Ct. App. 1975).

58. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981).

59. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

60. *Id.* at 325-26, Cal. Rptr. at 925. See also *Weiner v. McGraw Hill, Inc.*, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982); RESTATEMENT (SECOND) OF CONTRACTS § 80, comment a (1981).

61. *Pugh*, 116 Cal. App. 3d at 325, 171 Cal. Rptr. at 924-25.

62. 333 N.W.2d 622 (Minn. 1983).

63. *Id.* at 629. See also *Drzewiecki v. H. & R. Block Inc.*, 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 174 (1972).

64. *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 809 (D. Col. 1983); *Wagner v. Sperry Univac*, 458 F. Supp. 505, 520 (E.D. Pa. 1978), *aff'd*, 624 F.2d 1092 (1980); *Langdon v. Saga Corp.*, 596 P.2d 524, 527 (Okla. App. 1976); *Yartzhoff v. Democrat-Herald Publishing Co.*, 576 P.2d 356, 359 (Or. 1982).

65. *Pine River*, 333 N.W.2d at 630. See also *Southwest Gas Corp. v. Ahmad*, 668 P.2d 261 (Nev. 1983) (The company's issuance of such handbooks and plaintiff's knowledge of pertinent provisions suggest that the handbook formed part of the employment contract of the parties.).

years, especially when his seniority and experience are not likely to be readily transferable to another job.”⁶⁶ Any evidentiary function of independent consideration has been displaced largely by a willingness to infer an agreement from an employer’s issuance of personnel policies and an employee’s knowledge of these policies.⁶⁷

The need for additional consideration also may arise when the employer’s personnel policy is promulgated or amended after the employee has commenced work. *Griffin* implied that the amendment of the personnel policies after plaintiff was hired was a factor in its refusal to enforce the policies. Traditional contract rules provide that an agreement to alter the terms of a contract must be supported by new consideration.⁶⁸ This rule is intended to prohibit modifications obtained by coercion, duress, or extortion when one party agrees to modify the agreement in the face of threats of nonperformance.⁶⁹ Because contracting parties often desire to alter their agreements in response to changes in circumstances,⁷⁰ modern contract theory changed to reflect this consideration. The Uniform Commercial Code recognizes that a modification of good faith sales agreements needs no consideration to be binding.⁷¹ This rationale—promoting enforcement of arm’s length alterations of contract and denying enforcement of coerced modifications⁷²—suggests that alterations of an employment contract in favor of the employee should be enforced. Because the employer is invariably in the superior bargaining position, he is unlikely to be coerced by employees into unilaterally modifying his promises.

Finally, the third argument cited to support the refusal to enforce personnel policies as part of the employment contract, is the belief that the employment-at-will doctrine takes precedence over any such restrictions. In *Chin v. American Telephone & Telegraph Co.*⁷³ the court rejected plaintiff’s contract claim based on provisions of an employee manual because the manual did not contain all the terms of employment, specifically the length of employment. The court concluded that in the absence of a specific term, the employment contract was terminable at will.⁷⁴ Similarly, in *Muller v. Stromberg Carlson*

66. Blades, *supra* note 1, at 1420.

67. Employees may not have to be aware of the personnel policy prior to termination. Because the employer made promises to a *class* of employees, communication to some members of the class was sufficient for all. It would be unfair, impractical, and inefficient to base an employee’s right to recover on whether he read the company’s benefit policies. See Pettit, *supra* note 50, at 583.

68. See *Brenner v. Little Red School House Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981); *Wheeler v. Wheeler*, 299 N.C. 633, 636, 263 S.E.2d 763, 765 (1980).

69. See, e.g., *Lingenfelder v. Wainwright Brewery Co.*, 103 Mo. 578, 593, 15 S.W. 844, 847-48 (1891); *J. CALAMARI & J. PERILLO, supra* note 46, § 4-8.

70. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 COR. L.Q. 680, 681 (1982).

71. U.C.C. § 2-204(1) (1977). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1979) (“promise modifying a duty . . . is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made”).

72. Hillman, *supra* note 70, at 681.

73. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (1978).

74. *Id.* at 1072, 410 N.Y.S.2d at 739. See also *White v. Chelsea Ind.*, 425 So.2d 1090 (Ala.

*Corp.*⁷⁵ the Florida Court of Appeals held that employment policies did not give rise to a right to just-cause dismissal because enforcement of such policies would introduce uncertainty into the employer-employee relationship.⁷⁶ Like *Chin*, the *Muller* court contemplated an employment contract specifying a term expressed in months or years.

These arguments, however, misconstrue the employment-at-will doctrine. The doctrine is a rule of contract construction, and does not impose substantive limits on the formation of an employment contract.⁷⁷ A rule of construction should signal a court to construe a contract by looking beyond its face to the parties' true intentions.⁷⁸ An employer might reveal his intent to limit his power of termination by unilaterally offering job security provisions in the form of personnel policies. The courts should not limit the employer to offering only terminable-at-will contracts.

Thus, modern contract theory has supplanted the traditional reasons courts have proffered for refusing to incorporate personnel policies into employment contracts. North Carolina's continuing refusal to enforce such policies in cases like *Griffin* and *Biscuitville* no longer is justified. The North Carolina Court of Appeals already has decided a case that supports enforcement of personnel policies. In *Brooks v. Carolina Telephone & Telegraph Co.*⁷⁹ the court of appeals approved plaintiff's claim for severance pay because of provisions in defendant company's personnel policy. The court accepted plaintiff's claim that severance pay provisions contained in defendant's personnel policy were part of the employment contract, stating that "such an *employment contract provision*, recognizably cancellable at will by an employer, would nevertheless operate to protect employees within its coverage during their employment and during the effective operation of such a provision."⁸⁰ The court distinguished *Biscuitville* by stating that *Biscuitville* "dealt with each employee's right to continued employment and did not deal with the issue of benefits or compensation earned *during* employment."⁸¹

This distinction is not convincing. Plaintiffs in *Biscuitville* and *Griffin* did not allege any right to continued or permanent employment; plaintiffs in all three cases alleged breach of contract based on personnel policy provisions that were not included expressly in their employment contracts. It is unclear why the right to warnings, notice, hearings prior to dismissal, or to dismissal for just cause are not considered benefits earned during employment, whereas

1983) (employee handbook did not vary the common-law rule that an employee is terminable at will); *Heideck v. Kent Gen. Hosp.*, 446 A.2d 1095, 1097 (Del. 1982), (handbook did not grant employee a specific term of employment and does not therefore alter plaintiff's at will status).

75. 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

76. *Id.* at 270.

77. See *Toussaint*, 408 Mich. at 599, 292 N.W.2d at 890-91; *Pine River*, 333 N.W.2d at 628; RESTATEMENT (SECOND) OF AGENCY § 442, comment a (1958).

78. Note, *Job Security for the At Will Employee: A Contractual Right of Discharge for Cause*, 57 CHL.-[KENT L. REV. 697, 719 (1981).

79. 56 N.C. App. 801, 290 S.E.2d 370 (1982).

80. *Id.* at 804, 290 S.E.2d at 372 (emphasis added).

81. *Id.* at 805, 290 S.E.2d at 372.

severance pay is considered such a benefit.⁸² By eliminating this artificial distinction between monetary and procedural benefits, the North Carolina courts could enforce all personnel policies under the *Brooks* rationale.

It has been suggested that employers might respond to attempts to enforce personnel policies by including disclaimers in employee handbooks stating that employees serve at will and may be discharged at any time and for any reason.⁸³ Such a disclaimer has been upheld in at least one case,⁸⁴ but several courts have questioned its effectiveness. In *Schipani v. Ford Motor Co.*⁸⁵ the court held that despite the disclaimer the employee handbook's allusions to fairness in any termination may be enforced to prevent injustice.⁸⁶ Similarly, in *Greene v. Howard University*⁸⁷ defendant's employee handbook contained a qualifier that its provisions were not contractual obligations. The court, however, held that the policies and practices of the University embodied in its handbook regulations and customs contemplated a hearing prior to termination, despite the disclaimer.⁸⁸ These cases indicate that courts will be reluctant to allow an employer to take back with one hand what it gives with the other. If the employer chooses to create expectations of entitlement to fair and uniform personnel policy application, he may not be permitted to disclaim them.

Giving personnel policies the force of contract has been criticized for fear that employers will be encouraged to withdraw them.⁸⁹ Such a consequence is unlikely since employers would sacrifice the benefits of increased employee morale and productivity that flow from a sound personnel policy.⁹⁰ Furthermore, enforcement of personnel policies should not substantially increase costs to the employer. A policy providing employees the right to just-cause discharge does not require the employer to retain unsatisfactory employees. Retention of the freedom to discharge arbitrarily may lead to a waste of training, continuity, and expertise.⁹¹ Provisions requiring warnings or a predischage hearing are not onerous or costly invasions of an employers' freedom; they actually may improve communication between management and employees. Any costs of vexatious litigation may be reduced by including binding arbitration⁹² provisions which an employer can draft to fit his needs.

82. "[A]n agreement between an employee and her employer concerning the manner in which her job could be terminated constitutes an enforceable agreement." *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 581, 279 S.E.2d 46, 48 (1981) (plaintiff could be terminated at will from her supervisor position; however, such termination was not to result in her discharge, but in her demotion to her former job).

83. *Toussaint*, 408 Mich. at 612, 292 N.W.2d at 891.

84. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980).

85. 102 Mich. App. 606, 302 N.W.2d 307 (1981).

86. 302 N.W.2d at 311 (Mich. App.).

87. 412 F.2d 1128 (D.C. Cir. 1969).

88. *Id.* at 1134.

89. See Note, *The Burden of Establishing Standards of Performance as a Basis for Employment Termination Rests upon the Employer*, 59 U. DET. J. URB. L. 83, 95-96 (1981).

90. See *supra* notes 34-35 and accompanying text.

91. See Note, *supra* note 22, at 1834-35.

92. See *Toussaint*, 408 Mich. at 624, 292 N.W.2d at 897. See also *Summers, Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521 (1976) (suggesting

In conclusion, judicial refusal to allow exceptions to the employment-at-will doctrine usually is based on dated contract principles or a simple reluctance to let go of a concept that just a few years ago seemed inviolable. Serious inroads into the employment-at-will doctrine, however, are inevitable. The recognition that personnel policies constitute enforceable contract rights can provide many of the protections employees need against abusive discharge while allowing employers to retain some control and flexibility in shaping their work force. Both employers and employees can benefit from a decision to enforce personnel policies as part of the employment contract. North Carolina's courts should take note of current contract and employment trends, re-examine their personnel policy position, and adopt this personnel policy exception to the employment-at-will doctrine.

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passage of statutory right not to be dismissed except for just cause with adjudication of the right through arbitration).

Mentally Retarded Employees in Day Care Centers in North Carolina: The 1983 Amendments

The 1983 North Carolina General Assembly changed the carefully delineated requirements for workers at North Carolina day care centers.¹ North Carolina General Statutes sections 110-90.1 and 110-91 originally barred employment of those "mentally retarded or mentally ill to an extent that may be injurious to children"; this wording was changed in 1983 to prohibit the employment of those "mentally or emotionally impaired to an extent that may be injurious to children."² Although this change appears merely to clarify the language,³ the amendment's title indicates a broader legislative intent: "An Act to Remove Mental Retardation From the Conditions Prohibiting a Person From Work in a Day-Care Center."⁴

As the Day Care Committee explained:

The Committee recommends legislation rewriting the term "mentally retarded" from the conditions prohibiting individuals from being proprietors of day care plans and facilities. There is no reason to stigmatize the mentally retarded who are not dangerous. Those who are, of course, remain excluded.⁵

Thus, this amendment represents another measured step toward the equal protection and "normalization"⁶ of the mentally retarded, or, more broadly, the handicapped. Considered with North Carolina's statute protecting the employment rights of the handicapped, this amendment further erodes the em-

1. An Act to Remove Mental Retardation From the Conditions Prohibiting a Person From Work in a Day-Care Center, 1983 N.C. Adv. Legis. Serv. 277 (codified at N.C. GEN. STAT. §§ 110-90.1, -91(8) (Cum. Supp. 1983)).

2. N.C. GEN. STAT. § 110-90.1 (Cum. Supp. 1983) provides:

No day-care plan shall be registered if that plan is operated by or employs any person who has been convicted of a crime involving child abuse, child neglect, or moral turpitude, or who is an habitually excessive user of alcohol or who illegally uses narcotics or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children.

N.C. GEN. STAT. § 110-91(8) (Cum. Supp. 1983) repeats these qualifications and prescribes age limits for employees and supervisors.

3. The original wording of the statute ("mentally retarded or mentally ill to an extent that may be injurious to children") was somewhat ambiguous, since it might ban either all the mentally retarded or only those who might be injurious to children.

4. 1983 N.C. Adv. Legis. Serv. 277 (codified at N.C. GEN. STAT. §§ 110-90.1, -91(8) (Cum. Supp. 1983)).

5. LEGISLATIVE RESEARCH COMMISSION, DAY CARE—REPORT TO THE 1983 GENERAL ASSEMBLY 7 (1983).

In 1979 the statute was amended to remove the upper age limit of 70, presumably out of concern for employment of the aged. The legislature apparently has developed a similar concern for the mentally retarded.

6. The principle of normalization, as established by the President's Committee on mental retardation, entails "making available to the mentally retarded, patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." A. JACOBS, HANDBOOK FOR JOB PLACEMENT OF MENTALLY RETARDED WORKERS 16 (3d ed. 1979) (quoting B. NIRJE, THE NORMALIZATION PRINCIPLE AND ITS HUMAN MANAGEMENT IMPLICATIONS. CHANGING PATTERNS IN SERVICES FOR THE MENTALLY RETARDED (President's Committee on Mental Retardation, 1969)).

employer's common-law discretion to hire and discharge whomever he pleases.⁷ Removal of the ban against employing mentally retarded day care workers brings North Carolina's statutes closer to principles of federal law,⁸ but also introduces some uncertainty over the extent to which an employer may choose between mentally retarded job applicants and those of normal intelligence. Although any initial, broad exclusion of the mentally retarded now is prohibited, the amendment's symbolic effect probably will outweigh its practical effect.

Recent antidiscrimination laws and other types of labor regulations have restricted an employer's discretion in hiring and discharging employees;⁹ historically, however, courts treated the employment relationship like any other contractual relation.¹⁰ Absent statutory or contractual restrictions, the public or private employer has the exclusive right to determine job qualifications for various positions, and to hire and discharge employees at will.¹¹ Unless the employer's decisions violate the rights of a member of a protected class or labor union, or the constitutional rights of an employee, courts tend to afford the employer wide latitude in basic employment decisions.¹² Thus, at common law an employer generally had no obligation to hire handicapped applicants. Furthermore, an employer may discharge an employee with or without cause absent statutory, contractual, or constitutional restrictions.¹³

7. At common law, the employer was free to hire whomever he desired, and to discharge "at will" employees who did not have written employment contracts, with or without cause, hearing, or explanation. See *infra* notes 10-13 and accompanying text.

8. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1976 & Supp. V 1981), forbids discrimination against the handicapped by any federally subsidized program. See *infra* notes 18-23 & 50-51 and accompanying text.

9. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981), forbids employment discrimination on the basis of race, color, religion, sex, or national origin. The Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976 & Supp. V 1981), also forbid employment discrimination based on race. The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1982), prohibits employment discrimination against individuals between the ages of 40 and 70. The National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982), particularly § 158(a)(3), forbids discrimination against employees for engaging in union activities. Finally, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982), see *infra* notes 18-23 & 50-51 and accompanying text, forbids discrimination on the basis of handicap. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-2 (2d ed. 1983).

10. *Alliance Co. v. State Hosp.*, 241 N.C. 329, 332-33, 85 S.E.2d 386, 389 (1955) stated: "The relation of employer and employee is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied."

11. See, e.g., *Charles City Educ. Ass'n v. Public Employment Relations Bd.*, 291 N.W.2d 663 (Iowa 1980); *Burton v. Crawford & Co.*, 89 N.M. 436, 553 P.2d 716, cert. denied, 90 N.M. 7, 558 P.2d 619 (1976); *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 267 S.E.2d 511 (1980); *Tatum v. Brown*, 29 N.C. App. 504, 224 S.E.2d 698 (1976).

Statutory restrictions on the employer's discretion to hire and fire employees usually are drawn narrowly to address specific problems and not interfere unduly with the employer's right to select or discharge employees. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1936). See also *Sioux Quality Packers, Div. of Armour & Co. v. NLRB*, 581 F.2d 153 (8th Cir. 1978).

12. See, e.g., *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976) ("A large corporate employer such as General Motors, except to the extent limited by statute or contractual obligations, must be accorded wide latitude in determining who it will employ and retain in employment in high and sensitive managerial positions.").

13. See, e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Prince v.*

Federal and state laws, however, increasingly have restricted this broad power, and recently the rights of the handicapped have been recognized and protected.¹⁴ Constitutional challenges to employment discrimination against the handicapped generally have been unsuccessful. Although the Supreme Court has not spoken directly on the subject, the lower federal courts generally have not treated the handicapped as a suspect class.¹⁵ Thus, any equal protection claims of discrimination are subject to the rational-basis test, which merely requires an employer to show some rational, nonarbitrary basis for his actions.¹⁶ Given the many potential difficulties and inconveniences of employing the handicapped, employers ordinarily have satisfied this test, and thus equal protection claims usually have failed to enhance the employment rights of the handicapped.¹⁷ Furthermore, only state action can violate the equal protection clause, rendering most employers' decisions immune to constitutional challenge.

Bridges, 537 F.2d 1269 (4th Cir. 1979); *Hodgin v. Noland*, 435 F.2d 859 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); *Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 226 S.E.2d 340 (1976); *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971); *Wilkinson v. Erwin Mills*, 250 N.C. 370, 108 S.E.2d 673 (1959).

A growing doctrine, accepted by some courts, prohibits an employer's discharge for activities that public policy encourages, for example, objecting to an employer's illegal actions, filing a worker's compensation claim or serving on a jury. See *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976), and cases cited therein.

14. For a general history of the treatment of the handicapped in society, see Allen, *Historical Overview: From Charity to Rights*, 50 TEMPLE L.Q. 953 (1977) (excerpted from R. ALLEN, *LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED* 1 (1969)).

15. See, e.g., *Simon v. St. Louis County*, 656 F.2d 316, 322 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 675-76 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980). See also B. SCHLEI & P. GROSSMAN, *supra* note 9, at 280 and cases cited therein.

One lower court has held that the handicapped are a suspect class, *In re G.H.*, 218 N.W.2d 441, 447 (N.D. 1974), and another has suggested it in dicta. *Fialkowski v. Shapp*, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975).

16. The Warren and Burger Courts have developed a three-tier system of equal protection analysis. A discriminatory practice is subject to strict scrutiny if it: interferes with the exercise of a fundamental right, or affects a suspect class, a "discrete and insular minority." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Employment has been held not to be a fundamental right, so in employment discrimination cases the focus must be on the screened-out class. Race, nationality, and alienage have been treated as suspect classes. In such cases, there is a presumption against the discriminatory practice.

The second tier of scrutiny bars discriminatory practices that are not related substantially to an important governmental objective. It is applied in cases involving a "semi-suspect" class, such as women or illegimates.

The third tier of scrutiny determines whether a rational relationship exists between the practice and a legitimate governmental objective, and it applies to all other groups. See Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 899-910 (1975); Comment, *The Equal Protection and Due Process Clauses: Two Means of Implementing "Integrationism" for Handicapped Applicants for Public Employment*, 27 DEPAUL L. REV. 1169, 1174-89 (1978). The handicapped usually are considered in this category. See cases cited *supra* note 15. For commentaries advocating that all or some of the handicapped should be considered a suspect class, see Burgdorf and Burgdorf, *supra*, and Comment, *supra*.

17. See cases cited *supra* note 15. One of the reasons for the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-7961 (1976 & Supp. V 1981), was "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination, . . ." S. REP. NO. 318, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2078.

In 1973, however, Congress passed the Rehabilitation Act of 1973,¹⁸ providing handicapped plaintiffs a statutory basis for pursuing discrimination claims. The Act states:

No otherwise qualified handicapped individual in the United States, . . . , shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance¹⁹

"Handicapped individual" is defined as one who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" ²⁰ The Act requires employers to make "reasonable accommodation" ²¹ for an otherwise qualified applicant or employee, including restructuring physical facilities, modifying job duties, and altering work schedules. ²² The employer is encouraged to consider each applicant individually, and although free to consider disability limitations, he may not exclude categorically on the basis of handicap. ²³

This federal legislation has been accompanied by corresponding state leg-

18. Pub. L. No. 93-112, 87 Stat. 357 (codified as amended at 29 U.S.C. §§ 701-796i (1976 & Supp. V 1981)).

19. 29 U.S.C. § 794 (1982).

20. 29 U.S.C. § 706(7)(B) (1982).

21. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. § 84.12(a) (1983).

22. *Id.* § 84.12(b).

The Supreme Court interpreted "reasonable accommodation" in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis* plaintiff had been denied admission to a nursing program because of a severe hearing disability. *Id.* at 402. The Court determined that the individual attention plaintiff would require exceeded the "modification" required under the Act. *Id.* at 410. The Supreme Court cautioned against the precedential value of *Davis*, however, *id.* at 412-13, and courts have interpreted it to require a great deal of modification to accommodate the handicapped. For example, in *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983), the court held that the employer had to accommodate the dyslexic plaintiff in administering a preemployment test, usually given in written form. In *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982), the court indicated that New York City must provide some type of accommodation for the handicapped in its mass transit system. A North Carolina federal district court, while requiring plaintiffs to exhaust their administrative remedies before continuing the litigation, implied that requiring a school board to offer a summer school program for children with cerebral palsy would not be unreasonable. *Phipps v. New Hanover County Bd. of Educ.*, 551 F. Supp. 732, 734 (E.D.N.C. 1982). ("*Davis* has been read as not prohibiting all affirmative action but only that which would entail extensive modification of some existing program.") In *Majors v. Housing Auth.*, 652 F.2d 454 (5th Cir. 1981), the court remanded the case to determine whether a low income housing authority should be required to break its rule barring pets to accommodate plaintiff's emotional disability that required the companionship of her dog. *But see American Pub. Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (holding that a regulation requiring every mode of mass transit to accommodate the handicapped was beyond the scope of § 504 of the Rehabilitation Act of 1973).

23. According to B. SCHLEI & P. GROSSMAN, *supra* note 9, at 282-83, employers practicing categorical exclusion have not prevailed under federal and state statutes without showing either:

(1) "[T]hat all or substantially all persons in the handicap category could not do the job," or

(2) That the exclusion was "justified by a high degree of human or economic risk, and the potential for creating the risk be readily determined" by a less exclusionary handicap or on an individual basis.

islation. Most states²⁴ have enacted legislation protecting the rights of the handicapped, although the laws differ as to the types of handicapped people protected,²⁵ the extent of accommodation required,²⁶ the type of preemployment inquiry or test allowed,²⁷ and whether a private cause of action is created.²⁸ Generally, however, the state laws supplement and reinforce the federal antidiscrimination legislation.

North Carolina has adopted antidiscrimination legislation for the handicapped. The overriding philosophy of the statutory scheme is to "encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment."²⁹ The statute specifically addressing employment states:

Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the able-bodied, unless it is shown that the particular disability impairs the performance of the work involved.³⁰

Handicapped persons are defined broadly as those with "physical, mental and visual disabilities."³¹

The North Carolina statute has been involved in significant litigation only once. In *Burgess v. Joseph Schlitz Brewing Co.*³² the North Carolina Supreme Court held that glaucoma, a potentially disabling condition, was not a visual disability under the statute, and thus the statute did not bar the employer from

24. According to B. SCHLEI & P. GROSSMAN, *supra* note 9, at 277 n.87, as of 1983, 48 states had adopted laws restricting discrimination against the handicapped.

25. *E.g.*, CAL. GOV'T CODE § 12920 (West 1980 & Supp. 1983) forbids discrimination based on a physical handicap or medical condition, such as cancer. VA. CODE § 40.1-28.7 (1981) forbids only discrimination based on physical handicap.

26. Georgia's statute explicitly states that the employer need not modify his physical facilities or grounds to accommodate handicapped individuals. GA. CODE ANN. § 34-6A-4 (1981).

27. Texas bars all preemployment tests with a disproportionate impact on handicapped applicants unless the test has been validated specifically for the job, or no other tests exist. TEX. HUM. RES. CODE ANN. § 121.010(e) (Vernon Supp. 1984). Georgia's statute specifically permits preemployment inquiry as to handicap, and rejections based on medical examinations, as long as there is a "good faith reliance" on a doctor's evaluation. GA. CODE ANN. § 34-6A-3(c) (1981).

28. Although some statutes clearly provide a private cause of action, others are less clear. In *Dillon v. Great Atl. & Pac. Tea Co.*, 43 Md. App. 161, 403 A.2d 406 (1979) the Maryland Court of Special Appeals held that Maryland's statute did not create a private cause of action. The West Virginia Appeals Court, however, in *Hurley v. Allied Chem. Corp.*, 262 S.E.2d 757, 765 (W. Va. App. 1980), found an implied private cause of action in the West Virginia statute. The court rejected the argument that a private cause of action on the state level would invade an area delegated exclusively to the federal government. *Id.* at 764-65.

29. N.C. GEN. STAT. § 168-1 (1982). The North Carolina statutes were passed in 1973, presumably to complement the federal Rehabilitation Act.

30. *Id.* § 168-6 (1982). The statute could be construed to restrict discrimination only in the "terms and conditions" of employment after hiring already has occurred, as opposed to restricting discrimination in the hiring decision itself. The statute states, "Handicapped persons shall be employed . . . on the same terms and conditions as the able-bodied," (emphasis added) with no mention of hiring. In *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979), however, *discussed infra* notes 32-35 and accompanying text, the North Carolina Supreme Court applied the statute to a hiring decision without mentioning that hiring was not treated specifically in the statute.

31. N.C. GEN. STAT. § 168-1 (1982).

32. 298 N.C. 520, 259 S.E.2d 248 (1979).

refusing to hire any individual with glaucoma.³³ Despite this somewhat unsettling result, the court suggested that the statute should be interpreted broadly: "[T]his statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope."³⁴ Given the apparent contradiction between the court's statement and its result, the ultimate scope of the statute remains uncertain.³⁵

Aside from the apparent social benefits of employing the mentally retarded, categorically excluding them from day-care centers might violate federal or state law. The federal statute³⁶ forbids discrimination against the handicapped by any program receiving federal financial assistance. A previous interpretation of the Act by the United States Court of Appeals for the Fourth Circuit limited its applicability to those programs receiving federal funds for which the primary purpose was to provide employment.³⁷ The United States Supreme Court recently rejected this view, however, holding that the Act, by its own terms, applies to any program receiving federal aid, for whatever purpose.³⁸ Under this interpretation, North Carolina day-care centers' federal aid clearly would be threatened by policies that discriminate against the handicapped in violation of the Rehabilitation Act of 1973.³⁹

An employer might argue that the mentally retarded are unqualified to work in day-care centers, and thus the discrimination is justified for business reasons.⁴⁰ This argument is weak, however, considering the extent to which the retarded already are employed in day-care centers to some extent.⁴¹ Also,

33. *Id.* at 528, 259 S.E.2d at 253.

34. *Id.* at 524, 259 S.E.2d at 251.

35. The only other case arising under the statute is *GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E.2d 477 (1979), a class action to restrict smoking in public places brought on behalf of all those with pulmonary problems. The court of appeals held that the class involved—all those with any pulmonary problem—was too broad to come under the definition of "handicapped." This decision, while also restricting the definition of "handicapped," arguably is less questionable than *Burgess* because the class that the court declined to label "handicapped" included many people with minor pulmonary problems, as opposed to the discrete group of those with potentially disabling glaucoma in *Burgess*.

For a view that the North Carolina supreme court's definition of "handicapped" was too restrictive in *Burgess*, and that the broader definition of the federal statute should apply, see Note, *Employment Discrimination—Judicial Identification of the "Handicapped Person" in North Carolina*—*Burgess v. Joseph Schlitz Brewing Co.*, 16 WAKE FOREST L. REV. 836 (1980).

36. See *supra* notes 18-23 and accompanying text.

37. *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

38. *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248 (1984).

39. According to a study of North Carolina day-care centers, 554 of the sample 2248, or approximately 25%, of North Carolina day-care centers are labeled "subsidized" and 1694 of 2248, about 75%, are "nonsubsidized." Subsidized centers receive approximately 39% of their income from government agencies and 12% from the federal Child Care Food Program. Nonsubsidized centers receive approximately 2% of their income from government agencies and 2% from the Child Care Food Program, and to the extent that their actions might violate the federal law, would be subject only to losing that small amount. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION FOR DAY CARE STUDY COMMITTEE, LEGISLATIVE RESEARCH COMMISSION, NORTH CAROLINA DAY CARE COST STUDY, Day Care Centers, Final Report 53-58 (April 1983).

40. See *infra* notes 51-52 and accompanying text.

41. The frequency of jobs held by the mentally retarded are ranked as follows: (1) food

given the number and variety of tasks required in a day-care center,⁴² the requirement of "reasonable accommodation"⁴³ under the federal law almost certainly would require an employer to restructure his division of tasks to place mentally retarded workers in positions for which they are unquestionably qualified.⁴⁴

Presumably, the North Carolina legislature originally barred employment of the mentally retarded to ensure high quality day care. Compared with the day-care statutes of other states, North Carolina's legislative requirements are remarkably specific, and set very high standards.⁴⁵ The North Carolina law basically adopts the somewhat controversial high staff-child ratios of the Federal Interagency Day Care Requirements of 1968.⁴⁶ It bars the employment in day-care centers of excessive users of alcohol, users of illegal drugs, and those who have committed certain crimes.⁴⁷ The statute even states that: "Each operator or staff member shall truly and honestly show each child in his care true love, devotion and tender care."⁴⁸ The legislature's concern for high quality day-care is commendable at one level.

This concern, however, probably was misplaced to the extent that it led the legislature to bar the mentally retarded from working in day-care centers. Of the few state laws that specify any requirements for day-care centers, few or none bar the employment of the handicapped or the mentally retarded.⁴⁹ Even

services; (2) building services (custodial); (3) domestic services; (4) groundskeeping; (5) office occupations; (6) merchandising occupations; (7) building trades; (8) helpers in hotels; (9) helpers in nursery schools; (10) helpers in hospitals. A. JACOBS, *supra* note 6, at 20.

42. A. JACOBS, *supra* note 6, at 193-94, 147-48, 174-75. The Nursery School Aide is listed as having the following specific skill requirements: ability to coordinate work with other employees; knowledge and observance of hazards to children; knowledge of basic rules and equipment for indoor and outdoor games for children; knowledge of simple arts and crafts techniques and equipment; ability to use simple cleaning equipment and supplies; ability to enforce simple rules; knowledge of locations of equipment and supplies; ability to determine when to seek help in an emergency; ability to handle food in a neat, sanitary manner; ability to interact well with young children and adults; and ability to observe routines and procedures. *Id.* at 194. For example, food preparation, maintenance, and clerical work, as well as child care, are all necessary in day care centers.

43. See *supra* notes 21-22 and accompanying text.

44. See *supra* note 22 and accompanying text.

45. See, e.g., the following statutes, in which the legislature merely delegates responsibility for establishing standards and requirements for day-care centers to an administrative agency or board: CAL. HEALTH & SAFETY CODE § 1527 (West 1979 & Supp. 1983); D.C. CODE ANN. § 3-312 (1981); GA. CODE § 49-5-12 (1981); MD. ANN. CODE art. 14, § 104 (1981); MICH. STAT. ANN. § 25.358(12) (Callaghan 1974); N.Y. SOC. SERV. LAW § 390 (West 1983); S.C. CODE ANN. § 59-3-80 (Law. Co-op. 1976); TEX. STAT. ANN. art. § 4442a(1) (Vernon 1976); VA. CODE § 63.1-196 (1980); W. VA. CODE § 49-2B-4 (Supp. 1983).

46. 45 C.F.R. § 71 (1970) (no longer in effect). N.C. GEN. STAT. § 110-91(7) (1978) requires one staff member for every eight children under the age of two, one for every twelve children ages two to three, one for every fifteen children ages three to four, one for every twenty children ages four to five, and one for every twenty-five children over the age of five. See also *infra* note 50 and accompanying text.

47. N.C. GEN. STAT. §§ 110-90.1, 110-91(8) (1978 & Supp. 1983).

48. *Id.* § 110-91(10) (1978).

49. See, e.g., D.C. CODE ANN. § 3-311 (1981) (establishing specific standards for in-home care, requiring that staff members be between 21 and 70, in good health and have prior experience in child care); VA. CODE § 63.1-196.3(3)(C) (1980) (requiring, for religious institution child care centers, that supervisors be certified by physicians as free from any disability that would prevent them from caring for children).

the strict federal requirements for day-care centers receiving federal aid⁵⁰ did not bar the mentally retarded. Those standards merely stated: "Staff of the facility and volunteers must have periodic assessments, . . . of their physical and mental competence to care for children."⁵¹ Mental "competence" could refer to emotional stability or intelligence. This loose definition, therefore, permitted flexibility in determining a standard of competence—mental retardation could have been one of many factors taken into account. Thus, although the North Carolina legislature undoubtedly meant well in originally barring the mentally retarded from working in day-care centers, it seems to have acted alone.

Given the competing policies—the broad common-law discretion of the employer to hire and discharge his employees, the statutory rights of the handicapped to equal opportunities in employment, and the desire to provide a high level of child care—the change in the North Carolina law was a good one. Removing the bar on employment of the mentally retarded would be meaningless without the nondiscrimination requirement of the North Carolina handicap law and the federal law. Taken together, however, the statutes require employers to consider each applicant individually. Rather than establishing a broad, bright-line test barring employment of the mentally retarded, or requiring affirmative action in hiring them, considering applicants individually will provide more flexible accommodation of the competing interests involved.

Removing this bright-line principle, however, will leave a vacuum of uncertainty in individual employment decisionmaking. Consider an employer faced with two applicants: one mentally retarded and one not, otherwise equally qualified. Given that the employee could affect the intellectual development of the children in the day-care center, may the employer justifiably hire the applicant of normal intelligence on the grounds that he is more qualified to develop the minds of the children? Arguably, unlike a qualification such as race or, in most instances, physical handicap, mental retardation may affect the quality of the work performance. Presumably, a careful evaluation of the job position involved and the actual effect on the children should precede any decision not to hire the handicapped applicant. A position that primarily involves supervision and playing with children probably would require less intelligence than, for example, a teaching position. It is particularly difficult to draw this line in the day-care situation, as opposed to other occupa-

50. The Federal Interagency Day Care Requirements, established in 42 U.S.C. § 1397(a) (1976) and 45 C.F.R. § 71.1-71.20 (1970), required high staff-child ratios (few children per caregiver) in all day-care centers receiving Social Security Title XX funds. The standards provoked a "storm of controversy" because of the costs of hiring additional staff. U.S. DEPT. OF HEW, NATIONAL DAY CARE STUDY, PRELIMINARY FINDINGS AND THEIR IMPLICATIONS 1 (1978). In *Stiner v. Califano*, 438 F. Supp. 796 (W.D. Okla. 1977), a suit brought to enjoin enforcement of the standards, parents argued that the standards would produce prohibitive costs, forcing them to quit work to care for their children. *Id.* at 801. The standards were considered "wholly unnecessary" for the care of children, imposing "severe financial burdens needlessly . . ." *Id.* at 800. Although the standards were upheld in *Stiner*, Congress eventually repealed the requirements. Omnibus Reconciliation Act of 1980, § 1001, Pub. L. No. 96-499, 94 Stat. 2655 (1980).

51. 45 C.F.R. § 71.16(i) (1970).

tions, given the uncertainty inherent in the emotional and intellectual development of children, and the employer's subjective evaluation of who will work effectively with children.

The effect of removing the ban on mentally retarded day-care workers will depend on the ultimate judicial interpretation of the North Carolina handicap statute. Some state laws prohibiting discrimination against the handicapped have been broadly interpreted and have had a significant effect, while other state laws have been emasculated by the judiciary.⁵² The North Carolina courts should construe the North Carolina handicap statute broadly, requiring significant accommodation similar to that ordered in liberal interpretations of the federal law.⁵³ The courts should require an employer to restructure his division of duties to take advantage of the mentally retarded worker's skills. A mentally retarded worker who is interested in children has as much to offer as any other employee, and should be as fully integrated into the day-care system as possible. As noted by the North Carolina Supreme Court in *Burgess*, the handicap statute was adopted after years of undue discrimination, and thus should be interpreted broadly to remedy any harmful lingering effects.⁵⁴

Although the practical effect of the change in the day-care law in conjunction with the handicap law is uncertain, the symbolic effect of further including the mentally retarded in society probably will exceed the statute's practical effect. The removal of any stigma of the mentally retarded, however, is, in itself, a worthwhile accomplishment.⁵⁵

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52. Compare *Panettieri v. C.V. Hill Refrigeration*, 159 N.J. Super. 472, 388 A.2d 630 (1978) (burden on employer to articulate legitimate, nondiscriminatory reason for his action) and *Kimmel v. Crowley Maritime Corp.*, 23 Wash. App. 78, 596 P.2d 1069 (1979) (plaintiff's knee injuries held to be a handicap) with *Advocates for the Handicapped v. Sears, Roebuck and Co.*, 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978) (plaintiff's kidney transplant made him uninsurable under defendant's self-insurance program, and thus defendant could discriminate legitimately against plaintiff) and *Providence Journal Co. v. Morgan*, 116 R.I. 614, 359 A.2d 682 (1976) (plaintiff's whiplash not a physical handicap within the Rhode Island statute).

53. See *supra* note 22.

54. See *supra* note 34 and accompanying text.

55. See *supra* note 5 and accompanying text. Representative Jeanne Fenner, from the Eighth District of North Carolina, the sponsor of the amendment, stated that she did not consider the amendment to be a jobs bill, but rather the removal of discriminatory language that perpetuated the myth that the retarded were completely incompetent or dangerous.

Statutory Protection Against Condominium Conversions for North Carolina Residential Tenants

On January 1, 1984 North Carolina joined the majority of jurisdictions by granting residential tenants statutory protection against conversion of their leased units into condominiums.¹ This protection, enacted as an amendment to the North Carolina Unit Ownership Act,² requires a landlord or developer to provide advance notice of the conversion to all residential tenants, and grants these tenants the first option to purchase their particular unit.³ The statute was enacted in response to a growing condominium conversion trend that has been characterized as the "most controversial real estate phenomenon to strike America in over 100 years."⁴ This note examines the impact of the conversion trend on residential tenants and analyzes the effectiveness of North Carolina's response.

States began recognizing condominium ownership during the early 1960s,⁵ and over ninety percent of the existing two million condominiums were created after 1970.⁶ Condominiums never have been a source of much legal or political controversy, and they are now recognized in every state.⁷ Although condominiums frequently are created through new construction, conversion of rental housing into condominiums recently has become popular.⁸ During the first half of this decade, an estimated 1,139,000 rental units will be converted into condominiums—three times the number converted dur-

1. A condominium consists of "two principal elements: (1) separate ownership of a part of a building (apartment), coupled with (2) common ownership with other apartment owners in the land and such part of the buildings as are intended for common use." A. FERRER & K. STECHER, *LAW OF CONDOMINIUM* 2 (1967). See also N.C. GEN. STAT. § 47A-3(5) (1976) ("'Condominium' means the ownership of single units in a multi-unit structure with common areas and facilities.").

2. N.C. GEN. STAT. §§ 47A-1 to -37 (1976 & Supp. 1983). The Act recognizes condominium ownership and establishes procedures for the registration, public sale, and management of a condominium project.

3. N.C. GEN. STAT. § 47A-36 (Supp. 1983). See *infra* notes 29-34 and accompanying text.

4. *Condominium and Cooperative Conversions—The Federal Response: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 97th Cong., 1st Sess. pt. 1 162 (1981) (statement of Kathleen R. Beal) [hereinafter cited as *1981 House Hearings*].

5. U.S. DEP'T OF HOUS. & URBAN DEV., *THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES, A NATIONAL STUDY OF SCOPE, CAUSES AND IMPACTS* XI-1 (1980) [hereinafter cited as *HUD REPORT*].

The condominium originated in the ancient civilizations of the Middle East and the Mediterranean and has long been recognized under civil law. For a discussion of the historical development of condominium ownership through ancient, civil, and common law, see A. FERRER & K. STECHER, *supra* note 1, at 14-81; P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* 2-1 to 2-9 (1983).

6. *Condominium Housing Issues: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 2 (1979) (statement of Sen. Harrison A. Williams, Jr.) [hereinafter cited as *Senate Hearings*].

7. Note, *Condominium Conversion Lease Extensions for Elderly and Disabled Tenants: Is Virginia's New Law a Panacea?*, 17 U. RICH. L. REV. 207, 209-10 (1982).

8. Condominium conversion involves a "change in the legal form of a multi-family rental property from single to multiple ownership. The change is made by filing a legal declaration, master deed, or subdivision application to the appropriate government body. After any necessary approval is received units in the condominium . . . may be sold." HUD REPORT, *supra* note 5, at

ing the 1970s.⁹

Several factors have caused this dramatic increase. First, landlords find conversion economically desirable. The aggregate sale price of units in a converted building will secure a return ten times the building's annual rental income,¹⁰ and from one and one-half to two times the market price of the building as rental property.¹¹ Such an immediate and sizeable return is extremely attractive, particularly considering the growing body of local landlord-tenant regulations¹² and the increasing cost of maintenance and administration.¹³ Second, a strong market for condominiums has developed among a wide spectrum of buyers. The condominium offers the economic¹⁴ and tax¹⁵ advantages of home ownership to low-to-middle income families who cannot afford traditional single-family homes. Upper income families view condominium ownership as an economically attractive means to enjoy an urban lifestyle while avoiding the maintenance burdens of the traditional single-family home.¹⁶ The condominium also has become an attractive investment device; one-third of all condominiums are held as investment property for lease to tenants.¹⁷

The original tenant of the converted unit is the third party (in addition to the landlord and the unit purchaser) affected by a conversion. Approximately twenty-two percent of tenants purchase their individual unit.¹⁸ An additional twenty-two percent obtain continued lease agreements from the new unit own-

app. ii. For a description of the administrative and financial requirements of conversion, see *id.* at III-1 to -23.

9. *Id.* at VII-37. From 1970 through 1979, 346,476 rental units were converted. The vast majority of these conversions, 260,730, occurred in the last four years of that decade. *Id.* at IV-6.

10. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversions*, 18 HARV. C.R.-C.L. L. REV. 179, 187 (1983).

11. Berger, *The New Residential Tenancy Law—Are Landlords Public Utilities?*, 60 NEB. L. REV. 707, 733-34 (1981).

12. Judson, *supra* note 10, at 187. Such regulations can include rent controls, eviction restrictions, and heating standards, as well as general building, fire, and health code requirements. The more stringent landlord-tenant regulations are found in the large urban centers. As such, the desire to escape regulation is not as significant a factor in North Carolina as in more populous states.

13. From 1967 to 1980, general consumer prices increased 148% while rent increased only 92%. Berger, *supra* note 11, at 729 n.109. Rent has failed to keep pace with other prices because of local rent controls, organized tenant resistance, and the inability of low and fixed income tenants to pay higher rents. HUD REPORT, *supra* note 5, at I-13; Judson, *supra* note 10, at 187.

14. Because the owner of a condominium possesses an equity interest in his unit, he benefits from any appreciation in the value of the unit. A tenant possesses no such interest. Berger, *supra* note 11, at 734.

15. The condominium owner may deduct payments for mortgage interest, I.R.C. § 163(a) (1976), and real property taxes, I.R.C. § 164(a)(1) (1976), in calculating his federal income tax. The tenant, however, receives no deduction for rent payments. Furthermore, the condominium owner can qualify for capital gains treatment of any appreciation in value when the unit is sold. I.R.C. § 1202 (Supp. 1981).

16. Judson, *supra* note 10, at 186. Thirty-eight percent of condominium purchases are motivated principally by noneconomic reasons. HUD REPORT, *supra* note 5, at VI-8.

17. HUD REPORT, *supra* note 5, at VI-2. See also *id.* at VI-11 to -14 (analysis of the condominium as investment).

18. *Id.* at IX-10.

ers and remain in their unit.¹⁹ The remaining fifty-six percent, however, are displaced by the conversion because they cannot or choose not to remain.²⁰ This high displacement rate has caused the current controversy over conversions and has prompted the legislative responses discussed in this note. Displaced tenants must compete among themselves to locate affordable replacement housing, often in a rental market characterized by a low vacancy rate.²¹ Because conversion removes rental units from the market, each conversion makes the search for housing more difficult.²² In addition to this problem of finding replacement housing, conversion also imposes moving expenses, as well as the burden of reestablishing a lifestyle in a new building or community, on the tenant.²³ Although these problems exist in any type of relocation, conversion is unique because it involves the involuntary simultaneous displacement of a large group of people.

Response to the conversion problem began at the municipal level in North Carolina. In 1980 Chapel Hill, a university town heavily dependent on rental housing, asserted the authority to regulate conversions through its zoning powers and barred a landlord from converting his apartment building into condominiums.²⁴ The North Carolina Court of Appeals held this action invalid in *Graham Court Associates v. Town of Chapel Hill*.²⁵ The court ruled that the town's zoning powers provided no right or legal authority to prohibit the conversion.²⁶ The applicable zoning statute²⁷ authorizes a municipality to regulate the use of land within its boundaries, but the court found that conversion merely changes the form of ownership.²⁸ Accordingly, the conversion was not subject to local regulation.

Two years after this unsuccessful municipal effort, the North Carolina legislature enacted the tenant protection statute.²⁹ The statute contains two provisions designed to ease the tenant's burden during conversion. First, it

19. *Id.* at IX-13.

20. *Id.*

21. The national vacancy rate is 4.8%. *Senate Hearings*, *supra* note 6, at 2 (statement of Sen. Harrison A. Williams Jr.).

22. Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 317. Because of the high cost of construction and mortgage financing, few converted units are replaced through new construction. *Id.* at 317-18.

23. Judson, *supra* note 10, at 190-91. These relocation problems have a more severe effect on elderly and disabled tenants. See *infra* notes 38-43 and accompanying text.

24. *Graham Court Assocs. v. Town of Chapel Hill*, 53 N.C. App. 543, 546, 281 S.E.2d 418, 419 (1981).

25. 53 N.C. App. 543, 281 S.E.2d 418 (1981).

26. *Id.* at 551, 281 S.E.2d at 423.

27. N.C. GEN. STAT. § 160A-381 (1981). A similar statute, N.C. GEN. STAT. § 153A-340 (Supp. 1983), authorizes county governments to regulate the use of land within their boundaries. Presumably, the *Graham Court Assocs.* ruling would apply to county as well as municipal governments.

28. *Graham Court Assocs.*, 53 N.C. App. at 551, 281 S.E.2d at 422. *Accord* City of Miami Beach v. Arlen King Cole Condominium Ass'n, 302 So. 2d 777 (Fla. Dist. Ct. App. 1974); AMN, Inc. v. South Brunswick Township Leveling Bd., 93 N.J. 518, 461 A.2d 1138 (1983); Maplewood Village Tenants Ass'n v. Maplewood Village, 116 N.J. Super. 372, 282 A.2d 428 (1971). *But see* Goldman v. Town of Dennis, 375 Mass. 197, 375 N.E.2d 1212 (1978) (conversion involving a probable change in the building's use is subject to zoning regulation).

29. An Act to Protect Renters of Apartment Buildings Being Converted to Condominiums,

requires the landlord to give the tenant ninety days notice of the conversion.³⁰ If the tenant's lease extends beyond this ninety-day period, presumably he will be allowed to complete his full lease term.³¹ Second, the landlord must give the tenant a thirty-day first option to purchase his unit.³² The landlord must include with the option an offering statement containing a description of the condominium and any planned improvements, the terms of any warranties, and any other information given to prospective nontenant buyers.³³ Once the tenant elects to exercise his option, he is granted an additional thirty days to complete the sale.³⁴

The ninety-day notice requirement is similar to notice requirements enacted by twenty-five other states and the District of Columbia.³⁵ The purpose

1983 N.C. Adv. Legis. Serv. ch. 624, § 1 (codified at N.C. GEN. STAT. §§ 47A-34 to -37 (Supp. 1983)).

30. N.C. GEN. STAT. § 47A-36(a) (Supp. 1983).

31. The statute is unclear on this point. A landlord could argue that the statute empowers him to evict a tenant at the end of the 90-day notice period, regardless of the remaining duration of the lease. One commentator, however, has noted that such a construction would be an unconstitutional taking of the tenant's leasehold without due process. See Note, *Condominium Conversions—Balancing Tenants' Rights and Property Owners' Interests*, 27 WAYNE L. REV. 349, 359 (1980).

32. N.C. GEN. STAT. § 47A-36(b) (Supp. 1983).

33. *Id.* § 47A-35.

34. *Id.* § 47A-36(b).

The constitutionality of North Carolina's tenant notice and first option provisions is not at issue. Courts have consistently found these and more stringent tenant protection requirements constitutional when subjected to due process (uncompensated taking) and equal protection challenges. See *River Park Tenants Ass'n v. 3600 Venture*, 534 F. Supp. 45, 50 (E.D. Pa. 1981) (extended notice requirement for elderly and disabled tenants survives equal protection analysis (*dicta*)); *Flynn v. City of Cambridge*, 1981 Mass. Adv. Sh. 692, 418 N.E.2d 335 (1981) (temporary moratorium on all evictions during conversion upheld against due process challenge); *Grace v. Town of Brookline*, 379 Mass. 43, 399 N.E.2d 1038 (1979) (6 month moratorium on all evictions during conversion upheld against due process and equal protection challenges); *Reiner-Kaiser Assocs. v. McConnachie*, 104 Misc. 2d 750, 429 N.Y.S.2d 343 (1979) (ban on eviction of elderly tenants during conversion upheld against equal protection challenge); see also *Judson*, *supra* note 10, at 198-230; *Rosenthal*, *The Legality and Practicality of Condominium Conversion Moratoriums*, 34 U. MIAMI L. REV. 1199, 1211-1222 (1980); Note, *Fifth Amendment Takings and Condominium Conversion Regulations that Restrict Owner Occupancy Rights*, 62 B.U.L. REV. 467, 486-91 (1982); Note, *The Validity of Ordinances Limiting Condominium Conversions*, 78 MICH. L. REV. 124, 134-35 (1979).

35. See ARIZ. REV. STAT. ANN. § 33-1326(B) (Supp. 1983) (120 day notice); CAL. GOV'T CODE § 66427.1(c) (West 1954) (180 day notice); COLO. REV. STAT. § 38-33-112(3) (1973) (90 day notice); CONN. GEN. STAT. ANN. § 47-88b(b)(3) (West Supp. 1983) (180 day notice); D.C. CODE ANN. § 45-1868 (b)(1) (1981) (120 day notice); FLA. STAT. § 718.606(1) (Supp. 1981) (270 day notice for tenants in possession over 180 days; 180 day notice for all other tenants); GA. CODE ANN. § 44-3-87(a) (Supp. 1983) (120 day notice); ILL. ANN. STAT. ch. 30, § 330(a) (Smith-Hurd Supp. 1983) (120 day notice); ME. REV. STAT. ANN. tit. 33, § 1604-111(a) (Supp. 1983) (120 day notice); MD. REAL PROP. CODE ANN. § 11-102.1(c) (Supp. 1983) (180 day notice); MICH. STAT. ANN. § 26.50(204) (Callaghan Supp. 1983) (120 day notice); MINN. STAT. ANN. § 515A.4-110(a) (West Supp. 1983) (120 day notice); MO. ANN. STAT. § 448.4-112(1) (Vernon Supp. 1984) (120 day notice); N.H. REV. STAT. ANN. § 356-B:56(II) (Supp. 1981) (90 day notice); N.J. STAT. ANN. § 2A:18-61.2(g) (West Supp. 1983) (3 year notice); N.Y. GEN. BUS. LAW § 352-eee(2)(d)(ii) to -eeee(2)(d)(ii) (McKinney Supp. 1983) (local governments in New York City metropolitan area empowered to require 3 year notice); OHIO REV. CODE ANN. § 5311.25(G) (Page 1981) (120 day notice); OR. REV. STAT. § 94.116(1) (1953) (120 days notice); PA. STAT. ANN. tit. 68, § 3410(a) (Purdon Supp. 1983) (1 year notice); R.I. GEN. LAWS § 34-36.1-4.12(a) (Supp. 1983) (120 day notice); S.C. CODE ANN. § 27-31-420(A) (Supp. 1983) (90 day notice); TENN. CODE ANN. § 66-27-123(a) (1982) (60 day notice); VA. CODE ANN. § 55-79.94(b) (Supp. 1983) (120 day notice); WASH.

of such notice is to afford the displaced tenant ample time to secure suitable replacement housing. Although the ninety-day period is shorter than the notice periods provided in most conversion statutes,³⁶ it gives most tenants sufficient time to find replacement housing since a displaced tenant usually can find similar housing within thirty to ninety days.³⁷ For these tenants, the ninety-day notice period will ease the burden of conversion.

Although the notice period is sufficient for the majority of tenants, it is inadequate for elderly and disabled tenants, two groups with special housing needs. Conversion particularly harms the elderly. During a conversion, elderly tenants will very likely be among those displaced.³⁸ Because of fixed incomes, many elderly tenants are unable to obtain the necessary financing to purchase their individual unit.³⁹ Moreover, those who can afford to purchase may have no desire to do so. Given their shorter remaining life expectancies, the advantages of establishing equity in a condominium are less attractive to elderly tenants; such tenants may prefer to keep their financial resources in liquid assets for present use and enjoyment.⁴⁰

In addition to being highly susceptible to displacement, the elderly have the most difficulty in obtaining replacement housing. Many elderly tenants cannot search for new housing without physical assistance. Additional problems arise from the need to find housing with adequate security, easy physical access, and sufficient proximity to medical care.⁴¹ Finally, the elderly can suffer chronic emotional and psychological harm after being forced to move. Displacement disrupts established patterns of daily life and causes increased stress and anxiety. The more serious of these disruptions include impaired access to family members, friends, church services, and preferred medical care.⁴²

REV. CODE ANN. § 59.18-200(2) (Supp. 1983) (90 day notice); W. VA. CODE § 36B-4-110(a) (Supp. 1983) (120 day notice); WIS. STAT. ANN. § 703.08(1) (West 1957) (120 day notice).

Congress has conducted extensive hearings on the need for federal conversion rights for tenants. See, e.g., 1981 House Hearings, *supra* note 5; *Condominium Conversions: Hearings before the Subcomm. on Housing and Consumer Interests of the House Select Comm. on Aging*, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 House Hearings]; *Senate Hearings*, *supra* note 6. In the Condominium and Cooperative Conversion Protection and Abuse Relief Act of 1980, 15 U.S.C. § 3605 (1982), however, Congress merely urged state and local governments to enact their own notice and first-purchase option requirements. This result reflected a belief that the issue of "notice and opportunity to purchase" is "more appropriately addressed at the state and local level." H.R. REP. NO. 1420, 96th Cong., 2d Sess. 167, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3617, 3712.

36. Most states require a 120 or 180 day notice to the tenants. See *supra* note 35.

37. HUD REPORT, *supra* note 5, at IX-15.

38. Thirty-seven percent of displaced tenants are over fifty-five years old. 1980 House Hearings, *supra* note 35, at 7 (statement of Michael A. Stegman, Deputy Ass't Sec'y for Research, U.S. Dep't of Hous. & Urban Dev.).

39. Note, *supra* note 7, at 210.

40. Note, *Conversion of Apartments to Condominiums and Cooperatives: Protecting Tenants in New York*, 8 U. MICH. J.L. REF. 705, 708 (1975).

41. Comment, *Conversion of Apartments to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act*, 16 CAL. W.L. REV. 466, 468 (1980).

42. These disruptions and the emotional and psychological harm associated with them are discussed in several studies. See 1981 House Hearings, *supra* note 4, pt.1 at 162 (report of Kathleen R. Beal, Gerontology Program, George Washington Univ.); 1980 House Hearings, *supra* note

Like the elderly, the disabled require more time to adjust to the change and locate a new home. For example, they have specialized housing needs that require easy physical access and close proximity to medical care. Locating replacement housing that meets these special needs may be difficult. Rental costs can further complicate this search since many disabled tenants depend on fixed incomes.⁴³

Ten states and the District of Columbia have recognized these special problems and have enacted either eviction prohibitions or additional notice requirements for elderly and disabled tenants.⁴⁴ The North Carolina notice requirement lacks such a provision. Thus, although the current notice requirement is a significant step in the right direction, the legislature should consider an extended notice requirement of one to three years for elderly and disabled tenants.⁴⁵

The second provision of the North Carolina statute requires a landlord or developer to grant the tenant a thirty-day first option to buy his apartment.⁴⁶ This first-purchase option is designed to prevent developers from securing advance purchase commitments from third parties before notifying tenants of the planned conversion. First option requirements have gained wide legislative acceptance; twenty-one jurisdictions besides North Carolina now require them in all conversions.⁴⁷

35, at 65 (report of Dr. Leon A. Pastalan, Dir., Environment and Aging Program, Univ. of Michigan Inst. of Gerontology); *Senate Hearings, supra* note 6, at 116 (report of Legal Research & Serv. for the Elderly, Nat'l Council of Senior Citizens).

43. Note, *supra* note 7, at 210. If the tenant's disability is total, he may be completely dependent on social security, veteran's benefits, worker's compensation, or private insurance benefits for subsistence.

44. See CONN. GEN. STAT. ANN. § 47(a)-23c(b) (West Supp. 1983) (general prohibition of eviction of blind, disabled, or elderly tenants); D.C. CODE ANN. § 45-1616(a) (1981) (prohibits eviction of elderly tenants with annual incomes below \$30,000 during a conversion); MD. REAL PROP. CODE ANN. § 11-137 (Supp. 1983) (3 year notice of conversion to elderly tenants on fixed incomes); MICH. STAT. ANN. § 26.50(204b) (Callaghan Supp. 1983) (4 to 10 year notice determined by tenant's age; 4 year notice to disabled tenants); MINN. STAT. ANN. § 515A.4-110(a) (West Supp. 1983) (180 day notice to elderly tenants); N.J. STAT. ANN. § 2A:18-61.22 to .39 (West Supp. 1983) (local government authorized to grant disabled and elderly tenants individual lease extensions for a maximum of 40 years); N.Y. GEN. BUS. LAW § 352-e(2-a)(b)(ii) (McKinney Supp. 1983) (prohibits eviction of disabled and elderly tenants during a conversion); PA. STAT. ANN. tit. 68, § 3410(f) (Purdon Supp. 1983) (2 year notice to blind, elderly, and disabled tenants); R.I. GEN. LAWS § 34-36.1-4.12(e) (Supp. 1983) (1 year notice to elderly tenants); S.C. CODE ANN., § 27-31-420(A) (Supp. 1983) (120 day notice to elderly tenants); VA. CODE § 55-79.94(f) (Supp. 1983) (local governments authorized to require 3 year notice to elderly and disabled tenants).

45. A 1 year notice requirement for elderly and disabled tenants is advocated in Note, *Municipal Regulation of Condominium Conversions in California*, 53 S. CAL. L. REV. 225, 277 (1979). See also Comment, *supra* note 22 at 331; Note, *supra* note 31 at 364.

46. See *supra* notes 32-34 and accompanying text.

47. See ARIZ. REV. STAT. ANN. § 33-1326(B)(2) (Supp. 1983) (30 day first-purchase option); CAL. GOV'T CODE § 66427.1(d) (West 1983) (90 day first-purchase option); CONN. GEN. STAT. ANN. § 47-88b(c) & (j) (West Supp. 1983) (90 day first-purchase option to individual tenant; 30 day first-purchase option to tenants' association); D.C. CODE ANN. § 45-1638 (1981) (60 day first-purchase option); FLA. STAT. § 718.612 (Supp. 1981) (45 day first-purchase option followed by right of first refusal to subsequent public offers at more favorable terms); GA. CODE ANN. § 44-3-87(b) (Supp. 1983) (60 day first-purchase option followed by right of first refusal to subsequent public offers at more favorable terms); ILL. ANN. STAT. ch. 30, § 330(a) (Smith-Hurd Supp. 1983) (30 day first-purchase option); ME. REV. STAT. ANN. tit. 33, § 1604-111(b) (Supp. 1983) (60 day first-purchase option followed by 180 day ban on public sale at more favorable terms); MD. REAL

Although North Carolina's thirty-day option period is shorter than that provided by most jurisdictions,⁴⁸ it should provide a tenant sufficient time to analyze the relevant information pertaining to the conversion and reach an intelligent decision. This decision is greatly simplified because the tenant already is familiar with the layout and condition of the complex and his particular apartment. Many tenants will desire a longer option period so they can explore housing and financing options, but this desire must be balanced against the landlord's interest in proceeding with the conversion. As such, the thirty-day option, although short, is adequate. The thirty-day period to complete the sale after exercise of the option is also adequate. A condominium developer usually establishes standard sales terms for all conversion units and obtains advance financing commitments from area lending institutions for qualifying purchasers.⁴⁹ Thus, the tenant-purchaser probably will not face lengthy negotiations or a prolonged search for financing. Any terms subject to negotiation can be settled within the thirty-day period. If the tenant chooses to secure his own financing, he has sixty days to accomplish that goal—the thirty-day option period plus the thirty-day settlement period. Thus, although the option is not a cure-all,⁵⁰ it provides needed guarantees for those tenants who are willing and able to buy their units.

On their face, the option and settlement provisions should guarantee the tenant's right to purchase his unit if he so chooses. This result, however, may be defeated by two further provisions of the statute and by a significant omission. First, the tenant does not receive the first-option right to his unit if the "boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion."⁵¹ A landlord could claim that improvements to the unit constitute a substantial change in dimensions and

PROP. CODE § 11-136(a) (Supp. 1983) (60 day first-purchase option); MINN. STAT. ANN. § 515A.4-110(b) (West Supp. 1983) (60 day first-purchase option to buy followed by 180 day ban on public sale at more favorable terms); N.H. REV. STAT. ANN. § 356-B:56(II) (Supp. 1981) (60 day first-purchase option); N.J. STAT. ANN. § 2A:18-61.8 (West Supp. 1983) (first-purchase option); N.Y. GEN. BUS. LAW § 352-eee(2)(d)(ix) (McKinney Supp. 1983) (90 day first-purchase option); OHIO REV. CODE ANN. § 5311.25(G) (Page 1981) (90 day first-purchase option); OR. REV. STAT. § 94.122 (1983) (60 day first-purchase option followed by 60 day right of first refusal to any public offer at more favorable terms); PA. STAT. ANN. tit. 68, § 3410 (Purdon Supp. 1983) (6 month first-purchase option followed by 6 month right of first refusal to public offer at more favorable terms); R.I. GEN. LAWS § 34-36.1-4.12(b) (Supp. 1983) (60 day first-purchase option followed by 180 day ban on public sale at more favorable terms); S.C. CODE ANN. § 27-31-420(B) (Supp. 1983) (60 day first-purchase option followed by 15 day right of first refusal to public offer at more favorable terms); VA. CODE § 55-79.94(b) (Supp. 1983) (60 day first-purchase option); W.VA. CODE § 36B-4-110(b) (Supp. 1983) (60 day first-purchase option followed by 180 day ban on sale to public at more favorable terms); WIS. STAT. ANN. § 703.08(1) (West 1981) (60 day first-purchase option).

48. A 60 day option is required in 13 of the 21 jurisdictions requiring such options. Three states have longer option periods. See *supra* note 47.

49. HUD REPORT, *supra* note 5, at III-9. Such advance financing commitments are attractive to financial institutions because the institution is guaranteed all loan business for the project and gains a security interest in the entire project.

50. Only those tenants who are financially able to purchase their unit or who qualify for financing will benefit from this provision. Tenants who are too poor to qualify for financing are not assisted by this provision; they must rely on the ninety-day notice period to find replacement housing or negotiate a lease agreement with the new unit owner.

51. N.C. GEN. STAT. § 47A-36(b) (Supp. 1983).

deny the tenant a first-purchase option. In such a case, the tenant would be forced into litigation to preserve his option right. More significantly, this provision can create a dispute over option rights among the tenants if one unit is divided and merged into adjoining units during conversion.⁵² For these reasons, the legislature should consider one commentator's suggestion that tenants be given the option to purchase a unit within the conversion project if it is no longer possible to purchase his particular unit.⁵³

Second, the tenant loses his right to specific performance of the option if the landlord conveys the unit to a third-party purchaser who records the conveyance.⁵⁴ Although this result follows North Carolina's long-standing status as a "pure race" recording jurisdiction,⁵⁵ it robs the option of any real meaning. If the third-party purchaser records the conveyance, the tenant is limited to a suit for damages. Damages provide an inadequate remedy because, with the exception of moving expenses, the tenant can prove no pecuniary loss. This result, however, could be avoided by a statutory provision for alternative remedies. Such a provision might include a right to purchase an unsold unit or to recover liquidated damages in the amount of a set percentage of the unit's value. Either alternative would discourage landlords from selling units in violation of the tenant's option right.

A major omission from the North Carolina statute poses the final hazard to the option right. The tenant's option right may prove meaningless if the landlord demands an excessive price from the tenant during the option period, waits for the option to expire, and then offers the unit to the public at more favorable terms. A landlord might choose this course of action if he wanted to end relations with the tenant. To prevent such treatment of tenants, several states provide a statutory right of first refusal for a set period after the option expires.⁵⁶ Under this system, if the tenant declines to exercise his option and the landlord subsequently offers the unit to a third party at more favorable terms, the tenant has the right to purchase the unit at those terms. This first-refusal right requires the landlord to negotiate in good faith and eliminates the temptation to wait out the option period. It has received support from commentators⁵⁷ and should be included in the North Carolina statute.

Currently, all residential tenant conversion rights in North Carolina are provided by state law; local governments apparently lack authority to supple-

52. Wynn, *Condominium Conversions and Tenant Rights—Wisconsin Statutes Section 703.08: What Kind of Protection Does it Really Provide?*, 63 MARQ. L. REV. 73, 80 (1979).

53. *Id.* at 81.

54. N.C. GEN. STAT. § 47A-36(c) (Supp. 1983).

55. Under a "pure race" recording system, the grantee who first records his deed will prevail over any other conveyance from the title source. This grantee will prevail regardless of any notice he may have of a prior, unrecorded conveyance. See N.C. GEN. STAT. § 47-18(a) (1976), construed in *Hill v. Pinelawn Memorial Park, Inc.*, 304 N.C. 159, 282 S.E.2d 779 (1981); *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939).

56. Ten states currently provide a right of first refusal: Florida, Georgia, Illinois, Maine, Minnesota, Oregon, Pennsylvania, Rhode Island, South Carolina, and West Virginia. See *supra* note 47.

57. See, e.g., Note, *supra* note 31, at 364.

ment these state protections either by direct regulation⁵⁸ or through the exercise of zoning powers.⁵⁹ Thus, the North Carolina legislature should enact a sound and comprehensive tenant conversion rights statute. Although the current statute is a significant step in that direction, it is incomplete. The statute establishes a tenant's right to notice of conversion, a provision characterized as "the most fundamental tenant protection of all."⁶⁰ This notice requirement, however, fails to address the unique housing needs of elderly and disabled tenants. These tenants are affected most severely by a conversion and require more time to locate replacement housing. Accordingly, they should be provided additional notice of an impending conversion beyond the ninety days provided to all tenants.

The statute also correctly grants the tenant an option to purchase his converted unit before it is offered for public sale. Such an option will limit the disruptive effects of a conversion and avoid the expense of a move for those tenants willing and able to buy their unit. The statute in its present form, however, cannot fully implement this policy. A tenant can lose his option right if the conversion involves changes to the building layout or if the developer demands an excessive option price in an effort to wait out the option period. Moreover, this option right is unenforceable if the landlord conveys the unit to a third party who records the conveyance. The legislature should amend the statute to preclude any of these possibilities.

Condominium conversion is an established phenomenon in the American housing market. It offers significant benefits to landlords, developers, purchasers, and local communities.⁶¹ Conversion, however, can impose severe strain, even hardship, on the original tenant of the conversion property. This adverse

58. Prior to 1983 city and municipal governments were permitted to supplement all provisions of the Unit Ownership Act. N.C. GEN. STAT. § 47A-27 (1976) (amended *Id.* (Cum. Supp. 1983)). When the tenant protection provisions were added as article 2 of the Act in 1983, this authorization to supplement the Act was limited to the provisions of article 1, which governs the registration, public sale, and management of condominiums. 1983 N.C. Adv. Legis. Serv. ch. 624, § 2 (codified at N.C. GEN. STAT. 47A-27 (Cum. Supp. 1983)).

59. See *supra* notes 24-28 and accompanying text.

The problems created by condominium conversion vary from community to community; cities with a heavy reliance on rental housing experience the most severe impact. The legislature should permit local governments to respond to conversion problems by granting them some regulatory authority. Certainly, no North Carolina city is experiencing the conversion problems of the large urban centers, but some flexibility of response is needed.

60. *Senate Hearings, supra* note 6, at 132 (report of Legal Research and Servs. for the Elderly).

61. The advantages to a community of condominium conversion are detailed in Comment, *supra* note 22, at 314-17. Because the aggregate value of the individual converted units exceeds the value of the building as rental property, conversion increases the local tax base. Moreover, condominiums receive better maintenance than rental property and many buildings and individual units receive extensive renovation on conversion. Finally, conversion attracts upper and middle class families back into urban areas. Consumer spending by these families benefits area businesses. See also HUD REPORT, *supra* note 5, at VIII-1 to -36.

One commentator rejects this conclusion, arguing that, with the exception of the increased tax base, conversion offers no economic advantages to the community. *Senate Hearings, supra* note 6, at 49 (statement of Daniel Lauber, Planning/Communications Assocs.). Lauber argues that conversions typically occur in already stable neighborhoods and that the conversion itself is destabilizing because it displaces a large number of tenants.

impact can be reduced through appropriate legislation. North Carolina has initiated such a legislative response, one that it should now complete.

DAVID JAMES BURGE

The North Carolina Time Share Act

Whether motivated by the desire for a less expensive vacation, a second home, a hedge on inflation, or a calculated investment, over a quarter-million Americans last year each paid between four thousand and twenty-five thousand dollars for a week of vacation time during each of the next five, ten, thirty, or more years.¹ Developers in over 900 resort spots sold each unit to as many as fifty purchasers, at profits far greater than those on traditional condominium sales.² Consequently, resort timesharing has become the fastest growing sector of the vacation and resort industries. With sales increasing from fifty million dollars in 1975 to an estimated one and one-half billion dollars in 1983,³ timesharing has grown from a clever innovation to a self-contained industry, with numerous variations,⁴ questionable sales practices, and a maze of regulatory controls.⁵

With the North Carolina Time Share Act of 1983,⁶ North Carolina became the fourteenth state to pass an act directly regulating the timeshare industry.⁷ Although such legislation varies considerably from state to state, North Carolina's differs from the majority in one most significant feature: it has declared all forms of timeshares, "whether or not coupled with a freehold estate or an estate for years,"⁸ to be interests in real property.⁹ After briefly describing the development of timesharing and its various forms, this note focuses on the methods employed in controlling timeshare sales and operation, and discusses the ramifications of North Carolina's Act.

A classic example of the ingenuity of the entrepreneur, timeshares developed in response to the needs of both vacation home suppliers and consumers. The inflationary costs of land and construction in the early 1970s and the increasing administrative expenses of complying with condominium regulations¹⁰ had led to declining profit margins for condominium developers.¹¹ By employing the "basic principle of subdivision economics" through timeshar-

1. Daniels, *When a Week is Realty*, N.Y. Times, Oct. 9, 1983, § 12, at 51, col. 3. In addition to the purchase price of \$4,000 to \$25,000, the timeshare owner must pay yearly maintenance and facility fees, maid service fees, and taxes. *Id.* at 51, col. 2.

2. *Id.* at 52, col. 4. This is true despite the additional costs incurred in selling the same unit 50 times.

3. *Id.*

4. See *infra* notes 19-37 and accompanying text.

5. See generally Gunnar, *Regulation of Resort Time Sharing*, 57 OR. L. REV. 31 (1977).

6. 1983 N.C. Adv. Legis. Serv. 401 (codified at N.C. GEN. STAT. §§ 93A-39 to -57 (Cum. Supp. 1983)).

7. Alabama, Arizona, Connecticut, Florida, Georgia, Hawaii, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Tennessee, and Virginia also have timeshare acts. For statutory cites, see *infra* note 85.

8. N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983).

9. *Id.* § 93A-42.

10. See *infra* note 77. Condominium sales also are often considered sales of securities, and subjected to additional regulatory requirements. See Note, *New Ideas in the Vacation Home Market*, 48 ST. JOHN'S L. REV. 1203, 1205-10 (1974).

11. Roodhouse, *Fractional Time Period Ownership of Recreational Condominiums*, 4 REAL ESTATE L.J. 35, 38 (1975).

ing, these developers expected to offset their lost profits by selling "parts" of the condominiums for an aggregate amount greater than the whole.¹²

At the same time timeshares met an increasing consumer demand. Because of increased leisure and mobility¹³ and the need to escape urban nuisances,¹⁴ more middle-class Americans were seeking vacation retreats formerly reserved for the wealthy. The timeshare offered an affordable and flexible form of second-home ownership. With multiple ownership of a unit, purchasers could resolve the affordability problems of condominium ownership while getting exactly what they needed, a "place of their own" for a limited period each year.¹⁵ The practical problems encountered with group purchases of vacation homes could be avoided by employing professional managers to handle scheduling and maintenance.¹⁶ Finally, timeshare plans often enabled purchasers to trade timeshares with owners in other places, further increasing the popularity of timesharing.

A timeshare is the prepurchase of a week's exclusive use¹⁷ of a resort apartment or suite¹⁸ each year for a period ranging from five years to the useful life of the dwelling, or for perpetuity. For descriptive and sometimes regulatory purposes timeshares can be divided into two categories—"fee" and "right-to-use" timeshares.¹⁹ The fee timeshare includes the right to use a unit coupled with an ownership interest in that unit; a right-to-use timeshare involves simply the right to use a unit either by lease or contract, with no ownership interest.²⁰

Four types of fee timeshares correspond to four alternatives for conveying the interest.²¹ A "timespan" estate is held by all the weekly owners of a given

12. *Id.* at 38. Even though the costs of marketing a timeshare project are up to 50% higher than for conventional condominiums, the most expensive part, construction, costs no more. *Id.* at 39. It is estimated that revenues from a timeshare project may be from two and one-half to three times higher than from condominiums. Pollack, *Time-Sharing, or Time Is Money But Will It Sell?*, 10 REAL ESTATE L.J. 281, 287 (1982).

13. Roodhouse, *supra* note 11, at 36. See also Note, *supra* note 10, at 1203-04.

14. Note, *supra* note 10, at 1203.

15. *Id.* at 1210.

16. Gray, *Pioneering the Concept of Time-Sharing Ownership*, 48 ST. JOHN'S L. REV. 1196, 1197-98 (1974).

17. How the period or conditions of the exclusive use is defined varies greatly. North Carolina, for example, defines a timeshare as "a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options." N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983).

18. Timeshares are found not only in resort condominiums, but have expanded to "marinas, recreational vehicle parks, and even to campgrounds, and cities." Daniels, *supra* note 1, at 52, col. 4.

19. Labels for classifications of timeshares vary; "fee" and "right-to-use," as well as other labels used in this note are the most commonly used designations. This multiplicity of nomenclature is one of the primary sources of confusion in the timeshare industry.

20. The proportion of fee and right-to-use timeshare sales is close to 50-50. AM. LAND DEV. ASS'N, RESORT TIME-SHARING FACT SHEET (Oct. 1981).

21. For a complete analysis of the benefits and detriments of each form of fee timeshare, see generally Comment, *Time-Share Condominiums: Property's Fourth Dimension*, 32 ME. L. REV. 181 (1980); E. Peirce & R. Mann, *Time Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment* 4-29 (1983) (unpublished article from the University of North Carolina at Chapel Hill, School of Business Administration); Pollack, *supra* note 12, at 284-85.

unit as tenants in common, each having a present undivided interest in a fee simple estate.²² As a supplement to the deed, a timeshare declaration is recorded, with restrictive covenants giving each owner the exclusive right to possession for an established period each year.²³ With the second form, the "interval" estate, an estate for years is deeded to each purchaser, with title rotating among the owners; the possessory rights are determined by the rotating title rather than by a separate document.²⁴ The deed also vests a remainder in the purchasers as fee simple tenants in common.²⁵ The third form, the "fee simple" timeshare, grants each purchaser fee simple ownership for a given period each year.²⁶ Although this form avoids the complications of tenancy in common²⁷ and interval ownership,²⁸ it adds the unfamiliar dimension of time to fee simple ownership, which traditionally has been limited to dimensions of breadth, depth, and height.²⁹ Because of its novelty, fee simple timesharing may cause confusion in drafting conveyances and infringe the right to waste, an incident of fee simple ownership.³⁰ Because it defies these conventional property law concepts, fee simple timesharing has been used cautiously and infrequently.³¹ The fourth and newest form of fee timeshare ownership is the timeshare "cooperative," under which the purchasers own stock in a corporation that grants individual use periods through proprietary leases.³² Although this form is not yet widely used, it "appears to have advantages in the areas of financing, taxation, and regulation."³³

The "vacation license" is the oldest of three widely-used types of right-to-use timeshares.³⁴ "Developed primarily as a mechanism to avoid real estate

22. See Comment, *supra* note 21, at 184-85.

23. *Id.* at 186-91.

24. *Id.* at 201-02.

25. *Id.* "At the end of the recurring estates for years, the owners can either reinstate the interval arrangement or seek partition of their interests." *Id.* at 201 n.35.

26. *Id.* at 211. The fee simple timeshare originally was noted in Roodhouse, *supra* note 11, at 41 & nn.19-20.

27. Common problems with tenancy in common include partitioning, allocating the tax burden, enforcing the payment of taxes, and obtaining title insurance. For a complete treatment of these problems, see generally sources listed in *supra* note 21.

28. Problems of interval ownership stem from its similarity to a landlord-tenant arrangement and from the possibility of merger of title. As an estate for years, interval ownership might be treated under the special laws of landlords and tenants, implying developer liability for tort, warranty of habitability, and a nonequity interest for the purchaser. Comment, *supra* note 21, at 202, 204. Although a fee simple remainder might lessen the possibility of landlord-tenant treatment, it raises the possibility for merger of the lesser estate into the greater estate, eliminating the timeshare portion of the grant altogether. *Id.* at 207-10. For a more complete treatment of these issues, see generally sources listed in *supra* note 21.

29. Roodhouse, *supra* note 11, at 48-50.

30. *Id.* at 50-51.

31. E. Peirce & R. Mann, *supra* note 21, at 16.

32. PRACTICING LAW INST., THE LEGAL ASPECTS OF REAL ESTATE TIMESHARING 14 (1982).

33. *Id.* While the Institute does not describe these advantages, this form of ownership would avoid the problems of joint liability for financing and taxes.

34. The North Carolina Act mentions several other forms of right-to-use timeshares—prepaid hotel reservations, limited partnerships, and vacation bonds—which are not described in the literature on timeshares. N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983). The constant development of variations on the timesharing concept is evidenced by the fact that these forms of timeshares were not common when the literature was written.

regulatory agencies and the necessity of using licensed real estate salesmen," this form gives the purchaser the right to use a given unit for a specified portion of each year, for either a number of years or for the useful life of the unit.³⁵ The second form, the "vacation lease," gives the purchaser a leasehold interest in the unit for a specified period each year; unlike the license form, the vacation lease may be assigned, transferred, or subleased.³⁶ The final form of right-to-use timeshares is the "club membership," in which the purchaser pays a membership fee to a club or association that owns and operates the premises and leases timeshares to the members.³⁷

The numerous existing schemes for timesharing, and the likelihood that even more variations will evolve, illustrate the need for legislation governing the sale and operation of timeshares. Commentators have suggested legislation to protect consumers and establish guidelines for timeshare developers and managers since early in the development of the timeshare industry.³⁸ Consumer protection legislation was necessary to combat the questionable sales techniques employed,³⁹ such as "bait and switch,"⁴⁰ deceptive prize offers, and nondisclosure of fine print contract provisions, as well as the confusion caused by the multiple forms of timesharing.⁴¹ In addition, guidance was needed for the special management requirements of timeshares—scheduling and overseeing use and possession of, ensuring the maintenance of, and coordinating the insurance and tax payments on each unit.⁴² Other legal problems of timesharing, including tort and tax liability among owners, partition of units, property rights of timeshare purchasers in registration and transfer of interests, and the status of timeshares under securities regulation, also require legislative resolution. Finally, it was believed that "widespread market acceptance and legal soundness [of timeshares] might be greatly enhanced" by amending existing legislation to account for timesharing,⁴³ or passing specific legislation to govern timesharing.⁴⁴

Both the federal government and various state governments have recognized the need to protect consumers and guide timeshare operations through regulation of the timeshare industry.⁴⁵ Unfortunately, the regulations vary

35. E. Peirce & R. Mann, *supra* note 21, at 22.

36. Pollack, *supra* note 12, at 285. The vacation lease commonly has been accepted as a leasehold interest in real estate and thus may be unaffected by North Carolina's declaration that all timeshares are real property interests. See N.C. GEN. STAT. § 93A-42 (Cum. Supp. 1983).

37. E. Peirce & R. Mann, *supra* note 21, at 26.

38. Altro, *Resort Time-Sharing: Why Real Estate's New Brainchild Needs its Own Legislation*, 41 LA REVUE DU BARREAU DU QUEBEC 1054, 1086 (1981). See generally Roodhouse, *supra* note 11.

39. See *infra* notes 60-68 and accompanying text.

40. See *infra* note 63.

41. See *supra* notes 17-37 and accompanying text.

42. Roodhouse, *supra* note 11, at 52-54.

43. *Id.* at 52.

44. See generally Altro, *supra* note 38.

45. Although the most relevant federal legislation is discussed elsewhere in this note, see *infra* notes 47-50, 60-65, 69-73 and accompanying text, several other federal acts might also affect timeshares. These include: Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1691(f) (1976) (requires those who "regularly extend credit" to make certain disclosures regarding the cost of in-

widely among the states both in extent of coverage and regulatory methods, causing unnecessary confusion for both developers and purchasers. Even within a state, the inability to classify timeshares in an existing regulatory category, such as securities, consumer sales practices, or real estate, has led to an environment of "potential and actual regulation [that] often results in conflicting and irreconcilable requirements."⁴⁶ An examination of this regulatory environment illustrates this confusion.

One form of regulation that might apply to timeshares at both the state and federal level is securities regulation. Although the Securities and Exchange Commission (SEC) has not required registration of timeshare projects, nor planned any "definitive action" such as guidelines or no-action letters, it has not specifically exempted timeshares from its authority.⁴⁷ The SEC has issued guidelines for condominiums and other real estate securities that also might be used for timeshares.⁴⁸ Condominiums, when coupled with renting services for the purchaser, are included in the SEC definition of a "security," which emphasizes the purchaser's economic gains derived from a third party's efforts.⁴⁹ Timeshares might be distinguished, however, since the services provided are not so much for the purchasers' economic benefits as for their own use and enjoyment. Federal cases imply that most timeshares fall outside SEC control since purchases of commodities "for personal consumption or living quarters for personal use" are excluded from its "investment contract" definition of securities.⁵⁰

The majority of states, including North Carolina, apply the investment contract definition to their own "blue sky" laws.⁵¹ This theory, however, is

stallment credit); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691(f) (1976) (prohibits discrimination in extension of credit based on race, color, religion, sex, national origin, age, marital status, or source of income); Civil Rights Act of 1964, title II, 42 U.S.C. §§ 2000a to 2000a-6 (1976) (prohibits discrimination in public accommodations on basis of race, color, religion, sex, or national origins); Federal Flood Insurance Act, 42 U.S.C. § 2414 (1976) (availability of insurance dependent on compliance with certain construction standards in flood prone areas; as of October, 1983, federal flood insurance was not available for structures on "undeveloped" coastal barriers); Civil Rights Act of 1968, title VIII, 42 U.S.C. §§ 3601-3619, 3631 (1976) (prohibiting discrimination in housing on the basis of race, color, religion, gender, or national origin). For a more detailed discussion of these laws as they apply to timeshares, see Bloch, *Regulation of Timesharing*, 60 U. DET. J. URB. L. 23 (1982).

46. Gunnar, *supra* note 5, at 32-33. For example, a potential conflict between real estate laws and securities laws may require dual licensing of timeshare salespersons or multiple public offering statements. For a complete treatment of regulatory mechanisms and examples of possible confusion, see *id.* at 40-43. See also E. Peirce & R. Mann, *supra* note 21, at 48-65.

47. Bloch, *supra* note 45, at 37-38.

48. *Id.* at 38.

49. *Id.* at 38 & n.105.

50. In *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975), the Supreme Court held that the purchasers of "shares" in a cooperative housing project were not buying stock in the ordinary sense, to make a profit, but rather to acquire low-cost housing. This motive precluded the cooperative stock from being considered an investment contract under the test set forth in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). Under this test, a purchaser must invest in a common enterprise with the expectation of profits solely from the efforts of the promoter or some third party. *Id.* at 298-99. For a more complete treatment of the securities issue in timesharing, see Comment, *Regulating Vacation Timesharing: A More Effective Approach*, 29 UCLA L. REV. 907, 911-33 (1981-82).

51. Bloch, *supra* note 45, at 34 & n.91. As of 1982, 35 states had adopted the Uniform Secur-

applied only if the legislation does not specify its own applicability or inapplicability. Several states expressly include⁵² or exclude⁵³ timeshares from blue sky coverage or limit the coverage to real estate⁵⁴ or nonreal estate⁵⁵ interests. North Carolina has chosen to apply its securities laws to the extent that timeshares are deemed investment contracts;⁵⁶ thus, while leaving open the possibility of securities regulation for timeshares, it has not expressly included or excluded them. Although some favor applying blue sky legislation to timeshares because of its broad concept of fraud, wider range of civil remedies, and greater authority for substantive regulation,⁵⁷ "[t]he consensus among commentators is that securities laws should not apply to most time share offerings."⁵⁸ Although treating timeshares as securities might be desirable when no other laws apply, such regulation may create an unnecessary overlap of authority when specific legislation could perform the same function more efficiently.⁵⁹

A second area of regulation involves the prohibition of unfair and fraudulent sales practices. This type of state and federal legislation addresses the sales and promotion techniques of timeshare developers, a major complaint of prospective timeshare purchasers. Alleged "misrepresentation of gifts and prizes offered, misrepresentation of the purpose of the solicitation, failure to disclose material facts about the offering, 'high pressure' sales, and even 'verbal abuse' of consumers," have resulted in lawsuits, adverse publicity, and legislative and administrative attention.⁶⁰ The Federal Trade Commission (FTC) has informally assisted potential purchasers of timeshares by preparing a consumer checklist for timeshare offerings.⁶¹ It also investigates timeshare promoters and sellers for "unfair methods of competition or unfair or deceptive acts or practices;"⁶² these investigations have led to at least one court action.⁶³ A further regulatory provision applicable to timeshares⁶⁴ is the holder-

ities Act, which applies the "investment contract" definition of security. *Id.* In North Carolina both the Securities Act and the Time Share Act refer to investment contracts. *See* N.C. GEN. STAT. § 78A-2(11) (1981) (definition of "security" includes "investment contract"); *Id.* § 93A-50 (Cum. Supp. 1983) ("time shares deemed to be investment contracts" are subject to securities laws in addition to real estate laws).

52. These states include Alaska, Maine, Minnesota, and New York. Smith, *Timesharing Regulation by States*, NAT'L L.J., May 10, 1982, at 34.

53. *E.g.*, OR. REV. STAT. § 94.813 (1983).

54. *E.g.*, OHIO REV. CODE ANN. § 1707.33(B) (Page 1978 & Supp. 1982) (securities regulations applicable to out-of-state real property).

55. Maryland, for example, might classify some timeshares as "limited use resort securities" subject to its blue sky laws. Bloch, *supra* note 45, at 28 n.48.

56. N.C. GEN. STAT. § 93A-50 (Cum. Supp. 1983).

57. Gunnar, *supra* note 5, at 45; *see also* Comment, *supra* note 50, at 930-31.

58. E. Peirce & R. Mann, *supra* note 21, at 36. *See also* MODEL TIME-SHARE SALES ACT § 1-106 (Fourth Draft, October 1982) (National Time Sharing Council of the Am. Land Dev. Ass'n) (timeshare not a security unless the income of the project goes directly to timeshare owners) [hereinafter cited as MTSA].

59. *See infra* notes 85-113 and accompanying text.

60. Bloch, *supra* note 45, at 30-31.

61. *Id.* at 41.

62. *Id.* The authority for these investigations is section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982).

63. F.T.C. v. Paradise Palms Vacation Club, 2 TIMESHARING L. REP. (LDI) II-7 (No. C81160

in-due-course rule, which requires "that consumer credit contracts used in financing the retail purchase of consumer goods or services specifically preserve the consumer's rights against the seller."⁶⁵

Most states have similar regulations governing fraud, monopolies, and consumer protection that permit actions for misrepresentation, nondisclosure, and "high pressure" sales tactics.⁶⁶ For example, section 75-1.1 of the North Carolina General Statutes parallels the FTC Act,⁶⁷ and the North Carolina Time Share Act expressly requires developers to comply with chapter 75 when their timeshare promotions include offers of prizes.⁶⁸

Another type of timeshare regulation involves controls on the subdivision and sale of land. The Federal Interstate Land Sales Full Disclosure Act of 1968,⁶⁹ which requires registration of land marketed or sold in interstate commerce and provides remedies for victims of fraud and misrepresentation, may apply to timeshares. Although a federal court has upheld application of this Act to right-to-use "camping clubs,"⁷⁰ the Act exempts land that already has been improved or on which a building is scheduled to be built within two years,⁷¹ as well as land subject to certain other statutory registration and disclosure requirements.⁷² Although these provisions would exempt many timeshares from the Act's coverage, others that include the "right to exclusive use of a specific portion of land" would be covered.⁷³

At the state level, inclusion of timeshares under similar land sales and subdivision acts often depends on whether they are considered an interest in real estate; thus, some states include fee timeshares under these laws, but ex-

V, W.D. Wash., filed Sept. 28, 1981) (involves alleged "bait and switch" tactics by timeshare developers, sales organization, and owners association in misrepresenting the availability of Hawaiian timeshares to purchasers and then offering only units in Tahoe, Nevada and Ocean Shores, Washington). Discussed in Dickerson, *Litigating Resort Timeshare Abuses*, NAT'L L.J., June 7, 1982, at 44.

64. Bloch, *supra* note 45, at 44-45.

65. FTC Guidelines, 41 C.F.R. § 433.2 (1982). The holder-in-due-course rule requires a boldface statement of the consumer's rights on the contract. *Id.*

66. Bloch, *supra* note 45, at 30-31.

67. N.C. GEN. STAT. § 75-1.1 (1981). See *supra* note 62. See *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975) ("close parallel" to FTC Act); *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 275 S.E.2d 565 (1981) (§ 75-1.1 applied to an agreement to prevent performance of contracts to purchase condominium); *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E.2d 176 (rental of spaces in mobile home park is "trade and commerce"), *aff'd as modified*, 303 N.C. 675, 281 S.E.2d 43 (1981); *Kleinfelter v. Northwest Bldrs. & Developers*, 44 N.C. App. 561, 261 S.E.2d 498 (1980) ("close parallel to FTC Act"); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977) (rental of housing is "trade or commerce"), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843, 844 (1978).

68. N.C. GEN. STAT. § 93A-46 (Cum. Supp. 1983).

69. 15 U.S.C. §§ 1701-1720 (1982).

70. See Bloch, *supra* note 45, at 46.

71. 15 U.S.C. § 1702(a)(2) (1982).

72. *Id.* § 1702(b). Subdivisions involving purely intrastate activity or those meeting local minimum standards for subdivisions, zoning, and utility provision, and assuring marketable title, personal inspection of the property, and involving no prize offers are excluded. *Id.*

73. Bloch, *supra* note 45, at 48.

empt right-to-use units.⁷⁴ Also, some state acts apply only to vacant land⁷⁵ or to land on which there is no contractual obligation to build within two years.⁷⁶ Other state laws, such as those requiring timeshare salespersons to have real estate licenses or including timeshares under condominium statutes, also often distinguish between fee and nonfee timeshares.⁷⁷

Among states that have not expressly excluded right-to-use timeshares from land subdivision or real estate licensing acts, the courts are split over whether they are real property interests. In *State v. Carriage House Associates*,⁷⁸ the Nevada Supreme Court determined that the state land sales act did not apply to a right-to-use timeshare. In so finding, the court cited with approval the lower court's opinion that although the right-to-use timeshare is "really an anomaly . . . [that] doesn't fit neatly into any nice legal terminology, . . . an individual entering into the contract [does not acquire] an interest in real estate."⁷⁹ Similarly, the Oregon Court of Appeals found that vacation club timeshares were not subject to the state's subdivision control laws, nor to the condominium regulations promulgated under the authority to regulate the sale of "an interest or estate" in a condominium unit.⁸⁰ The Oregon court classified right-to-use memberships as "mere contract rights to use unspecified property."⁸¹ Conversely, California's Court of Appeal found the state's land subdivision sales act applicable to right-to-use timeshares.⁸² Although the timeshare purchaser had not been entitled to a particular unit, the entitlement to exclusive occupancy for a specific period of time brought the timeshare under California's real property law.⁸³ Although the specific provisions of the particular timeshare arrangement in question may be determinative in these close cases, the divergence of judicial opinion on this issue is clear.⁸⁴

74. The states are: Arizona, Colorado, Idaho, Illinois, Iowa, Michigan, Nevada, New Hampshire, New Jersey, and New Mexico. *Id.* at 25.

75. *E.g.*, N.Y. REAL PROP. LAW §§ 337 to 339-c (McKinney 1916 & Supp. 1984).

76. *E.g.*, ILL. REV. STAT. § 30-372a-2A(3) (Supp. 1982); UTAH CODE ANN. § 57-11-4(1)(b) (1953 & Supp. 1983).

77. *E.g.*, COLO. REV. STAT. §§ 38-33-110 to -111 (1982) (condominium statutes with separate sections for timeshares apply only to interval and timespan timeshares); ME. REV. STAT. ANN. tit. 33, §§ 591-94 (West Cum. Supp. 1983) (provisions for timeshares within condominium act distinguish between timeshare estates and timeshare licenses).

78. 94 Nev. 707, 585 P.2d 1337 (1978).

79. *Id.* at 710, 585 P.2d at 1339 (citation omitted). In 1982, however, the Nevada Attorney General declared that a right-to-use timeshare is an interest in property and as such is subject to the Nevada Land Sales Act. PRACTICING LAW INSTITUTE, *supra* note 32, at 15. In the same year an opinion by the Texas Attorney General declared that a right-to-use timeshare is not an interest in real property. *Id.*

80. Royal Aloha Partners v. Real Estate Div., 59 Or. App. 564, 651 P.2d 1350 (1982).

81. 651 P.2d at 1353 (Or. App.).

82. Cal-Am Corp. v. Department of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (1980) (state act requiring registration of, and public disclosure statements for, subdivisions of real property).

83. *Id.* at 458, 163 Cal. Rptr. at 732. The purchaser was given "exclusive occupancy" during a specific portion of each year "until *precisely* December 31, 2041." *Id.*

84. Another case, arising in a bankruptcy context, held that a right-to-use timeshare that did not promise a specific unit was neither an unexpired lease nor an executory contract for the sale of real property, and gave the purchaser no right in the underlying property. *In re Sombrero Reef Club, Inc.*, 18 Bankr. 612, 617-19 (Bankr. S.D. Fla. 1982).

Instead of depending on these more general regulatory frameworks, the final form of timeshare regulation specifically regulates timeshares as a distinct form of sale, subdivision, or security.⁸⁵ This per se legislation generally entails a combination of other regulatory methods and covers some combination of the following: sales practices;⁸⁶ salesperson and project registration;⁸⁷ public offering statements;⁸⁸ liens;⁸⁹ partitioning;⁹⁰ advertising and promotions;⁹¹ and project organization and management.⁹² Like the other forms of legislation, per se timeshare laws often distinguish between fee and right-to-use timeshares; although some portions of most state acts apply to both forms, other provisions may apply only to one type.⁹³

Although some commentators contend that amendment of existing state condominium acts might protect timeshare purchasers and owners, or that fee timeshares are best regulated as condominiums and right-to-use timeshares under general consumer protection laws,⁹⁴ the trend is toward comprehensive legislation specifically covering timeshare sales and operation.⁹⁵ Nevertheless, specific regulation of timeshares varies considerably in comprehensiveness. In addition to provisions based on the fee and right-to-use distinction, some acts exclude timeshares from the other means of regulation discussed above,⁹⁶ while others continue to subject them to multiple regulatory mechanisms.⁹⁷

Some states have adopted portions of the three model timesharing acts that have been drafted, but none of the model acts has been widely accepted. The Model Time-Sharing Ownership Act,⁹⁸ known as RTC/NARELLO, is a "disclosure-type" statute "designed to assure consumer protection while pre-

85. Fourteen states have passed legislation specifically regulating timeshares. They are: ALA. CODE §§ 34-27-50 to -69 (Cum. Supp. 1983); ARIZ. REV. STAT. ANN. §§ 32-2197 to -2197.17 (West. Cum. Supp. 1983); CONN. GEN. STAT. ANN. §§ 42-103w to -103bb (West. Cum. Supp. 1984); FLA. STAT. ANN. §§ 721.01 to -.28 (Cum. Supp. 1981); GA. CODE ANN. §§ 44-3-160 to -205 (Supp. 1983); HAWAII REV. STAT. §§ 514E-1 to -15 (Supp. 1982); NEB. REV. STAT. §§ 76-1701 to -1741 (1981); NEV. REV. STAT. §§ 119A.010 to -.700 (1983); N.C. GEN. STAT. §§ 93A-39 to -57 (Cum. Supp. 1983); OR. REV. STAT. §§ 94.803 to -.991 (1983); S.C. CODE ANN. §§ 27-32-10 to -230 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 43-15B (1983); TENN. CODE ANN. §§ 66-32-101 to -130 (1982); VA. CODE §§ 55-360 to -400 (1981 & Supp. 1983). In most states, the timeshare acts are administered by the same entity that administers land subdivision controls.

86. *E.g.*, CONN. GEN. STAT. ANN. § 42-103 (West Cum. Supp. 1984).

87. *E.g.*, N.C. GEN. STAT. § 93A-52 (Cum. Supp. 1983).

88. *E.g.*, VA. CODE § 55-374 (1981 & Supp. 1983).

89. *E.g.*, FLA. STAT. ANN. § 721.16 (Cum. Supp. 1981).

90. *E.g.*, *Id.* § 721.22.

91. *E.g.*, ARIZ. REV. STAT. ANN. § 32-2197.11 (West Cum. Supp. 1983).

92. *E.g.*, OR. REV. STAT. §§ 94.846 to .869 (1983).

93. *See, e.g.*, VA. CODE § 55-363 (only transfer of timeshare "estates" may be recorded); *id.* §§ 55-368, 371 (separate management guidelines for timeshare "estates" and "uses" respectively).

94. Comment, *supra* note 21, at 223; E. Peirce & R. Mann, *supra* note 21, at 70.

95. Until 1982, only seven states—Arizona, Florida, Hawaii, Nebraska, South Carolina, Tennessee, and Virginia—had per se legislation. Since 1982, however, Alabama, Connecticut, Georgia, Nevada, North Carolina, South Dakota, and Oregon have enacted timeshare legislation. *See supra* note 85 (statutory cites).

96. *E.g.*, FLA. STAT. ANN. § 721.23 (Supp. 1981) (timeshare not a security); OR. REV. STAT. § 94.813 (1983) (timeshare not a security).

97. *E.g.*, N.C. GEN. STAT. § 93A-50 (Cum. Supp. 1983) ("investment contract" timeshare is a security); *id.* § 93A-46 (advertising and promotions subject to separate consumer protection laws).

98. MODEL TIME-SHARING OWNERSHIP ACT (1974) (Resort TimeSharing Council of the Am.

serving a reasonable commercial atmosphere."⁹⁹ This Act, adopted without change by Nebraska¹⁰⁰ and with some variation by at least five other states,¹⁰¹ includes provisions for a public offering statement, a three-day rescission period, and a nondisturbance clause, under which the lender, developer, and buyer agree to protect the purchaser from loss due to default by the developer and subsequent foreclosure by the lender.¹⁰² RTC/NARELLO distinguishes between a "time-share estate" (timeshare coupled with an interest in property) and "timeshare use" (no attached property interest). Despite this distinction, however, RTC/NARELLO does not state explicitly whether a right-to-use timeshare is to be treated as an interest in real estate.¹⁰³

In 1982 the American Land Development Association drafted a second model statute, the Model Time-Share Sales Act (MTSA). More comprehensive than RTC/NARELLO, MTSA includes structural guidelines for timeshare projects,¹⁰⁴ provisions controlling advertising and timeshare exchange programs,¹⁰⁵ and an exemption of most timeshares from securities laws.¹⁰⁶ MTSA also changed the definition of timeshare so that "no distinction is made between a so-called time-share use and a so-called time-share estate."¹⁰⁷ Like RTC/NARELLO, MTSA brings all regulatory power over timesharing under a single state agency, preferably an agency governing real estate matters. While MTSA has not been adopted by any states, some of its concepts have been included in state acts.¹⁰⁸

The third model act, also more comprehensive than RTC/NARELLO, is the Uniform Real Estate Time Share Act (URETSA).¹⁰⁹ URETSA distinguishes between the "time-share estate" and "time-share license" forms of ownership.¹¹⁰ It characterizes the "time-share license," however, as an estate

Land Dev. Ass'n & Nat'l Ass'n of Real Estate License Law Officials) [hereinafter cited as RTC/NARELLO].

99. Smith, *supra* note 52, at 34.

100. Bloch, *supra* note 45, at 24.

101. *Id.* These states are Arizona, Florida, Hawaii, Tennessee, and Virginia. *Id.*

102. Smith, *supra* note 52, at 35.

103. Pollack, *supra* note 12, at 296-97.

104. MTSA, *supra* note 58, art. III. Article III requires a recorded declaration establishing the basic scheme of ownership, occupancy, and management in accordance with rules and regulations to be promulgated regarding the creation of an owners' association, the powers of the association, the powers of hired management, methods of assessing and collecting fees for maintenance and operating expenses, and requirements for insurance. *Id.*

105. *Id.* art. VI. Article VI prohibits misleading advertising, requires that all advertisements be reviewed by the regulatory agency, and restricts certain advertising techniques, especially those that offer gifts or prizes. *Id.*

106. *Id.* § 1-106. See *supra* note 58 and accompanying text.

107. *Id.* § 1-102.

108. See, e.g., GA. CODE ANN. §§ 44-3-185 to -188 (Supp. 1983) (based on MTSA, art. VI - Advertising); N.C. GEN. STAT. § 93A-48 (Cum. Supp. 1983) (based on MTSA, Art. V - Exchange Programs); NEV. REV. STAT. §§ 119A.590 to .620 (1983) (loosely based on MTSA, art. V - Exchange Programs).

109. UNIFORM REAL ESTATE TIME SHARE ACT (1979) (Nat'l Conference of Commissioners on Unif. State Law) [hereinafter cited as URETSA]. See also Pollack, *supra* note 12, at 296.

110. E. Peirce & R. Mann, *supra* note 21, at 46. For comparison of MTSA and URETSA, see *id.*, at 44-48; Pollack, *supra* note 12, at 295-301.

for years with all the incidents that attach to it at common law.¹¹¹ Thus, it appears that URETSA classifies all timeshares as interests in real property. Of the states with timeshare legislation, only Oregon has adopted this bifurcated definition with both types of timeshares classified as real property.¹¹² URETSA is also broader than the other model acts in that it recognizes both implied and express warranties of quality, has a seven-day period for rescission, and establishes a plan for timeshare project management.¹¹³

The North Carolina Time Share Act¹¹⁴ includes several features of MTSA. Most importantly, it defines "time share" without distinguishing between fee and right-to-use timeshares.¹¹⁵ Also, like MTSA, it provides for detailed disclosures regarding vacation exchange programs available to purchasers,¹¹⁶ and a five-day rescission period during which any money paid is to be escrowed.¹¹⁷ In addition, the North Carolina Act establishes requirements, procedures, and disciplinary measures for registration of timeshare projects and salespersons with the North Carolina Real Estate Commission,¹¹⁸ and requires a public disclosure statement for all timeshare offerings.¹¹⁹

The Act, however, does not cover many subjects that are included in a more comprehensive act, such as MTSA and URETSA.¹²⁰ For example, the North Carolina Act does not address the resale of timeshares, out-of-state sales,¹²¹ the structure and management of the timeshare project,¹²² local regu-

111. Pollack, *supra* note 12, at 297, 299.

112. OR. REV. STAT. § 94.813 (1983). North Carolina, among other states, has defined "timeshare" as a single concept and classified it as real property. *See infra* notes 115, 125, 171.

113. Pollack, *supra* note 12, at 295-301. Unlike RTC/NARELLO, which requires merely that management provisions be included in timeshare agreements, URETSA specifically describes management duties and purchaser involvement in management decisionmaking. *Id.* at 298.

114. N.C. GEN. STAT. § 93A-39 to -57 (Cum. Supp. 1983).

115. "Time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with a freehold estate or an estate for years in a time share project or a specified portion thereof, including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership, or vacation bond *Id.* § 93A-41(9).

Under the MTSA:

"Time-share" means the right, however evidenced or documented, to use and occupy a living unit (either a specifically identified living unit or a living unit of a specific type or any living unit) which use and occupancy rights are divided among all persons holding similar interests within that living unit according to a fixed or variable time schedule on a periodic basis that has been or will be allotted from the use or occupancy into which the time-share project has been divided. No distinction is made in this Act between a so-called time-share use and a so-called time-share estate.

MTSA, *supra* note 58, § 1-102.

116. Compare N.C. GEN. STAT. § 93A-48, -49 (Cum. 1983), with MTSA, *supra* note 58, art. V.

117. Compare N.C. GEN. STAT. § 93A-45 (Cum. Supp. 1983) with MTSA, *supra* note 58, §§ 4-101 to 102.

118. N.C. GEN. STAT. §§ 93A-40, -52, -53 (Cum. Supp. 1983).

119. *Id.* § 93A-44.

120. *See supra* notes 104-13 and accompanying text. Though not modeled exactly on either of the model acts, several state acts, such as those in Georgia, Florida, Oregon, and Tennessee are fairly complete. For statutory references, see *supra* note 85.

121. *E.g.*, S.D. CODIFIED LAWS ANN. § 43-15B-7 (1983) (applies to all timeshares located in South Dakota or sold in South Dakota). The North Carolina registration requirements apply only to timeshares located in North Carolina. N.C. GEN. STAT. § 93A-40 (Supp. 1983).

lation of timesharing development, or tort liability of timeshare owners. Rather than being self-contained, the North Carolina Act delegates some of the regulatory authority over time shares to administrators other than the Real Estate Commission; securities violations fall under the jurisdiction of the Secretary of State,¹²³ and violations of advertising and promotions laws are investigated and prosecuted by the Attorney General.¹²⁴ Nowhere does the act expressly exempt timeshares from the coverage of other laws.

The most significant portion of the North Carolina Act is section 93A-42, which characterizes all timeshares as interests in real estate.¹²⁵ By defining timeshare to include a periodic right to use "whether or not coupled with a freehold estate or an estate for years,"¹²⁶ this provision turns all timeshares, whether of the fee or right-to-use type, into interests in real estate "governed by the law of [North Carolina] relating to real estate."¹²⁷ Although insignificant for those timeshares that always have been considered realty interests,¹²⁸ this provision subjects arrangements formerly contractual, such as timeshare licenses and club memberships, to the laws of real property and the rights and duties incident to ownership of real property. This change, which overrides the common-law notions that a license to use land is not an interest in land,¹²⁹ but rather a mere contract right,¹³⁰ has several implications.

First, by statutorily designating right-to-use timeshares as real property interests, the Act avoids the potential flood of litigation that would result from a less certain statutory provision. The Act conclusively determines that real estate laws apply to right-to-use timeshares; if this issue had been litigated, a North Carolina court probably would have found real estate laws inapplicable after considering the North Carolina common law¹³¹ and the decisions of other states.¹³²

Second, the Act will promote uniformity of timeshare practices by providing the same benefits and protections to all timeshare purchasers, regardless

122. MTSA, *supra* note 58, art. III.

123. N.C. GEN. STAT. § 78A-45(a) (1981 & Cum. Supp. 1983). The North Carolina Time Share Act provides that the North Carolina Securities Act, applies "to time shares deemed to be investment contracts or to other securities offered with or incident to a time share." *Id.* § 93A-50.

124. *Id.* § 75-15. The Time Share Act requires full compliance with chapter 75 of the North Carolina General Statutes for advertisements that include the offer of a prize or other inducement. *Id.* § 93A-46.

125. *Id.* § 93A-42 (Cum. Supp. 1983).

126. *Id.* § 93A-41(9). For the full text of this definition, see *supra* note 115.

127. *Id.* § 93A-42(a).

128. See *supra* notes 19-37 and accompanying text.

129. Hill v. Smith, 51 N.C. App. 670, 277 S.E.2d 542, *disc. rev. denied*, 303 N.C. 543, 281 S.E.2d 392 (1981) (permission given by licensor without deed of property for wife of decedent to use house located on land purchased by licensor from decedent's estate was not a life estate but a mere license, revocable at will of licensor).

130. See *supra* notes 78-84 and accompanying text.

131. Even a leasehold in real estate is treated by North Carolina courts as a "chattel real," or personal property, except as modified by statute. Moche v. Leno, 227 N.C. 159, 41 S.E.2d 369 (1947); Waddell v. United Cigar Stores, 195 N.C. 434, 142 S.E. 585 (1928). See also *supra* note 129 and accompanying text.

132. See *supra* notes 71-84 and accompanying text.

of the type purchased. The legislature apparently recognized that the vacation license was developed primarily as a mechanism to avoid existing land sales regulation¹³³ and subjected all timeshare salesmen and projects to registration requirements.¹³⁴ Consequently, developers and salespersons will be more accountable for their actions; this will shield the prospective purchaser from fraud or misrepresentation. Also, because there will be no legal incongruities to consider in forming and purchasing timeshares, a purer economic market putting consumers on more equal footing with developers will result.

All timeshare purchasers also will now receive the additional protections of real property ownership, such as registered and insured title¹³⁵ and the equitable remedy of specific performance. With a contractual timeshare, however, the licensee would have had little right to keep the timeshare if the developer defaulted or the title were encumbered.¹³⁶ In these situations, the licensee could sue the developer for monetary contractual damages, but this action would be "only as good as the solvency of the licensor and [would have] no reference to the land itself."¹³⁷ Since the defaulting developer probably would be judgment proof, the licensee might collect nothing.

With a real property interest, the purchaser can purchase title insurance to protect that interest against failure or defect of title. For example, if the developer conveys the same timeshare to two purchasers, or possesses an encumbered title to the property, the purchaser might not be able to keep the timeshare. He would, however, recover his loss in insurance regardless of the developer's financial status. If, however, the developer has good title, but fails to deliver it as promised, the purchaser may demand specific performance of the agreement, a remedy granted only in actions involving real property and unique goods.¹³⁸ Thus, if a developer fails to cede exclusive occupancy of the unit for the time period purchased, the purchaser can compel performance.¹³⁹

In addition, an interest in real property generally may be sold, mortgaged, leased, or willed, while contractual rights might be more strictly limited.¹⁴⁰ Under ordinary contract theory, for example, the purchaser's right to his timeshare unit probably would terminate upon his death, but a property interest timeshare may be willed to whomever the timeshare owner chooses. Similarly, a contract might restrict the resale of a timeshare. By designating the timeshare as a property interest, however, this kind of restriction probably would constitute an unlawful restraint on alienation. The inability to sublease

133. Davis, *Time Sharing Ownership—Legal and Practical Problems*, 48 ST. JOHN'S L. REV. 1183, 1184 (1974).

134. N.C. GEN. STAT. § 93A-40 (Cum. Supp. 1983).

135. Vogel, *The Tax Consequences of Time-Sharing*, 10 J. REAL EST. TAX. 323, 328 (1983). Vogel's article is a good general source on the tax implications of timesharing and the differences between fee and right-to-use timeshares.

136. Davis, *supra* note 133, at 1185.

137. Note, *supra* note 10, at 1210.

138. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 795-96 (1973).

139. In the timeshare context, however, this remedy is not as valuable as in other situations, since the purchaser's possessory period is likely to have passed by the time an action is brought.

140. Note, *supra* note 10, at 1210.

or assign often distinguishes vacation licenses from vacation leases,¹⁴¹ but such a restriction on real property would violate state policy declaring realty "a basic resource of the people [that] should be made freely alienable and marketable so far as is practicable."¹⁴² Given that the constitutional right to property is also subject to "reasonable regulation for the general welfare,"¹⁴³ however, a less restrictive constraint, such as requiring developer approval of a proposed sublease or assignment, might be permitted in North Carolina as it has been elsewhere.¹⁴⁴

Designation of timeshares as real property interests confers several other advantages. Although the contractual purchaser receives nothing more than the use of the unit, the property purchaser acquires an equitable interest in the property, and may realize a gain upon resale from appreciation in the property's value.¹⁴⁵ In addition, the timeshare owner will pay real rather than personal property taxes, and may deduct these and his mortgage interest payments from his taxable income.¹⁴⁶ Finally, property ownership has an inherent status and psychological advantage over a mere rental or contract right.¹⁴⁷

Although the Timeshare Act is intended to protect the consumer, the classification of all timeshares as real property may have adverse consequences. The price of timeshares probably will increase. Because all timeshares are now considered real property, the developer must employ licensed real estate salespersons for all timeshares,¹⁴⁸ not just for fee timeshares; these costs, along

141. Pollack, *supra* note 12, at 285.

142. N.C. GEN. STAT. § 47B-1 (1976 & Cum. Supp. 1983). A restraint prohibiting the transfer, sublease, or assignment of real property "is contrary to public policy and void." *Williams v. McPherson*, 216 N.C. 565, 566, 5 S.E.2d 830, 831 (1939) (realty conveyed with clause "never to be sold, bought, or transferred" was void).

143. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

144. *See Laguna Royale Owners Ass'n v. Darger*, 119 Cal. App. 3d 670, 683, 174 Cal. Rptr. 136, 144 (1981) (condominium's requirement that management approve assignments and transfers is valid, if exercised reasonably).

145. A substantial gain is unlikely, however, since the developer's marketing expenses will have inflated the original purchase price. Pollack, *supra* note 12, at 287-88. Many agree that claiming a timeshare to be a good capital investment is difficult to sustain. "Even using swash-buckling projections for future inflation and interest rates, timeownership is still likely to take approximately 20 years to pay for itself against renting equivalent hotel or motel accommodations." *Business Brief: Doing Time on Holiday*, *ECONOMIST*, Apr. 10, 1982, at 81.

146. Vogel, *supra* note 135, at 336. A tax matter of interest to all timeshare purchasers is the passage, in 1983, by the North Carolina General Assembly of two statutes declaring that when real or personal property is owned under a timesharing arrangement but managed by a homeowner's association or some other managing entity it is to be listed for taxes under the name of the entity rather than the actual owner. N.C. GEN. STAT. § 105-302(c)(13) (Cum. Supp. 1983) (real property), and *id.* § 105-306(c)(9) (personal property). Although these statutes will simplify the paperwork for tax personnel, they might reduce tax revenues to the local government, since the aggregate value of separately assessed timeshares is usually much higher than the property's independent value. Timeshare managers may face problems in allocating the tax burden among timeshare owners and in deciding whether to include tax expenses in annual maintenance fees, to assess each timeshare owner, or to absorb the expense. For timeshare owners there is the additional problem of whether property taxes may be deducted for income tax purposes when they are not assessed directly.

147. Note, *supra* note 10, at 1211.

148. N.C. GEN. STAT. § 93A-40 (Cum. Supp. 1983) (timeshare salesmen must be licensed real estate agents). Even if salespersons are paid on a commission-only basis, a licensed agent proba-

with the expenses of complying with disclosure and registration requirements,¹⁴⁹ likely will be passed on to the purchaser. In addition, the purchaser will incur the added expenses of purchasing and owning real estate—title search fees, attorney's fees, and property taxes. The purchaser also will absorb the risk of damage or destruction to the property, or at least the expense of insurance. With a contractual relationship, the developer might have retained these costs.

A final concern is whether the right-to-use arrangements are compatible with other laws that now govern them. According to the Act, timeshares "shall be governed by the law of this State relating to real estate,"¹⁵⁰ which includes conveyancing laws,¹⁵¹ mortgaging and foreclosure statutes,¹⁵² recordation requirements,¹⁵³ eminent domain powers,¹⁵⁴ the Uniform Marketability of Title Act,¹⁵⁵ and the Unit Ownership Act,¹⁵⁶ as well as the common law regarding real property. Although most of these laws present no direct conflict with the right-to-use form of ownership, and the Act has addressed some of the conflicts that might arise from applying traditional real estate law to timeshares,¹⁵⁷ a few potential problem areas remain.

One possible problem not addressed by the Act is presented by the rule against perpetuities,¹⁵⁸ which invalidates from its creation a future interest in property if it does not vest "within a life or lives in being and twenty-one years and ten lunar months thereafter."¹⁵⁹ In North Carolina this rule applies to

bly will demand a larger commission, causing the developer to raise the purchase price accordingly.

149. *Id.* §§ 93A-40, -52 (application fee for registering timeshare project of up to \$1500).

150. *Id.* § 93A-42(a).

151. *Id.* §§ 39-1 to -29 (1976).

152. *Id.* §§ 45-1 to -74 (1976 & Cum. Supp. 1983).

153. *Id.* §§ 47-1 to -120. Timeshare conveyances, contracts to convey, or leases must be registered for the buyer to prevail against lien creditors or bona fide purchasers for value. *Id.* § 47-18. In addition to placing registration and title search duties on timeshare purchasers, and according them the protection of title registration, this will create a tremendous increase in business in Registrar of Deeds' offices, especially in resort counties.

154. *Id.* §§ 40A-1 to -69 (Cum. Supp. 1983).

155. *Id.* §§ 47B-1 to -9 (1976 & Cum. Supp. 1983).

156. *Id.* §§ 47A-1 to -37 (controlling the creation, structure, and management of condominiums and the relations among unit owners and with the management).

157. Although difficulties might occur in a tenancy in common situation with partitioning of a timeshare, the Act expressly prohibits partitioning of the timeshare unit itself. It allows the partition, by sale, of a single timeshare interest. *Id.* § 93A-43 (Cum. Supp. 1983). For discussion of the partitioning problems, see generally *supra* note 21. Also, the Act requires the developer to release timeshare owners from any liens affecting that timeshare and provides, unless otherwise agreed, for the severability of liability for liens against more than one timeshare in the project. *Id.* § 93A-57. This provision entitles the timeshare owner to a release from such a lien "upon payment of the amount of the lien attributable to his time share." *Id.* Thus, debts of other timeshare owners will not affect his interest.

158. The rule against perpetuities is still significant in North Carolina law. See generally Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. REV. 727 (1979).

159. *American Trust Co. v. Williamson*, 228 N.C. 458, 463, 46 S.E.2d 104, 108 (1948). North Carolina has a long history of cases holding that restraints on the sale of conveyed property are void. See, e.g., *Pilley v. Sullivan*, 182 N.C. 493, 109 S.E. 359 (1921); *Stokes v. Dixon*, 182 N.C. 323, 108 S.E. 913 (1921); *Brooks v. Griffin*, 177 N.C. 7, 97 S.E. 730 (1919); *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916); *Christmas v. Winston*, 152 N.C. 48, 67 S.E. 58 (1910); *Wool v. Fleetwood*,

remainders as well as executory interests,¹⁶⁰ to personal as well as real property,¹⁶¹ to sales as well as gratuitous conveyances,¹⁶² and possibly even to commercial contractual arrangements.¹⁶³

In the timesharing context, the rule might cover units conveyed for the useful life of the building with a remainder in the grantor or in the purchasers as tenants in common. Like a life estate, this conveyance is for an indefinite term; however, it is attached only to the life of a building, which is not considered "a life or lives in being."¹⁶⁴ Although the life of the building might be estimable, it is not certain. Since it may last longer than twenty-one years and ten months plus some life in being, the rule would invalidate the remainder.¹⁶⁵ Although the rule against perpetuities may have been of concern to purchasers of conventional condominiums¹⁶⁶ and interval timeshares, and possibly to timeshare licensees depending on the rule's applicability to mere contractual rights prior to passage of the Act,¹⁶⁷ it is of certain concern now that timeshares are considered real property.

The rule will necessitate change in either the timeshare documents or in the Act. If the interest is to revert, the useful life of the building will have to be estimated and a contingency added to the agreement for the possibility of early destruction of the building. In this case the agreement would be subject to two contingencies, one stating a definite time period complying with the rule, the other exceeding the rule (saying, *e.g.*, "so long as the building shall stand"). With this arrangement, however, the courts may disregard an "or" between the two contingencies and "hold that such an interest, if void in part, is void in *toto*."¹⁶⁸ If the possibility of destruction were ignored in the conveyance for a term of years, it surely would conform to the rule; with this

136 N.C. 460, 485 S.E. 785 (1904); *see also* Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960); Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397 (1978).

160. Link, *supra* note 158, at 753.

161. *Id.* *See* Stellings v. Autry, 257 N.C. 303, 126 S.E.2d 140 (1962) (rule against perpetuities applied to stock).

162. Link, *supra* note 158, at 806. *See* Hardy Bros. v. Galloway, 111 N.C. 519, 15 S.E. 890 (1892) (grantor's right of first refusal to repurchase land if grantee should "ever" sell held void as contrary to rule against perpetuities).

163. Link, *supra* note 158, at 754, 804-17. Professor Link discusses the propriety of applying the rule against perpetuities to commercial interests, saying that although the rule is a "fairly appropriate yardstick for family settlements . . . [it is] not an appropriate unit of measure for most commercial interests. Often no lives in being can be related to the commercial interest." *Id.* at 807. *See* Gay Mfg. Co. v. Hobbs, 128 N.C. 46, 38 S.E. 26 (1901) (right to all timber cut by grantee on grantor's land for five years "from the time [grantee] begins to manufacture said timber into wood or lumber" invalidated; rule against perpetuities rationale used, though rule not specifically cited).

164. The lives by which the interest can be measured must be human. Link, *supra* note 158, at 768.

165. *See* Farnan v. First Union Nat'l Bank, 263 N.C. 106, 110, 139 S.E.2d 14, 17 (1964); Parker v. Parker, 252 N.C. 399, 402-03, 113 S.E.2d 899, 902 (1960) (if controlling event might not occur within period of the rule, or if any uncertainty or doubt exists, limitation is void, whether or not event actually occurs).

166. *See generally* Seeber, *Condominiums in North Carolina: Improving the Statutory Base*, 7 WAKE FOREST L. REV. 355, 359-64 (1971).

167. *Id.*

168. *Id.* at 361.

possibility, however, the protection to the developer from the claims of purchasers in the event of destruction is limited. The remaining possibility, and probably the best, is to amend the Timeshare Act to provide that the rule against perpetuities will not invalidate any instruments thereunder.¹⁶⁹ Until the Act is so amended, however, those involved in timeshare transactions should check every instrument for possible violations, and correct these violations by making the term more definite or stating that it not exceed the rule.¹⁷⁰

Although sellers and purchasers of right-to-use timeshares probably have intended them not to be real property interests,¹⁷¹ this intent has been based on expectations nurtured by the prevailing laws. With a change in the law, expectations eventually will change as well. Some commentators, however, believe that designating a new interest in real estate will paralyze the timeshare industry; they argue that people will avoid timeshares because they do not know what this new interest means. The fee timeshare, however, has already fit into existing property interests without destroying the state's property law or the timeshare industry. Defining all timeshares as real property merely affords the protections of property ownership to all timeshare owners, regardless of the particular timeshare arrangement involved.

The other arguments against North Carolina's decision are similarly surmountable. Although the change will lead to a higher price for timeshares, this increase should be nominal since the developer's increased expenses may be spread among the purchasers. The problem with the rule against perpetuities is not necessarily new. North Carolina has applied it to nonrealty conveyances in the past. In any case, the problem usually can be avoided by careful drafting, without substantially changing the relationship of the parties under the conveyance.

In conclusion, the benefits of North Carolina's Act outweigh its detriments. With timeshares considered real property, timeshare owners will be given the protection of title insurance and registration, the right of specific performance, and greater freedom of alienability, as well as the other incidents of real property ownership. The uniform applicability of real property law to all timeshare interests will foster a greater uniformity of timeshare projects, once developers and consumers learn how best to comply with the law's re-

169. *Id.* at 362.

170. For a summary of drafting prescriptions that help avoid the rule, see Link, *supra* note 158, at 817-18.

171. Case law, though sparse, usually has declared that right-to-use timeshares do not constitute real property interests. See *supra* notes 78-84 and accompanying text. Similarly, most state statutes distinguish between fee and right-to-use timeshares, defining only the fee form as including real property interests. *E.g.*, Alabama, Arizona, Georgia, Nebraska (except for tax purposes), Tennessee, and Virginia (except for tax purposes). In addition to MTSA, only five other states have expressed the same view as North Carolina: California, Hawaii, New Hampshire, Oregon, and Utah. See *supra* note 85. Further, commentators express the notion that neither purchasers nor developers think of timeshares as real estate. "All of the putative advantages of the vacation license time-share arrangement are founded upon the premise that the interest purchased is not an interest in real property." E. Peirce & R. Mann, *supra* note 21, at 22. "But under no circumstances do the purchaser and seller of these right-to-use programs intend that this approach will give rise to what is commonly considered the ownership of land." Vogel, *supra* note 135, at 327.

quirements. This uniform applicability will prevent developers from circumventing the law merely by structuring the timeshare development as a right-to-use project.

In addition to declaring timeshares a real property interest, North Carolina has taken another step toward protecting the timeshare purchaser by recognizing the necessity of enacting *per se* timeshare legislation. Because timeshares face problems beyond those of conventional condominiums, condominium laws are insufficient to cover timesharing. Similarly, subdivision laws, blue sky laws, and general consumer protection laws, while covering some aspects of timesharing, do not comprehensively regulate the area. Even if they did, regulation under several different laws and agencies would complicate unnecessarily compliance by a timeshare project.

The substance of North Carolina's Act, however, does not protect consumers completely. The absence of guidelines for the management of timeshares denies the timeshare owners' right to be represented by management. The possibility of applying securities laws to timesharing leaves open an avenue for litigation that could have been closed by exempting timeshares from securities laws or by intensifying timeshare registration and disclosure provisions. In addition, the Act fails to address other problems that are certain to arise, such as the rule against perpetuities, resale, and out-of-state sales. Finally, the lack of uniformity in timeshare legislation from state to state, while not a problem specific to the North Carolina Act, is likely to unnecessarily complicate timeshare sales and operation for interstate developers and purchasers.

Although the North Carolina Time Share Act is not comprehensive, the efforts of the North Carolina legislature in enacting it are laudable. The Act addresses the needs of a growing sector of the population and will eliminate much of the confusion caused by the multiplicity of timeshare forms and the questionable promotional techniques of timeshare developers. It should improve relations between timeshare developers and purchasers and provide incentive and guidance for the industry to develop in a positive direction.

ROBERT M. KESSLER

Zoning Ordinances that Exclude Mobile Homes from Districts Reserved for Single-Family Dwellings

Approximately one North Carolinian in ten lives in a mobile home.¹ The demand for this form of housing has increased because of the steadily rising costs of conventional housing, as well as improvements in the design and construction of mobile homes.² No longer viewed as an unfortunate necessity, the mobile home has become a legitimate, even desirable, alternative to a traditional site-built home.³ As mobile homes begin to look more like conventional housing, the mobile home owner begins to resemble the conventional home owner. In age, occupation, number of children, and income, the demographic characteristics of the mobile home owner approaches the average home owner.⁴

The law, however, has failed to keep pace with these developments. Although the nation has experienced a serious low-cost housing shortage since World War II, state and federal governments only recently have passed regulations that enable mobile homes to help alleviate this problem.⁵ Local governments, which could stimulate the use of the mobile home through their zoning power,⁶ have responded even more slowly. Although local resistance to the mobile home may be eroding,⁷ many ordinances barring mobile homes

1. See Weber, *Mobile homes gain ground, respect in N.C. communities*, The Raleigh News & Observer, Jan. 8, 1984, at 30A, col. 2. Mobile homes are becoming known as "manufactured housing." *Id.*

2. B. HODES & G. ROBERSON, *THE LAW OF MOBILE HOMES* 7-8 (3d ed. 1974); Anderson, *The Regulation and Accommodation of Mobile Homes*, 1975 INST. ON PLAN. ZONING & EMINENT DOMAIN 151, 151.

3. Anderson, *supra* note 2, at 151.

4. See *Acceptance Grows for Mobile Homes*, 16 LAND USE DIG. Aug. 15, 1983.

5. See *infra* notes 27-28 and accompanying text.

6. Although regulation of the location of mobile homes is accomplished chiefly through zoning, other means are available. The state directly controls the location of mobile homes through floodplain control laws, see N.C. GEN. STAT. §§ 143-215.51 to -215.61 (1983), and coastal area management acts, see *id.* §§ 113A-100 to -128. See Brough, *State Laws and the Regulation of Mobile Homes*, POPULAR GOV'T, Summer 1975, at 12.

Municipal regulation of mobile home location may be accomplished not only through zoning but also through the power to abate nuisances. See N.C. GEN. STAT. § 160A-193 (1982). The North Carolina Supreme Court, however, has determined that mobile homes are not nuisances per se and therefore may not be excluded from a municipality acting under its power to abate nuisances. See *Town of Conover v. Jolly*, 277 N.C. 439, 177 S.E.2d 879 (1970). Local boards of health are the given authority under N.C. GEN. STAT. § 130-17(b) (1981) to make such rules and regulations as may be necessary for the protection of public health. This is a potential means of regulating the location of mobile homes. See Brough, *supra*, at 13. Mobile homes also may be restricted by private covenants. See Bartke & Gage, *Mobile Homes: Zoning and Taxation*, 55 CORNELL L. REV. 491, 514 (1970).

7. See Weber, *supra* note 1. See also 2 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 19-4 to -5 (4th ed. 1983) (noting the increasing share of the low-cost housing market captured by the mobile home industry); 2 N. WILLIAMS, *AMERICAN PLANNING LAW* §§ 57.01, 57.42 n.280 (1974 & Cum. Supp. 1983) (noting the increase in litigation involving mobile homes). One writer has detected, perhaps over-optimistically, "a shifting of public attitudes from psychological rejection of manufactured homes to increasingly unqualified acceptance." Dean, *What is a Mobile Home? The Law and Manufactured Housing*, CASE & COM., Sept.-Oct., 1981, at 10, 16.

from residential districts still exist in city and county codes,⁸ and likely will remain there for the near future. This note discusses the development of mobile home law, the types of zoning ordinances that exclude mobile homes from residential districts, and two possible legal challenges to these ordinances.

The modern mobile home evolved from the travel trailers of the 1920s.⁹ Travel trailers originally were designed to be pulled by cars and to serve as temporary shelter for tourists and itinerant workers.¹⁰ Because these early mobile homes were not suited for use as permanent housing,¹¹ communities objected to their location in conventional neighborhoods. Mobile homes also were considered unsafe because they were not constructed in accordance with state or local building codes and their low cost aroused suspicions of shoddy design and workmanship. Some of the materials found in mobile homes were highly flammable, and fires posed a danger not only to the occupants of the mobile homes but to the lives and property of surrounding landowners. Early mobile homes also were relatively lightweight and when not securely affixed to the land could be overturned easily by high winds. They were also considered dangerous to public health because they lacked the sanitary facilities of conventional housing and were not subject to water and sewer regulation.¹²

Furthermore, mobile homes were considered a burden to the community. Their occupants had to be provided with all the municipal services afforded other residents of the community, such as garbage collection and access to public schools.¹³ When a large number of mobile homes were situated in a small area the high population density placed a considerable strain on municipal resources.¹⁴ Moreover, the low cost and rapid depreciation of mobile homes deprived municipalities of tax revenues that might have offset the burdens imposed.¹⁵ Mobile homes often were classified as personalty, and many states taxed personalty at a lower rate than realty.¹⁶ Consequently, the public accused mobile home owners of failing to pay their own way.

The public also objected to mobile homes on moral grounds. Mobile home occupants were considered undesirable nomads with no stake in the

8. See, e.g., ordinance cited *infra* note 116.

9. See, e.g., 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 14.01 (2d ed. 1976); B. HODES & G. ROBERSON, *supra* note 2, at 5.

10. See 2 R. ANDERSON, *supra* note 9, § 14.01.

11. See 2 N. WILLIAMS, *supra* note 7, § 57.03.

12. Early mobile homes were exempt from water and sewer regulation because municipalities viewed them as vehicles rather than houses. See, e.g., *Napierkowski v. Township Comm. of Gloucester*, 29 N.J. 481, 150 A.2d 481 (1959); *Midgarden v. City of Grand Forks*, 79 N.D. 18, 54 N.W.2d 659 (1952). See 2 R. ANDERSON, *supra* note 9, § 14.05; 2 N. WILLIAMS, *supra* note 7, § 57.09.

13. 2 R. ANDERSON, *supra* note 9, § 14.05; 2 N. WILLIAMS, *supra* note 7, § 57.09.

14. See, e.g., *Rezlar v. Village of Riverside*, 28 Ill. 2d 142, 190 N.E.2d 706 (1963); *Town of Yorkville v. Fonk*, 3 Wis. 2d 371, 88 N.W.2d 319, *cert. denied*, 358 U.S. 58 (1958). See also 2 R. ANDERSON, *supra* note 9, §§ 14.01, 14.05; 2 N. WILLIAMS, *supra* note 7, § 57.15.

15. See, e.g., *New York Mobile Home Ass'n v. Steckel*, 9 N.Y.2d 533, 175 N.E.2d 151 (1961), *cert. denied*, 369 U.S. 150 (1962). See generally Kuklin, *Housing and Technology: The Mobile Home Experience*, 44 TENN. L. REV. 765, 809-26 (1977).

16. Kuklin, *supra* note 15, at 812.

community.¹⁷ The close quarters of the mobile home were suspected of producing an undesirable precocity in children, potentially causing moral harm.¹⁸

Finally, mobile homes were believed to lower the value of surrounding property.¹⁹ Mobile homes were considered ugly, or at least sufficiently different in appearance to disturb the architectural harmony of the neighborhood.²⁰ Furthermore, because mobile home occupants were considered undesirable, the presence of mobile homes was thought to lower the "social tone" of the neighborhood.²¹ In response to all these objections municipalities enacted zoning ordinances restricting the location of mobile homes.²²

Despite these zoning ordinances and objections to mobile homes, mobile home ownership has increased dramatically since the 1920s.²³ One reason for this growth is the serious national shortage of low-cost housing,²⁴ which has been aggravated by increased unemployment.²⁵ Since the conventional housing industry cannot meet the increased need for low-cost housing, more people have turned to the mobile home as their only form of affordable housing.²⁶ In the late 1960s the federal government recognized mobile homes as a means of solving the housing problem.²⁷ State and local authorities gradually have followed the lead of the federal government,²⁸ and mobile homes have become

17. See *In re Tradlock*, 261 N.C. 120, 122, 134 S.E.2d 177, 179 (1964) (referring to the "undesirable type of people who would live in the mobile homes"). See also *Streyle v. Board of Property Assessment, Appeals and Review*, 173 Pa. Super. 324, 98 A.2d 410 (1953); *Crane v. Board of County Comm'rs*, 175 Neb. 568, 122 N.W.2d 520 (1963). See 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-4.

18. See 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-4.

19. See, e.g., *Wright v. Michaud*, 160 Me. 164, 200 A.2d 543 (1964); *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962). See *Kuklin*, *supra* note 15, at 823.

20. See *Kuklin*, *supra* note 15, at 823. The aesthetic problem presented by mobile homes often is compounded by a proliferation of outbuildings around the unit due to a lack of storage space within. Insofar as zoning ordinances restricting the location of mobile homes are founded on aesthetic considerations, it should be noted that a majority of American jurisdictions have approved zoning on aesthetic grounds. See Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980). The North Carolina Supreme Court approved aesthetic zoning in *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982). See Note, *State v. Jones: Aesthetic Regulation—From Junkyards to Residences?*, 61 N.C.L. REV. 942 (1983).

21. See 2 N. WILLIAMS, *supra* note 7, at 473.

22. See *infra* notes 57-63, 116 and accompanying text.

23. See B. HODES & G. ROBERSON, *supra* note 2, at 6; 2 N. WILLIAMS, *supra* note 7, at 448, 451; Smith, *The Impact of Mobile Homes on the Housing Market*, 41 POPULAR GOV'T 1, at 1 (1975).

24. See 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-4.

25. See 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-4.

26. See SHEPARD'S MOBILE HOMES AND MOBILE HOME PARKS, § 1.2 (L. Davis ed. 1975) [hereinafter cited as SHEPARD'S]; 2 N. WILLIAMS, *supra* note 7, § 57.01.

27. In 1968 Congress launched "Operation Breakthrough" in an attempt to help solve the nation's housing problem. The Department of Housing and Urban Development was authorized to subsidize or directly finance 4,000,000 new housing units, including mass-produced low-cost units, over a 10-year period. See Flippen, *Constitutionality of Zoning Ordinances Which Exclude Mobile Homes*, 12 AM. BUS. L.J. 15, 16-17, nn.16-17 (1974). In 1970 President Nixon, in a message to Congress, declared that an increase in the supply of mobile homes was necessary for the nation to reach its housing goals. M. DRURY, MOBILE HOMES 114 (2d ed. 1972). Later, Congress passed the National Mobile Home Safety and Construction Act of 1974, 42 U.S.C. §§ 5401 to 5426 (1976), recognizing mobile homes as a significant form of housing and regulating them.

28. Official recognition of the importance of the mobile home for North Carolina citizens

more acceptable to the public.²⁹

The transformation in design and construction of mobile homes also has contributed to their increasing popularity. The sudden and large scale demand for the mobile home as alternative permanent housing during and immediately following World War II led to changes in design and construction.³⁰ After the war the dimensions of the standard unit were increased steadily, first in length and then in width.³¹ Greater and more versatile interior space was introduced with the "double-wide,"³² the "expandable,"³³ and multistory units.³⁴ Mobile homes could no longer be pulled behind cars but had to be towed by large trucks or carried on flatbed trailers to their sites.³⁵ Today, mobile homes usually are stripped of their wheels and tongues and placed on permanent foundations.³⁶

As the mobile home has approached the conventional home in size and immobility, so also in appearance. Mobile homes now are equipped with all the amenities of site-built housing, including all major appliances and complete furnishings.³⁷ Pitched and shingled roofing and masonite or wood siding also are available.³⁸

Thus, many of the objections that led to restrictions on the location of mobile homes are no longer valid because of changes in design, construction, and regulation.³⁹ One objection, however, remains both widespread and ar-

includes the following statements: (1) By the North Carolina General Assembly: "[M]obile homes have become a primary housing resource for many citizens of North Carolina." N.C. GEN. STAT. § 143-143.8 (1983); (2) By the North Carolina Supreme Court: Mobile homes are "a perfectly respectable, healthy and useful kind of housing, adopted by choice by several million people in this country today." *Town of Conover v. Jolly*, 277 N.C. 439, 443, 177 S.E.2d 879, 882 (1970) (quoting *Vickers v. Township Comm. of Gloucester*, 37 N.J. 232, 181 A.2d 129 (1962), cert. denied, 371 U.S. 233 (1963)); (3) By the Multi-County Planning Commission, Region G: "One technique for avoiding the high cost of housing is purchasing a mobile home. As the need for less expensive housing increases, the importance of the mobile home in housing the people of our region will emerge." B. CALLOWAY, L. COX, W. COLONNA, C. LOOP, M. BORUM & T. COOKE, REGIONAL HOUSING PLAN: STATE MULTI-COUNTY PLANNING REGION G 63-64 (1977) [hereinafter cited as B. CALLOWAY].

29. See Anderson, *supra* note 2, at 152. Other factors leading to the increased popularity of the mobile home, include the adoption of industry-wide quality standards, see SHEPARD'S, *supra* note 26, § 1.2, and the availability of more favorable financing to the mobile home purchaser. See *id.*; M. DRURY, *supra* note 27, at 93-94. Also, the development of more and better mobile home parks, see SHEPARD'S, *supra* note 26, § 1.2, along with more creative land use planning, see Anderson, *supra* note 2, at 163, have helped foster public acceptance.

30. B. HODES & G. ROBERSON, *supra* note 2, at 2.

31. See 2 N. WILLIAMS, *supra* note 7, § 57.03.

32. See 2 N. WILLIAMS, *supra* note 7, § 57.03.

33. An "expandable" is a unit with "one or more room sections that fold, collapse, or telescope into the principal unit while transported on the highways and are firmly joined together when stationed on the site, provid[ing] additional living-room area." B. HODES & G. ROBERSON, *supra* note 2, at xxxvii.

34. M. DRURY, *supra* note 27, at 99.

35. M. DRURY, *supra* note 27, at 93-94.

36. 2 N. WILLIAMS, *supra* note 7, § 57.03.

37. SHEPARD'S, *supra* note 26, § 1.1.

38. 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-5.

39. For the objections to mobile homes, see *supra* notes 11-21 and accompanying text.

One group of objections was based on a concern for the public safety. Mobile homes today are built in accordance with federal safety and construction regulations, see *supra* note 27, which

guably valid: that mobile homes reduce the value of surrounding property.⁴⁰ Even today some mobile homes, in terms of roof pitch, exterior siding, or other architectural details, differ from site-built homes. On the other hand, in size, shape, and materials, many modern mobile homes are "scarcely distinguishable from site-built homes."⁴¹ Thus, it is unrealistic to distinguish between mobile homes and site-built homes per se. The effect of a house on surrounding property values is a highly subjective determination. Size, age, appearance, condition, and upkeep must be considered, and in these respects mobile homes do not differ from other housing.

Given the strong policy arguments for opening more land to mobile homes,⁴² it is difficult to justify the persistence of ordinances excluding mobile homes from zoning districts reserved for single-family dwellings. The persistence of some of these ordinances undoubtedly is attributable to governmental inertia,⁴³ while the longevity of other ordinances may be the result of the personal prejudices of local officials.⁴⁴ Nevertheless, the majority of these ordinances have survived because some measure of public resistance to the mobile home also has survived.⁴⁵

Public attitudes toward the mobile home are in transition. Although the public accepts mobile homes much more today than it did before,⁴⁶ acceptance is by no means unanimous or unequivocal. Because of the shortcomings of early trailers, communities relegated them to the least desirable areas of the municipality—often highly visible commercial or industrial areas, or areas

specifically provide for the elimination of fire hazards. Additionally, the mobile home industry has established its own standards which, in some ways, are more stringent than the federal regulations. See SHEPARD'S, *supra* note 26, § 1.2. The danger of high winds also has been largely eliminated. The larger and heavier units manufactured today are less vulnerable to high winds than were their predecessors. The trend towards immobilization, see *supra* notes 35-36 and accompanying text, has reduced further the threat of wind damage. Both the North Carolina Building Code and the Office of the Commissioner of Insurance have issued rules regarding the secure anchoring of mobile homes.

The objections to mobile homes that were based on concern for public health also are no longer valid. Today, mobile homes are manufactured with all the sanitation facilities of site-built homes. See *supra* note 37 and accompanying text.

The modern mobile home owner and the site-built home owner are very similar, see *supra* note 4 and accompanying text. Thus, there is no longer reason for criticism that mobile home residents are less respectable than the rest of the population. See, e.g., M. DRURY, *supra* note 27, at 71-72; Bartke & Gage, *supra* note 6, at 495; Kuklin, *supra* note 15, at 812-19.

Mobile home owners also were considered objectionable because they failed to pay their way in taxes. Many states today tax mobile homes as realty. Although North Carolina continues to tax mobile homes as personality, personality and realty are taxed at the same rate. It also has been argued that "higher-end" mobile homes actually appreciate over the years, as do site-built homes, thus enhancing local revenues. See B. CALLOWAY, *supra* note 28, at 37-38.

40. See *In re Tradlock*, 261 N.C. 120, 122, 134 S.E.2d 177, 179 (1964); 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-5.

41. M. DRURY, *supra* note 27, at 71-72.

42. See *supra* notes 24-26 and accompanying text.

43. See Bartke & Gage, *supra* note 6, at 496, 525; Kuklin, *supra* note 15, at 826.

44. See Bartke & Gage, *supra* note 6, at 525; Kuklin, *supra* note 15, at 827.

45. See Bartke & Gage, *supra* note 6, at 497; Kuklin, *supra* note 15, at 809. This residue of public hostility is the chief cause of the continued existence of zoning ordinances excluding mobile homes. B. CALLOWAY, *supra* note 28, at 36-38. See also M. DRURY, *supra* note 27, at 15; Kuklin, *supra* note 15, at 825-26.

46. See *supra* note 7 and accompanying text.

along highways.⁴⁷ These deteriorating units in unattractive locations continue to influence the public image of the mobile home. Newer and more attractive units, on the other hand, frequently are located out of public view.⁴⁸ Perhaps more fundamentally, the mobile home is resisted because it does not fulfill the public's image of ideal housing.⁴⁹ This ideal conflicts with the need for low-cost housing; until it changes those who cannot afford the ideal home will continue to suffer. Failure to change public attitudes could result in "an indefensible waste of this potentially powerful housing resource."⁵⁰ Unless the courts are willing to intervene, the ultimate success of the mobile home industry will depend on the ability of its proponents to convince the public that highly restrictive zoning ordinances no longer are necessary.⁵¹

Because such negative attitudes persist a variety of exclusionary zoning ordinances remain on the books. For example, ordinances establishing minimum floor space⁵² or minimum lot size⁵³ requirements indirectly exclude mobile homes. In addition, some zoning ordinances directly restrict the location of mobile homes. Some ordinances specifically have excluded mobile homes from the entire community.⁵⁴ Aside from the constitutional questions they raise,⁵⁵ these ordinances force mobile home owners to locate their units outside the city limits. This unregulated placement of units outside the city's jurisdiction, however, may hinder a city's expansion.⁵⁶

Rather than excluding mobile homes from the community entirely, most municipalities exclude them from districts reserved for single-family dwellings.⁵⁷ Three types of zoning ordinances have been used for this purpose. First, some ordinances *expressly* exclude all mobile homes from these dis-

47. See *infra* notes 57-63, 116, and accompanying text.

48. See Kuklin, *supra* note 15, at 814.

49. See M. DRURY, *supra* note 27, at 9.

50. See B. CALLOWAY, *supra* note 28, at 38. See also Note, *Mobile Homes—Some Legal Questions*, 75 W. VA. L. REV. 382, 401 (1973) (growing importance of mobile homes in housing industry mitigates heavily against their complete prohibition).

51. See Dean, *supra* note 7, at 10; Kuklin, *supra* note 15, at 838-42; Note, *Zoning Restrictions Applied to Mobile Homes*, 20 CLEV. ST. L. REV. 196, 205 (1971).

52. Even the largest mobile homes are limited in size. Setting minimum floor space requirements thus can effectively exclude mobile homes from an area. See 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-23 to -24.

53. Minimum lot size requirements could place the cost of lots beyond the reach of those persons for whom the mobile home is the only affordable form of housing.

54. Few North Carolina municipalities have adopted this kind of ordinance. See Comment, *Mobile Homes in North Carolina: Residence or Vehicle?*, 50 N.C.L. REV. 612, 615 (1972). For the classic discussion of the total exclusion of mobile homes, see *Napierkowski v. Township Comm. of Gloucester*, 29 N.J. 481, 150 A.2d 481 (1959).

55. A full discussion of the validity of zoning ordinances that totally exclude mobile homes from a community is beyond the scope of this note. These ordinances, however, generally have been held unconstitutional. See 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-19 to -20. See also Brough, *supra* note 6, at 20. Although the North Carolina Supreme Court never has faced this issue, it has been suggested that the court would follow the weight of authority. See Comment, *supra* note 54, at 623. For cases upholding such ordinances, see Moore, *The Mobile Home and the Law*, 6 AKRON L. REV. 1, 8 n.39 (1973).

56. See Anderson, *supra* note 2, at 165. In North Carolina, cities and counties may mitigate this problem through their power of extraterritorial zoning. See, e.g., *City of Raleigh v. Morand*, 247 N.C. 363, 100 S.E.2d 870 (1957), *cert. denied*, 357 U.S. 343 (1958).

57. 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-21.

tricts.⁵⁸ Second, some ordinances restrict mobile homes to mobile home parks.⁵⁹ Both of these types of ordinances expressly distinguish mobile homes from single-family dwellings.⁶⁰ Third, some reserve a district for "single-family dwellings" without expressly restricting mobile homes from the district or to any other district.⁶¹ Mobile homes are then banned from these areas by construing the word "dwelling" to exclude mobile homes.⁶² All three types of ordinances can be oppressive if there is a shortage of land zoned for mobile homes or if this land is in an undesirable location.⁶³

Two issues frequently have arisen regarding zoning ordinances that exclude mobile homes from districts reserved for single-family dwellings.⁶⁴ The first involves the interpretation of the ordinance; the second involves its constitutionality.

Of the three types of ordinances, only the third presents a significant interpretation problem. Ordinances that expressly restrict mobile homes from residential districts or to mobile home parks usually avoid interpretation problems by defining the term "mobile home." Such definitions typically are very broad, classifying as a "mobile home" any unit designed to be transported on its own wheels regardless of whether it has become immobilized.⁶⁵ But the third type of ordinance, which merely limits a district to single-family dwellings without specifically defining or restricting mobile homes,⁶⁶ presents the question of whether a mobile home is a "dwelling" within the meaning of the ordinance.⁶⁷

58. See 2 N. WILLIAMS, *supra* note 7, § 57.22.

59. The majority of zoned municipalities in North Carolina have adopted this kind of ordinance. See Comment, *supra* note 54, at 615-16.

60. 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-23.

61. See, e.g., *Town of Manchester v. Phillips*, 343 Mass. 591, 592 n.1, 180 N.E.2d 333, 334 n.1 (1962). See 2 N. WILLIAMS, *supra* note 7, § 57.37.

62. See *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962).

63. See Comment, *supra* note 54, at 624-25; Moore, *supra* note 55, at 13. In North Carolina those cities that restrict mobile homes to mobile home parks typically regulate the parks to ensure some minimum level of quality. See Comment, *supra* note 54, at 616.

64. Of course, other issues also have arisen, such as whether a zoning ordinance is within the scope of the enabling legislation, see *infra* note 97 and accompanying text.

65. See, e.g., CHARLOTTE, N.C., CODE § 23-2(16a) (1970), HIGH POINT, N.C., CODE § 22-9.1(A)(1) (1971).

66. See *supra* notes 61-62 and accompanying text.

67. The problem of the proper classification of the mobile home, as dwelling or vehicle, realty or personalty, has arisen in many contexts. Classification may affect the application of building, health, and tax codes, the Uniform Commercial Code, statutes of descent and distribution, provisions of wills, restrictive covenants, insurance contracts, and the statute of frauds. See Kuklin, *supra* note 15, at 802-05. The question of whether the "automobile exception" to the requirement of a search warrant applies to mobile homes also has arisen. See *United States v. Wiga*, 662 F.2d 1325 (9th Cir. 1981); *United States v. Williams*, 630 F.2d 1322 (9th Cir. 1980).

The courts have held that classification of the mobile home for one purpose does not affect its classification for other purposes. See *Manchester v. Webster*, 100 N.H. 809, 128 A.2d 924 (1957) ("Mobile homes" might be "buildings" for tax and insurance purposes without being subject to local building codes.); *Streyle v. Board of Property Assessment*, 173 Pa. Super. 324, 98 A.2d 410 (1953) (a "house trailer" might be a "home" for the purposes of police power regulation without being "realty" for tax purposes).

Although the mobile home industry today rejects the vehicular classification of the mobile home, see *Amicus Curiae Brief*, *Duggins v. Town of Walnut Cove*, 63 N.C. App. 689, 306 S.E.2d

This question has arisen in two situations.⁶⁸ In the first, the ordinance limits improvements on realty to single-family dwellings. The mobile home owner argues that his unit is a "single-family dwelling," while the municipality argues that the mobile home is not a dwelling and therefore may not be placed on the property.⁶⁹ In the second situation the roles of the parties are reversed. The zoning ordinance requires that all dwellings on the property conform to certain requirements, such as minimum floor space. The mobile home cannot satisfy these requirements, so its owner argues that it is not a "dwelling" and is therefore not subject to the requirements. The municipality argues that the mobile home is a "dwelling" that fails to comply with the requirements of the ordinance, and thus cannot be located on the property.⁷⁰

Courts agree that a mobile home is not a dwelling as long as it remains mobile.⁷¹ Most of the litigation has been concerned with whether a mobile home becomes a dwelling when it becomes permanently immobilized, that is, when its wheels and tongue are removed and it is placed on a permanent foundation. On this question the courts are divided.⁷² A slight majority have held that when its wheel and tongue are removed and it is placed on a permanent foundation a mobile home becomes a dwelling and may not be excluded from a district reserved for single-family dwellings.⁷³ This view is founded on the presumption that the distinguishing characteristic of a mobile home is its mobility, and when this characteristic is removed there is no reason to distinguish between site-built homes and mobile homes per se. Concerns over property values and architectural harmony can be satisfied by specific ordinances outlining criteria such as minimum floor space and architectural standards. Given the increasing similarity between mobile and site-built homes, this position is reasonable. A growing number of states have adopted the majority

186 (1983), at 2-3, one writer has argued that the success of the mobile home has been linked to its classification as a vehicle. See M. DRURY, *supra* note 27, at 123. Some writers have suggested that rather than trying to pigeonhole the mobile home into some inappropriate existing classification, it should be recognized as sui generis. See Carter, *Problems in the Regulation and Taxation of Mobile Homes*, 48 IOWA L. REV. 16, 57 (1962). One court anticipated this advice. See *Napierkowski v. Town Comm. of Gloucester*, 29 N.J. 481, 485, 150 A.2d 481, 485 (1959).

68. See Bartke & Gage, *supra* note 6, at 499-501; Carter, *supra* note 67, at 36.

69. See, e.g., *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962); *Sioux Falls v. Cleveland*, 75 S.D. 548, 70 N.W.2d 62 (1955).

70. *County v. Stanfill*, 7 Ill. App. 2d 52, 129 N.E.2d 46 (1955) (minimum lot-size requirement); *Kimsey v. City of Rome*, 84 Ga. App. 671, 67 S.E.2d 206 (1951) (minimum floor-space requirements).

71. See B. HODES & G. ROBERSON, *supra* note 2, at 66.

72. P. ROHAN, *ZONING & LAND USE CONTROLS* 390 (1983). Two distinct questions are presented by the immobilization of the mobile home: (1) Is an immobilized mobile home still a mobile home? and (2) If not, is it a dwelling? A court could find that when placed upon a permanent foundation a mobile home ceases to be a mobile home but does not become a dwelling. Courts, however, have not made this distinction. Evidently, it is assumed that if an immobilized mobile home is no longer a mobile home it must be a dwelling.

73. See, e.g., *Reed v. Zoning Bd. of Review*, 31 Pa. Commw. 605, 377 A.2d 1020 (1977); *Mosin v. Zoning Hearing Bd. Review*, 162 R.I. 457, 232 A.2d 393 (1967); *Lescault v. Zoning Bd. of Review*, 91 R.I. 1277, 162 A.2d 809 (1960); *In re Willey*, 120 Vt. 359, 140 A.2d 11 (1958). Among the cases holding that mobile homes are dwellings are *Kimsey v. City of Rome*, 84 Ga. App. 671, 67 S.E.2d 206 (1951) and *Town of Huntington v. Transon*, 43 Misc. 2d 912, 252 N.Y.S.2d 576 (1964).

view by legislation.⁷⁴

A minority of the courts have determined that placement of a mobile home on a permanent foundation does not transform it into a dwelling.⁷⁵ The minority view has been criticized for denying immobilized mobile homes the status of single-family dwellings merely because of their past mobility.⁷⁶ The minority view, however, appears to be tacitly based on an additional principle: a unit manufactured in a factory and designed to move on its own wheels must differ from conventional housing in many ways that survive immobilization. Because of the important changes in the design and construction of the mobile home, this reasoning no longer is valid. The original mobility of the mobile home is the last remaining distinction between mobile and conventional housing.⁷⁷

No reported North Carolina case has considered whether an immobilized mobile home is a dwelling. The North Carolina Court of Appeals, however, has twice considered whether an immobilized mobile home is still a mobile home. In *City of Asheboro v. Auman*⁷⁸ the court considered an ordinance restricting mobile homes to mobile home parks⁷⁹ and concluded that a unit stripped of its wheels and tongue and placed upon a permanent foundation remained a "mobile home."⁸⁰ In the 1983 case of *Barber v. Dixon*,⁸¹ the court construed a restrictive covenant⁸² providing that: "No structure of a temporary character (including house trailers) shall be used upon any lot at any time."⁸³ The court could have questioned whether a modern mobile home is a "house trailer." Instead, the court assumed that the unit in question was a

74. See, e.g., ILL. ANN. STAT. ch. 111 1/2, § 712.1 (Smith-Hurd 1966); S.D. New Laws, H.B. 1127 p. 105; UTAH CODE ANN. § 59-3-3 (Supp. 1983).

75. See, e.g., *New Orleans v. Louviere*, 52 So. 2d 751 (La. Ct. App. 1951); *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962); *Town of Marblehead v. Gilbert*, 334 Mass. 602, 137 N.E.2d 921 (1956). See also Comment, *supra* note 54, at 619; 2 R. ANDERSON, *supra* note 9, § 14.05.

76. 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-8 to -9.

77. See the discussion of design and construction changes, *supra* notes 30-36 and accompanying text, and the discussion of the invalidity of original objections to mobile homes, *supra* note 39 and accompanying text. The presumption of other distinctions between mobile and conventional housing based upon the original mobility of the mobile home is even more tenuous because of the growing tendency of the conventional housing industry to use prefabricated materials. Moreover, modular units, see 2 A. RATHKOPF & D. RATHKOPF, *supra* note 7, at 19-8 to -9, usually are classified as dwellings because they were not designed for mobility, although these units also are produced in factories.

78. 26 N.C. App. 87, 214 S.E.2d 621, *cert. denied*, 288 N.C. 239, 217 S.E.2d 663 (1975).

79. ASHEBORO, N.C., CODE § 609-12 (1972).

80. *Auman*, 26 N.C. App. at 88, 214 S.E.2d at 621.

81. 62 N.C. App. 455, 302 S.E.2d 915, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 732 (1983).

82. Most courts construe zoning ordinances and restrictive covenants according to the same principles, and decisions construing one often are cited in cases construing the other. See *Bartke & Gage*, *supra* note 6, at 515 & n.113. The Supreme Court of Maine, however, has treated restrictive covenants more liberally than zoning ordinances. For cases construing the word "dwelling" with regard to mobile homes as used in restrictive covenants, see *Carter v. Conroy*, 25 Ariz. App. 434, 544 P.2d 258 (1976); *Mitchell v. Killins*, 408 So. 2d 969 (La. Ct. App. 1981); *North Cherokee Village Membership v. Murphy*, 71 Mich. App. 592, 248 N.W.2d 629 (1976); *Wade v. Anderson*, 602 S.W.2d 347 (Tex. Civ. App. 1980); *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977).

83. *Barber*, 62 N.C. App. at 456, 302 S.E.2d at 916.

"house trailer"⁸⁴ and considered the critical question to be whether a "house trailer" remains a "house trailer" after it is immobilized. Relying on its decision in *Auman*, the court concluded that an immobilized double-wide unit was still a "trailer and temporary structure"⁸⁵ because the two sections had been transported to the site "by wheels, tongues and axles that were bolted on at the place of manufacture and removed about two days after the units were located on the lot."⁸⁶ These decisions suggest that under North Carolina law a unit designed to be mobile is forever a mobile home, future immobilization notwithstanding. The two definitions of the term "mobile home" appearing in the North Carolina statutes also employ this classification.⁸⁷

Although the question of whether an immobilized mobile home is still a mobile home logically is distinct from the question of whether an immobilized mobile home is a dwelling, courts generally have considered the first question to be determinative of the second.⁸⁸ Consequently, if faced with the precise issue, a North Carolina court probably would adopt the minority view that an immobilized mobile home is not a dwelling.⁸⁹ Nevertheless, the distinction between all mobile homes and all site-built homes on the basis of the original mobility of the mobile home is tenuous and probably will spawn continued litigation.⁹⁰

As statutory terms become defined more specifically through legislation and litigation, complainants often will need to rely on constitutional challenges. Zoning ordinances that exclude mobile homes from districts reserved for single-family dwellings have been attacked as violating the requirements of substantive due process by going beyond the permissible bounds of the State's police power.⁹¹

The tenth amendment reserves the police power to the states.⁹² The police power is incapable of strict definition or limitation⁹³ but was described by Blackstone as:

84. Ten years earlier, in *Van Poole v. Messer*, 19 N.C. App. 70, 198 S.E.2d 106 (1973), the court of appeals ruled that a mobile home was a "trailer" and therefore was excluded from a lot by a restrictive covenant prohibiting "trailers."

85. *Barber*, 62 N.C. App. at 459, 302 S.E.2d at 917.

86. *Id.* at 458, 302 S.E.2d at 917.

87. N.C. GEN. STAT. §§ 143-143.9(6), 145(7) (1983).

88. See *supra* note 72 and accompanying text.

89. The North Carolina Attorney General has determined, however, that for the purposes of relocation assistance a mobile home is a dwelling. See 40 N.C. ATT'Y GEN. BIENNIAL REP. 762, 763 (Sept. 2, 1969). Furthermore, N.C. GEN. STAT. § 41-2.5(a) (1983) provides that a husband and wife occupying a mobile home are to be treated as tenants by the entirety. It is not clear, however, whether the premise of this statute is that mobile homes are realty or whether they are only to be treated as if they were in this situation.

90. *Bartke & Gage*, *supra* note 6, at 498, 500, 504.

91. See, e.g., *Robinson Township v. Knoll*, 410 Mich. 293, 302 N.W.2d 146 (1981); *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex. 1982).

92. See *Keller v. United States*, 213 U.S. 138 (1908); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933). The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

93. *Pearsall v. Great N. R.R.*, 161 U.S. 646 (1895); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933).

the due regulation and domestic order of the kingdom: whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.⁹⁴

The police power may be exercised to require all citizens to yield property interests, for the public good, without compensation.⁹⁵

The political subdivisions of the states have no inherent authority to exercise the police power.⁹⁶ The states may, however, delegate to units of local government so much of the police power as they choose through "enabling legislation."⁹⁷ The power of municipalities to enact zoning ordinances has long been recognized as a proper exercise of the delegated police power.⁹⁸ In North Carolina, cities and counties have been granted general authority to exercise the police power⁹⁹ and specific authority to enact zoning ordinances.¹⁰⁰

The police power may restrain enjoyment of private property to further the public good, yet exercise of the police power must be limited to protect individual rights. The fourteenth amendment states that no state shall "deprive any person of life, liberty, or property without due process of law."¹⁰¹ In addition to its procedural mandate,¹⁰² this due process clause has been interpreted as placing substantive limitations on government action.¹⁰³ Legislative measures may be void as a violation of substantive due process if they are unreasonable, arbitrary, or capricious.¹⁰⁴

The courts have developed a three-part test to determine whether an exercise of the police power survives a substantive due process challenge.¹⁰⁵ First, the statute or ordinance must serve some legitimate purpose of the police power.¹⁰⁶ The purposes of the police power are defined broadly to include the promotion and protection of the public health, safety, morals, and general wel-

94. 4 W. BLACKSTONE, COMMENTARIES *162. Blackstone used the phrase "public power," but it is clear that the two labels are intended to refer to the same authority.

95. See Stoebeuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1058 (1980).

96. B. HODES & G. ROBERSON, *supra* note 2, at 190.

97. 1 T. MATTHEWS & B. MATTHEWS, MUNICIPAL ORDINANCES § 1.02 (rev. 2d ed. 1983); Note, *Regulation of Mobile Homes*, 13 SYRACUSE L. REV. 121, 126-27 (1961).

98. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

99. N.C. GEN. STAT. § 153A-121(a) (1983) (counties); *id.* § 160A-174(a) (1982) (cities).

100. *Id.* § 153A-340 to -348 (1983) (counties); *id.* § 160A-381 to -392 (1982) (cities).

101. U.S. CONST. amend. XIV § 1.

102. "Taken literally the term *due process* relates to the mode of proceeding that must be pursued by governmental agencies. Due process of law, in this sense, denotes *proper procedure*, and it was the meaning primarily intended by the men who drafted the Bill of Rights." B. SCHWARTZ, CONSTITUTIONAL LAW 165 (1972).

103. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887).

104. See, e.g., *Santiago v. Puerto Rico*, 154 F.2d 811, 813 (1st Cir. 1946).

105. See Stoebeuck, *supra* note 95, at 1058.

106. See, e.g., *Tyson & Brother-United Theatre Ticket Offices v. Bantor*, 273 U.S. 418 (1927); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

fare.¹⁰⁷ Second, assuming a valid purpose, the means adopted by the legislature must be rationally related to the attainment of the objective.¹⁰⁸ If there is any reasonable likelihood that the ordinance will tend to accomplish its objective, it will satisfy this second requirement.¹⁰⁹ Finally, assuming a valid purpose and a means rationally related to achieving that purpose, the means itself must still be reasonable,¹¹⁰ the courts may strike down unduly oppressive legislation.¹¹¹ This reasonableness requirement involves a balancing of public gain against private loss.¹¹² Courts are reluctant to question the legislature's exercise of the police power,¹¹³ but if the public gain is slight and the private burden great, courts may find a violation of substantive due process.¹¹⁴

The federal courts never have ruled on whether zoning ordinances that exclude mobile homes from residential districts violate substantive due process. Although the North Carolina Supreme Court has not faced this issue, the North Carolina Court of Appeals has considered the question twice.

In *Currituck County v. Willey*¹¹⁵ the court of appeals upheld as constitutional an ordinance excluding all mobile homes that did not meet certain dimensional requirements.¹¹⁶ The court cited a number of cases for the rule that an ordinance enjoys a strong presumption of validity and that "the burden is upon the complaining party to show its invalidity or inapplicability."¹¹⁷ In affirming a judgment for the county the court concluded "that defendant has not met her burden."¹¹⁸

The question was reconsidered by the court of appeals in *Duggins v. Town of Walnut Cove*¹¹⁹ in 1983. Duggins owned a lot in a district zoned by defend-

107. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

108. *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

109. *See, e.g.*, 1 T. MATTHEWS & B. MATTHEWS, *supra* note 97, § 2.10.

110. *See* B. HODES & G. ROBERSON *supra* note 2, at 204-217.

111. *See, e.g.*, 1 T. MATTHEWS & B. MATTHEWS, *supra* note 97, § 1.09; Note, *supra* note 51, at 197 n.6.

112. *See, e.g.*, *Dederick v. Smith*, 88 N.H. 63, 184 A. 595, *cert. denied*, 299 U.S. 506 (1936); *Mansfield & Swett v. Town of West Orange*, 120 N.J. 145, 198 A. 225 (1938).

113. *See* *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952) ("We do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). The party questioning an ordinance has the difficult burden of proving that it fails to satisfy one of the requirements of due process. *See* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Belle Terre v. Boraas*, 461 U.S. 1 (1974). *See generally* Flippen, *supra* note 27, at 18 & n.21; SHEPARD'S, *supra* note 26, § 10.5; Carter, *supra* note 67, at 39-40.

114. Note, *supra* note 50, at 197 n.10. The Supreme Court's extreme deference to the legislature in the area of substantive due process is evidenced by: *Agin v. Tiburon*, 447 U.S. 225 (1980) (upholding open space zoning); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (upholding historic landmark preservation). In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) substantive due process was labelled a "treacherous field."

115. 46 N.C. App. 835, 266 S.E.2d 52 (1980).

116. The ordinance provided: "(a) Permitted uses of buildings, structures and land: Dwellings, one family detached including modular and double-wide mobile homes with minimum dimensions of 24' x 60', but no other mobile homes." *Id.* at 835, 266 S.E.2d at 52.

117. *Willey*, 46 N.C. App. at 836, 266 S.E.2d at 53 (quoting *State v. Martin*, 7 N.C. App. 18, 20, 171 S.E.2d 115 (1969)).

118. *Id.*

119. 63 N.C. App. 684, 306 S.E.2d 186 (1983), *appeal filed*, 52 U.S.L.W. 3760 (N.C. Mar. 3, 1984).

ant for residential use exclusive of mobile homes.¹²⁰ Under the ordinance, all mobile homes were excluded regardless of their size, appearance, or mobility, while all site-built homes were permitted.¹²¹ Plaintiff contended that this ordinance violated substantive due process because it bore no rational relationship to any legitimate objective of police power regulation.¹²² Plaintiff admitted that the ordinance was presumed constitutional, but argued that he could present evidence to overcome this presumption.¹²³ At the trial level, defendant's motion for judgment on the pleadings was granted.

The court of appeals affirmed,¹²⁴ mentioning its decision in *Willey*, but choosing to consider the question anew.¹²⁵ The court applied the three-part due process analysis, beginning its discussion by pointing out that the ordinance was entitled to a strong presumption of validity: "If any state of facts can be conceived that will sustain the zoning ordinance, the existence of that state of facts must be assumed."¹²⁶ The first prong of the due process test requires that the zoning ordinance be enacted to promote the public health, safety, morals, and welfare. Plaintiff did not allege that the ordinance had not been enacted for such a purpose, and defendant did not allege any particular purpose for which it had been enacted. Although the point thus was not in issue, the court reasonably assumed that the ordinance had been enacted to protect the value of the property in the zoned area.¹²⁷ Protection of property values has long been considered a valid purpose for police power regula-

120. Defendant's ordinance created three classes of single-family residences: mobile homes, modular homes, and site-built homes. *Id.* at 685-86, 306 S.E.2d at 187.

121. *Id.* at 686, 306 S.E.2d at 187.

122. Record at 7-8 (quoting plaintiff's complaint § 21).

123. Record, Plaintiff-Appellant's Brief at 11.

124. *Duggins*, 63 N.C. App. at 689, 306 S.E.2d at 189.

125. The court stated in *Willey*: "We hold that mobile homes are sufficiently different from other types of housing so that there is a rational basis for placing different requirements upon them as was done by Currituck County." *Willey*, 46 N.C. App. at 836, 266 S.E.2d at 53. Defendant in *Duggins* relied heavily on this "holding," contending that it established a rule of law binding on the court.

Thus, the Court of Appeals has unequivocally rejected Appellant's contention that ordinances such as Walnut Cove's violate any constitutional provisions. . . . Appellant's attempts to distinguish between the *Willey* holding and the facts of this case ignore the broad unambiguous language used there indicating that the issue of the rationality of mobile home zoning ordinances has already been conclusively determined. . . . In conclusion, defendants respectfully assert that previously issued opinions of the appellate court of North Carolina conclusively established that zoning ordinances like Walnut Cove's are constitutional.

Record, Defendant-Appellee's Brief at 10-12.

Plaintiff in *Duggins* labelled the "holding" of the *Willey* court *obiter dictum*, asserting that the case actually had been decided on the grounds that defendant had failed to overcome the ordinance's presumption of validity. Plaintiff-Appellant's Brief at 22, *Duggins*. Plaintiff argued that whether a municipality can distinguish validly between mobile and site-built homes is a question of fact that must be determined on the basis of the complainant's evidence in each case. *Id.* at 23. The *Duggins* court's decision not to rely on *Willey* but to consider the matter anew suggests that the court accepted plaintiff's view of the "holding" in that case.

126. *Duggins*, 63 N.C. App. at 688, 306 S.E.2d at 189.

127. "The protection of property values in the zoned area is a legitimate governmental objective. We believe that the method of construction of homes [the basis of defendant's distinction between mobile and site-built homes] may be determined by a city governing board as affecting the price of homes." *Id.* at 688-89, 306 S.E.2d at 189.

tion,¹²⁸ and traditionally has been the primary reason given for excluding mobile homes from residential districts.¹²⁹

The second prong of the due process analysis requires that the means adopted by the ordinance be rationally related to the objective of the regulation. Plaintiff in *Duggins* argued that defendant's ordinance lacked a rational relation to any purpose within the police power.¹³⁰

Early zoning ordinances enacted to exclude mobile homes from residential districts were based on legitimate concerns about the dangers actually posed by trailers unsuited for permanent occupancy.¹³¹ These dangers, unique to mobile homes, could be eliminated best by excluding all mobile homes from residential districts. These early ordinances were substantially related to the ends for which they were enacted. Plaintiff in *Duggins* argued that if he could show that mobile homes no longer present these problems, an ordinance excluding mobile homes would not only be unnecessary, but would bear no rational relation to the purpose of eliminating those problems.¹³²

Because mobile homes today probably pose no danger to public health, safety, or morals, an ordinance excluding mobile homes is not likely to have any rational relation to these concerns.¹³³ But whether such an ordinance bears a rational relation to the protection of property values is not as clear.¹³⁴ Some mobile homes, like some site-built homes, can reduce the value of surrounding property. Plaintiff in *Duggins* contended that a zoning ordinance excluding all mobile homes while permitting all site-built homes, without regard to which homes actually would lower property values, is not rationally related to protection of property values.¹³⁵ The court correctly rejected this argument.¹³⁶ If some units of a particular class are likely to reduce property values, the exclusion of the entire class certainly will protect property values, and it is irrelevant that the ordinance does not also regulate another class that affects property values. Thus, ordinances such as that passed by the town of Walnut Cove satisfy the requirements of the second prong of the substantive due process analysis.

Finally, the due process analysis requires the ordinance to be reasonable. In determining reasonableness, the courts must balance public gain against private loss. If the public gain is insignificant and the private burden severe

128. Protection of property values is necessary to the general welfare. This is recognized by North Carolina statute. N.C. GEN. STAT. § 160A-383 (1982) lists protection of property values as a valid purpose of zoning. This statute must be considered as consistent with *id.* § 160A-381, which requires that zoning ordinances be enacted only for the protection of the public health, safety, morals, and general welfare.

129. See *supra* note 19 and accompanying text.

130. See Record, Plaintiff-Appellant's Brief at 12-19.

131. See *supra* notes 11-21 and accompanying text.

132. See Record, Plaintiff-Appellant's Brief at 12-19.

133. See *supra* note 39 and accompanying text.

134. See *supra* notes 40-41, 128 and accompanying text.

135. Record, Plaintiff-Appellant's Brief at 12.

136. "The prohibition of such buildings [mobile homes] is rationally related to the protection of the value of other homes in the area." *Duggins*, 63 N.C. App. at 689, 306 S.E.2d at 189.

the ordinance will be considered unreasonable.¹³⁷ Another issue is whether the restriction is necessary to secure the desired end; if a significantly less restrictive ordinance would achieve the same result, the ordinance may be unreasonable.¹³⁸

The court in *Duggins* granted defendant's motion for judgment on the pleadings without giving the plaintiff the opportunity to meet his burden of proof and overcome the ordinance's presumption of constitutionality. Instead, the court went beyond recognizing that the ordinance was presumed constitutional to a conclusion that the reasonableness of the ordinance was beyond the scope of judicial review. The court stated that it "cannot interfere with this legislative decision" and that it did "not believe [it] should make this factual determination. This is a matter for the governing board of Walnut Cove."¹³⁹ The court's reluctance to hear plaintiff's evidence is unfortunate because the reasonableness of this ordinance is highly questionable. The public benefit secured by the ordinance was slight. Although the ordinance protected against mobile homes reducing the value of nearby properties, it did not guard against a similar danger posed by site-built housing. An ordinance requiring that any improvements to the realty in the restricted area not lower property values would eliminate this danger without excluding mobile homes per se. Even granting that the ordinance achieved a significant public gain, it imposed a considerable hardship on plaintiff and others in his class. In its specific application the ordinance had the effect of denying to plaintiff the use of his property, as he could not afford any other type of housing. In its general application the ordinance required all those who could not afford traditional housing to live in mobile home parks. Given the public policy favoring the increased use of the mobile home¹⁴⁰ and the persistence of zoning ordinances defeating that policy, the North Carolina courts should be more willing to scrutinize this type of local regulation.¹⁴¹

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137. See *supra* note 112-114 and accompanying text.

138. See *supra* note 111 and accompanying text.

139. *Duggins*, 63 N.C. App. at 689, 306 S.E.2d at 189.

140. See *supra* notes 24-26 and accompanying text.

141. See Justice Hall's classic dissent in *Vickers v. Township Comm. of Gloucester*, 37 N.J. 232, 259, 181 A.2d 129, 143 (1962) (Hall, J., dissenting), *cert. denied*, 371 U.S. 233 (1963). "[O]ur courts have in recent years made it virtually impossible for municipal zoning regulations to be successfully attacked. Judicial scrutiny has become too superficial and one-sided." *Id.* at 259, 181 A.2d at 143 (Hall, J., dissenting). According to Justice Hall "[t]he judicial branch does not meet its full responsibility when, as here, its concept of review gives unquestioning deference to the views of local officials." *Id.* at 261, 181 A.2d at 145 (Hall, J., dissenting). See also Williams, *Planning Law and Democratic Living*, 20 LAW AND CONTEMP. PROBS. 317 (1955):

While controversy has often raged about judicial action in other areas, it has always been recognized that it is an essential part of the judicial function to watch over parochial and exclusionist attitudes and policies of local governments, and to see to it that these do not run counter to the national policy and the general welfare.

Id. at 318.

Responsible Citizens v. City of Asheville: A New Analysis of the Taking Issue or a Step Into Confusion?

The fifth amendment to the United States Constitution prohibits the taking of private property by the government without just compensation.¹ The "law of the land" provision of the North Carolina Constitution has been interpreted to impose a similar prohibition.² Not all interferences with property rights, however, constitute a taking; otherwise, any land use regulation would be subject to compensation, rendering government regulation impractical or impossible.³ The standards for determining what constitutes a taking under the federal and North Carolina constitutions have developed independently. The United States Supreme Court has recognized that in considering the taking issue it has conducted a series of "ad hoc, factual inquiries."⁴ In *Responsible Citizens v. City of Asheville*⁵ the North Carolina Supreme Court attempted to develop a coherent approach analyzing what constitutes a taking under the State constitution. This attempt, however, has left suspect some of the court's earlier decisions and offers property owners less protection than they receive under the federal constitution.

In *Responsible Citizens* several property owners challenged a city flood zone ordinance that restricted the development of their property.⁶ Plaintiffs contended that the cost of meeting the city's development standards was prohibitive and effectively denied them the right to develop their land.⁷ They challenged the ordinance on two grounds. First, they argued that the restric-

1. "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This prohibition has been made applicable to the states by the fourteenth amendment. See *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897).

2. "We recognize the fundamental right to just compensation so grounded in natural law and justice that it is part of the fundamental law of this State. . . . This principle is considered in North Carolina as an integral part of the 'law of the land' within the meaning of Article I, Section 19 of our State Constitution." *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982). N.C. CONST. art. I, § 19 reads as follows:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

3. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

4. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Cent. Transp. Corp. v. City of New York*, 438 U.S. 104, 124 (1978).

5. 308 N.C. 255, 302 S.E.2d 204 (1983).

6. *Id.* at 256, 302 S.E.2d at 206. All new construction or substantial improvements in a flood hazard district were required to be anchored to prevent flotation, collapse, or lateral movement, and constructed with materials and utility equipment resistant to flood damage. Furthermore, all water and sewage systems had to be constructed to limit infiltration of flood waters. In floodway and flood fringe districts all residential uses were prohibited; other construction was permitted if it met the flood hazard district requirements and if its lowest habitable floor was at least two feet above the regulatory flood elevation. *Id.* at 257-60, 302 S.E.2d at 206-07.

7. *Id.* at 264, 302 S.E.2d at 210.

tions constituted a taking for which they were entitled to just compensation.⁸ Second, they argued that the ordinance violated the equal protection provisions of both the State and federal constitutions "because it impose[d] a burden only on those citizens in the flood hazard area strictly for the benefit of those citizens with property outside the flood hazard area."⁹

The North Carolina Supreme Court stated that in ascertaining the validity of an equal protection challenge to a legislative classification, "[t]he test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation."¹⁰ Since the city had classified only lands that were prone to flooding, and the permissible object of the legislation was to prevent harm from flooding, the court concluded that the ordinance was constitutional.¹¹ Furthermore, the court concluded that the restriction did not amount to a taking under either the State or federal constitution.¹² The court found no taking under the fifth amendment,¹³ stating that nothing distinguished *Responsible Citizens* from *Penn Central Transportation v. City of New York*,¹⁴ in which the United States Supreme Court had upheld an historic district ordinance. The *Responsible Citizens* court found no violation of the North Carolina Constitution because plaintiffs had not been deprived of all practical uses of their property and the property had not been rendered valueless.¹⁵

The tenth amendment reserves the police power to the states,¹⁶ permitting state regulation that promotes the public health, safety, morals, and welfare.¹⁷ Not every exercise of the police power, however, constitutes a taking. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹⁸ If the government were required to compensate every governmentally induced

8. *Id.* at 256-57, 302 S.E.2d at 206.

9. *Id.* at 267, 302 S.E.2d at 212. The trial court dismissed the equal protection challenge on the ground "that all persons, firms and corporations whose properties are located in said Flood Hazard Districts are treated alike within said classification and the passage of said ordinance was a valid exercise of the police power" Record at 22, *Responsible Citizens*.

10. *Responsible Citizens*, 308 N.C. at 268, 302 S.E.2d at 212 (quoting *Guthrie v. Taylor*, 279 N.C. 703, 714, 185 S.E.2d 193, 201 (1971), *cert. denied*, 406 U.S. 920 (1972)).

11. *Id.*

12. The trial court concluded as a matter of law that even though the ordinance "seriously depreciates the value of properties, . . . [the ordinance did] not substantially deprive the plaintiffs . . . of the right to reasonable use of their property." *Id.* at 260, 302 S.E.2d at 208; Record at 22, *Responsible Citizens*.

13. *Responsible Citizens*, 308 N.C. at 267, 302 S.E.2d at 211.

14. 438 U.S. 104 (1978).

15. *Responsible Citizens*, 308 N.C. at 264-65, 302 S.E.2d at 210.

16. U.S. CONST. amend. X. See *State v. Joyner*, 286 N.C. 366, 369, 211 S.E.2d 320, 322, *appeal dismissed*, 422 U.S. 1002 (1975); *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971); *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 897 (1950). The cases refer to police power as being inherent in the states.

17. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Even though this power is reposed in the state legislature, it can be delegated to municipalities and counties. See *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975); *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971); *Marren v. Gamble*, 237 N.C. 680, 75 S.E.2d 880 (1953).

18. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

reduction in an individual's net worth, the taxing power would be abrogated.¹⁹ Since first permitting land use regulation as an exercise of the police power,²⁰ courts have struggled to determine when such regulation constitutes a taking and requires compensation.

The North Carolina courts have focused primarily on the extent that an ordinance interferes with the use of property. Land use regulation has been held not to be a taking when the interference is minor. In *Zoppi v. City of Wilmington*²¹ property adjacent to plaintiffs' property was rezoned from residential to commercial use. The court held that this did not constitute a taking because it had not interfered with plaintiffs' use of their property; they still were free to use their property for residential purposes.²² That the rezoning of the adjacent property reduced the value of plaintiffs' property was of no consequence.²³

In *State v. Joyner*²⁴ defendant operated a building material salvage shop in an area that had been rezoned to prohibit such use. Because defendant held the property under an oral lease, the lease was valid for no more than three years.²⁵ Even though defendant's use was frustrated completely, the rezoning did not constitute a taking because defendant's expectation was only for a three-year period. The court considered interference with such an insignificant interest to be insubstantial.²⁶

As these cases illustrate, insubstantial interference with the use of property does not constitute a taking. The North Carolina courts have found a taking only when property has been rendered valueless or the owner has been deprived of all reasonable use.²⁷ If the regulation prevents the owner from conducting all permitted uses of the property, the regulation constitutes a taking.²⁸ Simply because the landholder can comply with the regulation, however, does not relieve the government of a duty to pay just compensation. In *Helms v. City of Charlotte*²⁹ the trial court had found no taking since the property owner still could comply with the uses permitted by the challenged zoning ordinance.³⁰ The North Carolina Supreme Court reversed because the trial court had not found that the permitted uses were reasonable. The court concluded that if the permitted uses were unreasonable, the regulation deprived

19. *Penn Central*, 438 U.S. at 124.

20. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 375 (1926) (actions under police power do not require compensation because they are inherent in ownership).

21. 273 N.C. 430, 160 S.E.2d 325 (1968).

22. *Id.* at 433, 160 S.E.2d at 329.

23. *Id.* at 436, 160 S.E.2d at 332.

24. 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975).

25. N.C. GEN. STAT. § 22-2 (1965).

26. *Joyner*, 286 N.C. at 375-76, 211 S.E.2d at 326.

27. *Helms v. City of Charlotte*, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961).

28. *Roberson's Beverages, Inc. v. City of New Bern*, 6 N.C. App. 632, 637, 171 S.E.2d 4, 7 (1969), *cert. denied*, 276 N.C. 183 (1970).

29. 255 N.C. 647, 122 S.E.2d 817 (1961).

30. *Id.* at 656, 122 S.E.2d at 824.

the owner of all reasonable use and constituted a taking.³¹

The measure of what is a reasonable use is not a rigid standard. If the public interest is of lesser importance, the courts will find a lesser intrusion to have denied the owner reasonable use. In *State v. Jones*³² the supreme court imposed a lower threshold for finding an aesthetic zoning ordinance invalid because such ordinances are of lesser public importance.³³

The United States Supreme Court has not adopted such a reasonableness standard. In addressing taking questions, the Court conducts "essentially ad hoc, factual inquiries."³⁴ The Court focuses on the character of the government's action³⁵ and the economic impact of the regulation, considering particularly the extent to which the regulation has interfered with distinct investment-backed expectations.³⁶

The Supreme Court is less likely to find a taking if the government's action is a regulation instead of a physical invasion.³⁷ When the government's action rises to the level of a permanent physical occupation, the Court will find a per se taking.³⁸ To evaluate the substantiality of a regulation's economic impact, however, the Court has adopted a broad view of an owner's bundle of property rights and a narrow view of the property interest affected.³⁹ Thus, the Court has focused on whether the owner could make a reasonable use of his property after the government's action.⁴⁰ The Court has been most willing to protect investment-backed expectations when the government's action would have had the effect of denying the owner the fruits of some positive investment.⁴¹

31. The court stated that the permitted uses would have to be "practical, desirable and of reasonable value." *Id.* at 657, 122 S.E.2d at 825.

32. 305 N.C. 520, 290 S.E.2d 675 (1982).

33. See *id.* at 526, 290 S.E.2d at 678-79. See also *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979) (applying same standard to historic preservation ordinances). See generally Note, *State v. Jones: Aesthetic Regulation—From Junkyards to Residences?*, 61 N.C.L. REV. 942 (1983).

34. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (quoting *Penn Central*, 438 U.S. at 124).

35. *Id.*

36. *Penn Central*, 438 U.S. at 124.

37. Compare *Penn Central* (upholding regulation of owner's use of air space over Grand Central Station) with *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (denying government navigational servitude over waters that had been made navigable through private investment; Court characterized government's action as "physical invasion").

38. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For a discussion of Supreme Court taking jurisprudence and an analysis of *Loretto*, see Note, *Eminent Domain—Teleprompter Manhattan CATV Corp.: Permanent Physical Occupation As A Taking*, 62 N.C.L. REV. 153 (1983).

39. See *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central*, 438 U.S. at 130. In *Penn Central* the Court stated:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [The] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole

Id.

40. See *Penn Central*, 438 U.S. at 136.

41. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (expectation that privately developed marina would remain private).

In *Responsible Citizens* the North Carolina Supreme Court applied a three-part test for analyzing the taking question under the North Carolina Constitution.⁴² First, the court examined whether the object of the legislation is within the scope of the police power. Second, it determined whether the means employed are reasonably necessary to promote the accomplishment of that goal. Third, it examined whether the interference with the owner's right to use his property as he deems appropriate is reasonable.⁴³ To determine whether the object of the regulation in *Responsible Citizens* was within the police power, the court looked exclusively at the findings of fact enumerated in the ordinance. Since the purpose of the ordinance was to further the "public health, safety, morals, and welfare,"⁴⁴ the court concluded that the ordinance fulfilled the first element. Similarly, the court held that since the enacting body had found the means to be necessary, the second element was fulfilled.⁴⁵

The third prong of the test is based on North Carolina reasonable use cases, but departs from the analysis in earlier supreme court cases. In *Helms* the court had concluded that an intrusion is a taking if it deprives the owner of all reasonable use of the property, or if it renders the property valueless.⁴⁶ In *Responsible Citizens*, however, the court stated that both elements must be satisfied.⁴⁷ The pronouncement that both elements are required may have been an inadvertent error, given that the court gleaned this rule from *Helms*.⁴⁸ More importantly, however, the passage is merely dictum since neither taking criterion was found in *Responsible Citizens*.⁴⁹

Responsible Citizens identified a new factor to consider in ascertaining the reasonableness of the restriction—the form of the restriction. The court labeled the regulation in *Responsible Citizens* a "conditional affirmative duty."⁵⁰ Conditional affirmative duties require landowners to do something before changing the use of their land.⁵¹ The ordinance in *Responsible Citizens* prohibited new construction or substantial improvements on the affected property unless specific requirements were satisfied.⁵² If a regulation imposes only a conditional affirmative duty, it is not an unreasonable burden on the owner's use because "[t]he regulations do not affect in any way the current use of each

42. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citing *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979)).

43. *Id.* at 261, 302 S.E.2d at 208.

44. See *supra* note 17 and accompanying text. The stated purpose of the ordinance was to prevent or reduce loss of life, property damage, and the like due to flood. *Responsible Citizens*, 308 N.C. at 262, 302 S.E.2d at 209.

45. "Indeed, it can be argued that an ordinance requiring, among other things, the flood proofing of new structures is the only feasible manner in which flood damage can be prevented or minimized in a flood hazard area." *Id.* at 263, 302 S.E.2d at 209.

46. *Helms*, 255 N.C. at 653, 122 S.E.2d at 822.

47. *Responsible Citizens*, 308 N.C. at 264, 302 S.E.2d at 210.

48. *Id.* at 263-64, 302 S.E.2d at 209-210 (citing *Helms*).

49. *Id.* at 264-65, 302 S.E.2d at 210-11.

50. *Id.* at 264, 302 S.E.2d at 210.

51. *Id.*

52. *Id.* at 257-60, 265, 302 S.E.2d at 206-08, 210.

plaintiff's property."⁵³ Thus, it is of no consequence that other uses are prohibited.⁵⁴

This conditional affirmative duty analysis departs from the court's prior holdings and conflicts with *Helms*. In *Helms* the land was not in use at the time of the zoning change. The court examined whether the available uses were reasonable;⁵⁵ the option of allowing the unused condition to continue was only a part of this inquiry. If a plaintiff in *Responsible Citizens* was not using his land when the ordinance was adopted, and all development effectively was prohibited by the "conditional affirmative duties" imposed by the ordinance, he was left with no available reasonable use. Under *Helms*, this deprivation would constitute a taking. *Responsible Citizens* held that it was not a taking.

The court's analysis fails to consider factors that constitute a taking under the federal constitution. The court applied the conditional affirmative duty rationale and relied on *Penn Central* in dismissing summarily the challenge under the federal constitution.⁵⁶

Both ordinances place conditional affirmative duties on the landowner to meet certain requirements if he or she wishes to engage in new construction or alterations. Indeed, we find no feature of the *Penn Central* case which substantially distinguishes it from the case at bar—at least to the extent that would render the exercise of police power invalid or justify a different conclusion on the "taking" issue.⁵⁷

The court, however, incorrectly relied on *Penn Central* for its conditional affirmative duty analysis. *Penn Central* does not discuss the doctrine of conditional affirmative duty. Under the federal and State constitutions, the ends of the ordinance must be permissible, and the means must be reasonably necessary to effectuate those ends.⁵⁸ Even if an ordinance passes this test, however, its enactment constitutes a taking "if it has an unduly harsh impact upon the owner's use of the property."⁵⁹ Although the United States Supreme Court has not developed a framework for this analysis, the factors it has identified as pertinent to the taking issue do not include whether the regulation imposes a conditional affirmative duty on the owner.

The *Responsible Citizens* court's analytic framework does not account for an established federal factor—interference with investment-backed expectation in the use of property. If land presently is not in use or is held with an investment-backed expectation for the development of that land, a regulation

53. *Id.* at 264, 302 S.E.2d at 210.

54. *Id.* at 265, 302 S.E.2d at 210.

55. *Helms*, 255 N.C. at 656-57, 122 S.E.2d at 824-25.

56. *Responsible Citizens*, 308 N.C. at 266-67, 302 S.E.2d at 211.

57. *Id.* at 267, 302 S.E.2d at 211.

58. See *Penn Central*, 438 U.S. at 127. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Lochner v. New York*, 198 U.S. 45 (1905); *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979).

59. *Penn Central*, 438 U.S. at 127.

that prohibits development may constitute a taking under the federal constitution.⁶⁰ Under *Responsible Citizens*, however, if this prohibition is merely a constructive prohibition in the form of a conditional affirmative duty, it is not a taking. Suppose a plaintiff in *Responsible Citizens* had purchased vacant commercial property and expended a considerable sum of money to prepare for construction of a shopping center. If the city council then imposed a conditional affirmative duty that effectively prohibited any development of the property, a taking would have occurred under the reasoning of *Penn Central*.⁶¹ Under *Responsible Citizens*, however, this zoning would have been a permissible exercise of the police power.

The court's holding in *Responsible Citizens* was very broad. The court did not consider the different possible circumstances of the plaintiffs' property; it looked only to the form of the ordinance and held it not to constitute a taking. Furthermore, the trial court had failed to find that the ordinance did not deprive plaintiffs of all reasonable use of their property.⁶² If the supreme court had applied its pre-*Responsible Citizens* reasonableness standard, it would have remanded for such a finding.⁶³ The court's failure to remand illustrates that the form of the ordinance as a conditional affirmative duty was crucial to the outcome.

In *Responsible Citizens* the North Carolina Supreme Court provided a simple framework for analyzing the taking issue. The decision, however, casts doubt on the court's previous taking decisions⁶⁴ since its conditional affirmative duty analysis has short-circuited the definition of reasonable use announced in *Helms*. Although the court attempted to clarify the answers to questions that have plagued this area of law, it raised more questions than it answered, leaving the present state of the law uncertain. Because the decision affords a landowner less protection under the North Carolina Constitution than under its federal counterpart, the primary question in North Carolina taking cases will be whether a violation of the fifth amendment has occurred. Thus, although the court provided a simple framework with which to analyze North Carolina taking law, it has rendered that framework of little value.

60. See *supra* notes 36-41 and accompanying text.

61. See *Penn Central*, 438 U.S. at 136.

62. Record at 20, *Responsible Citizens*.

63. See *Helms*, 255 N.C. at 657, 122 S.E.2d at 824-25; *Jamison v. City of Charlotte*, 239 N.C. 423, 79 S.E.2d 797 (1954). See *supra* notes 29-31 and accompanying text.

64. Even though the court analyzed the facts broadly, *Responsible Citizens* seems to be an example of result-oriented adjudication. The ordinance was enacted for the purpose of allowing Asheville residents to qualify for federal flood insurance under the National Flood Insurance Act. 42 U.S.C. §§ 4001-4128 (1976 & Supp. V 1981). The court apparently felt compelled to uphold any such ordinance. This predisposition of the court toward upholding the constitutionality of the ordinance may have affected its analysis in two ways. First, the court was willing to adopt an analysis broader than its prior decisions. Second, the court cited cases from other jurisdictions that do not support its analysis. Each of the cases cited, however, upheld similar flood zone ordinances. See *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1975); *Capiture Realty Corp. v. Board of Adjustment of Elmwood Park*, 126 N.J. Super. 200, 313 A.2d 624 (1973), aff'd, 133 N.J. Super. 216, 336 A.2d 30 (1975). In both of these cases, however, the courts did not consider whether the ordinance constituted a taking of the plaintiffs' property. See, e.g., *Turnpike Realty*, 362 Mass. at 238, 284 N.E.2d at 901-02 (Tauro, C.J., concurring).

Once again, practitioners are left to interpret the "ad hoc factual inquiries"⁶⁵ of the United States Supreme Court.

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65. *See supra* notes 34-41 and accompanying text.

Murder in Mecklenburg—To the Issue Go the Spoils

One early summer morning in 1980, Isam Misenheimer was in his kitchen, cooking up country ham.¹ His son John appeared, and the men spoke. They may have fought; at some point John pulled from under his jacket a .22 caliber rifle shortened by the removal of its stock. A bullet raced through the older man's brain and soon he lay dead or dying, a small pool of blood staining the floor around his head.² John now is serving time at Central Prison in Raleigh.³

Isam Misenheimer left a will dividing his estate equally among John and John's seven brothers and sisters.⁴ The following year, John's siblings sued for a declaratory judgment⁵ barring John from taking anything under Isam's will. The trial court agreed with plaintiffs that John was barred by North Carolina's slayer statute from taking his one-eighth share of his father's estate. The court, however, rejected plaintiffs' argument that the slayer statute also barred John's two sons, ruling instead that they could take their father's share by substitution.⁶ The North Carolina Court of Appeals upheld the trial court's decision in *Misenheimer v. Misenheimer*,⁷ thus determining that the slayer statute will not deny a slayer's issue benefits from a death the slayer has caused.

The need for determining the rights of the slayer's issue arose because two succession statutes governed the case. The slayer statute, North Carolina General Statutes sections 31A-3 to 31A-15, provides for forfeiture of the slayer's share through the fiction that the slayer had predeceased his testator-victim.⁸ Section 31-42, the anti-lapse statute, provides for the passing of any estate or

1. Record at 32 (testimony of Sharon Misenheimer), *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981). Isam was shot on the morning of June 10, 1980. Ivan Misenheimer lived and died in Charlotte.

2. *Id.* at 57 (testimony of Dr. Hobart Wood, medical examiner); *Id.* at 84 (voluntary statement of John Misenheimer, June 10, 1980). The North Carolina Supreme Court found no error in the trial court's finding of first-degree murder. *State v. Misenheimer*, 304 N.C. 108, 111, 282 S.E.2d 791, 794 (1981).

3. Record at 3, *Misenheimer v. Misenheimer*, 62 N.C. App. 706, 303 S.E.2d 415 (1983). Unless otherwise noted, subsequent references in the text and notes to *Misenheimer* refer to the 1983 wills case of *Misenheimer v. Misenheimer*. *Misenheimer v. Misenheimer*, 62 N.C. App. 706, 303 S.E.2d 415 (1983).

4. *Misenheimer v. Misenheimer*, 62 N.C. App. 706, 707, 303 S.E.2d 415, 415 (1983). Isam's will left no specific gifts. After payment of debts, funeral expenses, administration costs, and death taxes, the will provided for distribution of all the residue to the eight named children.

5. N.C. GEN. STAT. §§ 1-253 to -267 (1983). The actual alignment of the parties was Donald Misenheimer (John's brother and administrator of Isam's estate) against all the named beneficiaries, including John, and also against John's two sons. References in the text to "the Misenheimer plaintiffs" refer to the seven siblings who sought to bar John and his two sons from taking under Isam's will.

6. *Misenheimer v. Misenheimer*, 62 N.C. App. 706, 707, 303 S.E.2d 415, 415-16 (1983).

7. 62 N.C. App. 706, 303 S.E.2d 415 (1983).

8. The slayer statute is article III of Acts Barring Property Rights, 1961 N.C. Sess. Laws 350, N.C. GEN. STAT. §§ 31A-3 to -15 (1976 & Cum. Supp. 1983). The relevant section of article III is § 31A-4 (1976):

The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:

part of an estate that would otherwise fail because a beneficiary died before his testator.⁹ The anti-lapse statute determines that when a beneficiary predeceases the testator, the beneficiary's issue take the beneficiary's share by substitution.¹⁰ In reconciling the slayer statute with the anti-lapse statute, the question was this: If the slayer is *deemed* to have predeceased the testator for the purpose of depriving the slayer of any share in the testator's estate, should the slayer also be deemed to have predeceased the testator for the purpose of the anti-lapse statute?

A devise lapses when a named beneficiary cannot or will not take the gift at the testator's death.¹¹ At common law, a lapsed legacy could pass under the residuary clause of the will, but a lapsed devise had to be treated as intestate property.¹² North Carolina's statutory provision against lapses grew out of 1844 legislation providing that lapsed devises could pass under a will's residuary clause.¹³ The North Carolina anti-lapse statute now provides that, if possible and if the will shows no contrary intent,¹⁴ a beneficiary's issue should take the beneficiary's share by substitution when the beneficiary dies before the testator.¹⁵ The statute further provides for gifts that cannot be saved from lapsing. The anti-lapse statute provides that any specific gift that has lapsed

(1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.

(2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession, such property shall pass to others next in succession in accordance with the applicable provision of the Intestate Succession Act.

(3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will.

9. N.C. GEN. STAT. § 31-42(a) (1976) provides for a devise or legacy to a beneficiary who would have taken had he survived the testator, but who died before the testator did. Such a devise or legacy passes by substitution to the beneficiary's issue, provided that (1) the beneficiary had issue living at his own death, and (2) the beneficiary's issue would have been heir of the testator, under the Intestate Succession Act, in the absence of a will. Section 31-42(b) provides that a devise or legacy to a class member who predeceases the testator also passes to the beneficiary's issue. Under subsection (b), if the beneficiary is not survived by issue, the gift devolves upon the remaining class members who survive the testator. Subsection (b) was not relevant to *Misenheimer*, since there the testator named each of the beneficiaries. Presumably, if Isam Misenheimer had left his residuary estate to the class "my children," the court would just as easily have found John's sons entitled to take John's share by substitution. Section 31-42(c) provides for cases in which subsections (a) and (b) do not apply, and a devise or legacy lapses: if there is a residuary clause, the gift passes under it; lacking a residuary clause in the will, the gift passes as if the testator had died intestate with respect to the gift. Further, under subsection (c), if a residuary gift lapses with respect to one beneficiary, the gift continues in the residue for distribution to the other residuary beneficiaries. If there are no other residuary beneficiaries, the gift passes as intestate property. Operation of subsection (a), (b), or (c) is contingent on no contrary instruction appearing in the will.

10. N.C. GEN. STAT. § 31-42(a) (1976). See *supra* note 9.

11. T. ATKINSON, WILLS § 140, at 777 (2d ed. 1953).

12. N. WIGGINS, NORTH CAROLINA WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 149, at 149 (1983).

13. *Id.* See 1844 N.C. Sess. Laws, ch. 88, § 4, reprinted in B. MOORE & A. BIGGS, REVISED CODE OF NORTH CAROLINA 608 (1855).

14. A contrary intent could be shown, for example, by a gift to a beneficiary, "if he survives me," or by a gift over to another if the beneficiary does not survive the testator. T. ATKINSON, *supra* note 11, § 140, at 780.

15. N.C. GEN. STAT. § 31-42 (1976). See *supra* note 9.

goes into the residuary portion of the estate, while any residuary gift that has lapsed passes to the other residuary beneficiaries. If no other residuary beneficiaries exist, the gift passes as if the testator had died intestate.¹⁶

In *Bear v. Bear*¹⁷ the court of appeals indicated that the plain meaning of the anti-lapse statute controlled any construction: subsection (a) of the statute, which passed the testate gift intended for a predeceased beneficiary to the beneficiary's issue, applied to any devise, residuary or specific. More relevant to the facts of *Misenheimer*, the *Bear* court held that a gift is not lapsed when the gift can pass to issue of the predeceased beneficiary. This proposition is central to the purpose of the anti-lapse statute—to prevent lapses, not just to provide for their eventuality.¹⁸

The slayer statute is based on the principle that no one should profit from his wrongdoing.¹⁹ North Carolina's slayer statute was enacted in 1961, replacing inadequate existing statutes and unsatisfactory case law.²⁰ The statutes had been limited to cases in which one spouse had killed the other and stood to gain from the victim's death.²¹ In other cases, courts had applied the equitable principle of the constructive trust.²² In the absence of an applicable statute, courts would refuse to invoke a forfeiture against a murderer, and instead hold that the murderer held his vested interest in the victim's estate in trust for

16. N.C. GEN. STAT. § 31-42(c)(1)(b) (1976).

17. 3 N.C. App. 498, 165 S.E.2d 518 (1969). In *Bear* testator executed a will in 1917 and died in 1968. The will gave the residue of the estate to two brothers, Emanuel and Sigmond. Emanuel died before the testator, leaving two children who took Emanuel's one-half share by substitution. Sigmond also died before the testator, but left no issue, so his half of the residue lapsed. Because there were no other named residuary beneficiaries, Sigmond's half had to be distributed as intestate property.

18. It appears to us that section (a) of the statute is designed and intended to prevent the lapse of a devise or bequest, whether it be specific or residuary, in a situation where the devisee or legatee who would have taken had he survived the testator predeceases testator survived by issue who survive the testator and who would have been heirs of testator had there been no will.

Id. at 504, 165 S.E.2d at 522.

19. "Nullus commodum capere potest de injuria sua propria." See McGovern, *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 71 (1969). See also Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). Dworkin states that courts have applied this principle in the absence of any preexisting rule, and that the principle illustrates a failure of positivist jurisprudence. The principle that no one should profit from his wrongdoing was first used to defeat a devise in the famous case of *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). Defendant in *Riggs* murdered his grandfather, and the court held that the slayer-grandson could not take anything under the will, despite the will's provisions for a gift to the grandson, and despite the lack of any barring provisions in New York's statutes or case law.

Riggs also served as the point of departure for an imaginative consideration of the predictability of unwritten law in D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129 (1975).

20. See N. WIGGINS, *supra* note 12. See generally Bolich, *Acts Barring Property Rights*, 40 N.C.L. REV. 175 (1962).

21. One year before the New York decision of *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), the North Carolina Supreme Court had allowed a wife who had been accessory to her husband's murder to take her intestate share of the husband's estate. *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794 (1888). The legislature responded to *Owens* with statutes aimed at preventing a recurrence of that result. See 1889 N.C. Sess. Laws, ch. 499 (repealed partially in 1959; balance repealed in 1973).

22. See, e.g., *Garner v. Phillips*, 229 N.C. 160, 47 S.E.2d 845 (1948) (constructive trust applied after son murdered parents).

the remaining beneficiaries.²³ To cover more situations in which a slayer might benefit from his wrongdoing, the North Carolina legislature in 1961 turned to the model slayer statute that Professor Wade had proposed in 1936.²⁴

North Carolina adopted most of Wade's model statute, but as the discussion in *Misenheimer* indicates, the divergences from the Wade model were significant. Wade provided that neither the slayer nor anyone claiming through him could take as a result of the slayer's wrongdoing.²⁵ The North Carolina statute provides merely that the slayer cannot benefit, without mentioning those who might claim through him. Citing its opinion in an earlier slayer case,²⁶ the court wrote, "the public policy sought to be fostered by the enactment of G.S. 31A is predicated upon the theory that the murderer *himself* will not profit by his own wrongdoing, however, this principle does not extend to those related to the slayer."²⁷ Most important, Wade's statute specifically provided that the anti-lapse statute would not apply to the slayer's share of the victim's will. The omission of this provision in the North Carolina statute strongly suggests that the anti-lapse statute should be read in conjunction with the slayer statute.²⁸

In *Misenheimer* the courts found John to be a slayer within the definition of "slayer" in the statute,²⁹ but the courts still had to determine who would

23. See A. SCOTT, TRUSTS §§ 492-494.4 (1967).

24. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

25. *Id.* at 724.

26. *Gardner v. Nationwide Life Ins. Co.*, 22 N.C. App. 404, 206 S.E.2d 818, cert. denied, 285 N.C. 658, 207 S.E.2d 753 (1974). *Gardner* involved a different problem from *Misenheimer*. Under § 31A-11 of the slayer statute, the principle that the murderer shall not benefit from his wrongdoing applies to insurance proceeds. In *Gardner* the insured slayer killed the beneficiary under the policy, then killed himself. The court held that the slayer's mother, who was named an alternate beneficiary in the policy, could take the proceeds.

27. *Misenheimer*, 62 N.C. App. at 709-10, 303 S.E.2d at 417 (citing *Gardner v. Nationwide Life Ins. Co.*, 22 N.C. App. 404, 409, 206 S.E.2d 818, 821, cert. denied, 285 N.C. 658, 207 S.E.2d 753 (1974)).

28. See Wade, *supra* note 24, at 727. Under Wade's model, "the heirs or next of kin of the slayer may claim the property if they are entitled to it in their own right, but they cannot claim through an ancestor who has disqualified himself by his wrong." *Id.*

29. A "slayer" is defined under N.C. GEN. STAT. § 31A-3 (1976) as any person who, as a principal or accessory in the "willful and unlawful killing of another person," (a) is found guilty, (b) pleads guilty, or (c) pleads nolo contendere in a criminal action. In addition, subsection (d) provides that a slayer who commits suicide or otherwise dies before being tried for the slaying, and before settlement of the estate, can be found a slayer in a civil action. Such an action must be brought within one year after the testator's death. Subsection (d) thus provides that in murder-suicide cases in which the slayer cannot be tried for murder, the slayer's share of the victim's estate will not go into the slayer's estate. One need not be a slayer under the definition of § 31A-3(3) to be barred from taking under the decedent's estate. In *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 213 S.E.2d 563 (1975), the beneficiary shot her husband. She was tried for murder, but found guilty of involuntary manslaughter. Quick had stipulated in the subsequent suit for the husband's insurance proceeds that she had killed her husband, and that the only issue was whether the slayer statute barred her from taking the proceeds. Apparently, she was under the "misapprehension that the decisive question was whether she was a *slayer* as defined by G.S. § 31A-3(3)." *Id.* at 56, 213 S.E.2d at 569. Since Quick's act was found to have been unwilful, she could not have met the test of a slayer. But the court went on to apply the common law as preserved in the statute—the broad construction provision of N.C. GEN. STAT. § 31A-15 (1976)—"both substantively and procedurally, as to all acts not specifically provided for in Chapter 31A."

receive John's share under Isam's will. To prevent John and his two sons from taking under the will, John's siblings raised two arguments against the trial court's finding for John's sons. First, they argued that the slayer statute exclusively controlled distribution of the estate, and that the anti-lapse statute did not apply when the slayer merely was deemed to have predeceased the testator. Second, they argued that if the anti-lapse statute did apply, the gift to John had lapsed and should have passed into the residue for distribution to the other residuary beneficiaries, under the terms of section 31-42(c)(2).³⁰

In rejecting the second argument, the court noted *Bear*,³¹ which had suggested that the anti-lapse statute should prevent lapse whenever possible, and thus, that the statute favors passage of the beneficiary's share to his issue over a lapse. Thus, once the *Misenheimer* court decided that the anti-lapse statute did apply, plaintiffs had to overcome the presumption that a lapse should be avoided. They failed to overcome this presumption.

The court of appeals briefly considered plaintiffs' argument for the exclusive operation of the slayer statute.³² Plaintiffs had stressed that section 31A-15 provides that Chapter 31A applies exclusively to all acts it specifically covers. The court interpreted this argument as a cue to refer to the provision of the slayer statute governing in the case of a slain testator, North Carolina General Statutes section 31A-4. Section 31A-4(3) provides that "where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will." The court concluded: "Since nothing to the contrary appears in the will of Isam R. Misenheimer, the anti-lapse statute is deemed a part of the will."³³

Thus, the court focused on the last phrase of subsection (3) without addressing the operative clause, "such property shall pass as if the decedent had died intestate with respect thereto." This clause suggests that John's one-eighth share should have been distributed according to the laws of intestate succession. Since the eight named beneficiaries also would have been Isam's heirs in intestacy, they would have shared equally in any intestate property, except John's sons would have taken John's share by substitution. Thus, under this construction, John's one-eighth share would have been divided

Quick, 287 N.C. at 56, 213 S.E.2d at 569. Thus, although the specific provisions of the slayer statute did not cover cases of involuntary manslaughter, the broad construction section could be invoked when the specific provisions of the slayer statute might otherwise fail to prevent one from profiting from his wrongdoing. Mr. Quick's death resulted from his wife's "culpable negligence, that is conduct incompatible with a proper regard for human life Culpable negligence proximately resulting in death comes within the purview of the common law maxim that no one shall be permitted to profit by his own wrong." *Id.* at 59, 213 S.E.2d at 570-71. See *supra* note 19. See also Note, *Decedents' Estates—Forfeitures of Property Rights by Slayers*, 12 WAKE FOREST L. REV. 448 (1976).

30. See *supra* note 9. John's defense counsel in the murder case apparently thought this was the correct construction, and that it explained the siblings' pecuniary interest in hiring a private prosecutor at the murder trial. Brief for Appellant at 6, *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

31. See *supra* note 17.

32. *Misenheimer*, 62 N.C. App. at 708, 303 S.E.2d at 416.

33. *Id.*

again by eight, so that John's seven siblings each would have taken an additional one-sixty-fourth share, while John's two sons would have divided only a one-sixty-fourth share as a result of intestate succession.³⁴

Admittedly, this construction lends little grace to the statutory architecture. The *Misenheimer* court saw a mesh between the slayer and anti-lapse statutes; although the slayer statute provides that "the slayer shall be deemed to have died immediately prior to the death of the decedent," the anti-lapse statute can prevent lapse or provide for passage of the slayer's share after lapse. The first sentence of the slayer statute, however, continues, "and the following rules shall apply: . . . (3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will."³⁵ Subsection (3) is surplusage if the anti-lapse statute operates on a testate slaying victim's property, because the anti-lapse statute itself provides for the possibility that a gift to the slayer might pass by intestacy.³⁶ In the anti-lapse statute, intestate succession is the final solution, to be avoided whenever a predeceased beneficiary leaves surviving issue, or whenever there are other residuary beneficiaries. For example, if John Misenheimer had predeceased his father without leaving issue, under section 31-42(c)(2) John's share of the residuary estate would have gone back into the residue of Isam's estate for distribution to the other residuary beneficiaries.³⁷ Under section (3) of the slayer statute, however, property "which would have passed to . . . [John] . . . pursuant to the will . . . shall pass as if the decedent had died intestate with respect thereto."³⁸ If the legislature had wanted the courts to read the anti-lapse and slayer statutes together, it would not have written a section pertaining to wills that so contradicted the anti-lapse statute. Instead, the legislature could have written a subsection (3) of the slayer statute specifically applying the anti-lapse statute, or it could have remained silent about wills in the slayer statute, which also would have implicated the anti-lapse statute.

Nevertheless, the court of appeals' construction of the slayer and anti-lapse statutes in *Misenheimer* is at least consistent with its perception of public policy—that the murderer's wrongdoing should not bar the murderer's relatives from taking his share. If consideration of the slayer's children indeed represents the legislature's will, the decision in *Misenheimer* gives effect to that will. The *Misenheimer* decision also ensures that the treatment of bequests to the slayer will not depend on whether the decedent leaves a will. Under the Wade model statute, the slayer's issue are not barred from taking an intestate share, provided they are heirs in their own right. But if the slayer is named in the testator's will, the slayer's issue only can take a share the testator may have

34. Thus, John's seven siblings would each take a total of 9/64 of the residuary estate, while John's sons would each take 1/128.

35. N.C. GEN. STAT. § 31A-4(3) (1976).

36. N.C. GEN. STAT. § 31-42(c)(2) (Cum. Supp. 1983). See *supra* note 9.

37. *Id.*

38. N.C. GEN. STAT. § 31A-4(3) (1976).

given them specifically.³⁹ The Uniform Probate Code may operate similarly.⁴⁰ Section 2-803 of the Code provides that, if the decedent dies intestate, the slayer-heir's portion passes to the slayer's issue under the Code's intestate succession provisions.⁴¹ If the decedent dies testate, however, and the killer is named in the will, the killer's portion may fall back into the residue or pass on to another residuary beneficiary.⁴² In *Misenheimer* the decedent had simply written into his will the same equal distribution to his eight children that intestate succession would have provided without a will. It would have been unfortunate if the slayer's children's claim to part of the decedent's estate depended not only on an act of their parent that they could not influence, but also on the uncontrollable (and normally desirable) decision of the decedent to write a will.

The decedent's intent is one consideration in determining whether a slayer's issue should take the slayer's share from the victim's estate by substitution. Anti-lapse statutes are said to affect the average testator's probable intentions if the testator had considered the possibility of surviving his beneficiary.⁴³ The intentions of a slain testator are questionable, however, because the court must speculate about what the testator would have intended had he known the slayer would kill him. Could Isam Misenheimer have thought, after having been shot on that fateful June morning, "I do not wish for John or his two sons to take from my estate"? North Carolina law supplants silence from the grave with a determination of public policy; if John's sons are innocent in the death of their grandfather, they may take their father's share.

In addition to policy considerations, a constitutional issue arises in construing the slayer statute. If a slayer statute is read to bar the succession rights of issue who claim through an ancestor slayer, a court may risk imposing the ancient penalty of corruption of the blood.⁴⁴ This penalty, which Blackstone called an "oppressive mark of [Norman] feudal tenure,"⁴⁵ extended the forfeiture penalty imposed on someone found guilty of treason or other felonies to his descendants. The descendants could not claim through the convicted ancestor and had to take title from a more remote ancestor. Professor Wade flatly denied that his model statute would work corruption of the blood, "since it does not prevent heirs of the slayer from inheriting from him property which he already owns, but merely keeps him from acquiring property in an illegal

39. See *supra* note 28.

40. UNIFORM PROBATE CODE § 2-803, 8 U.L.A. 172 (1983).

41. *Id.* Section 2-803(a) provides as follows:

A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

42. *Id.* See UNIFORM PROBATE CODE PRACTICE MANUAL 77 (R. Wellman 2d ed. 1977).

43. T. ATKINSON, *supra* note 11, § 140, at 778.

44. N. WIGGINS, *supra* note 12, § 203.

45. 4 W. BLACKSTONE, COMMENTARIES *388.

way."⁴⁶ Technically Wade is correct, but any law that bars issue from taking under a will by substitution because their ancestor is deemed to have predeceased the testator rather than actually having predeceased him, comes as close to a modern enactment of the corruption penalty as would legislation of the penalty itself. Since the Constitution forbids corruption of the blood,⁴⁷ any slayer statute should indicate clearly that it prevents only the wrongdoer himself from profiting from his wrong, and not innocent parties.

Other courts have disagreed about whether slayer statutes bar the slayer's issue from sharing in the decedent's estate. In addition to North Carolina, six states have adopted varying forms of the Wade model slayer act.⁴⁸ Of these six, only South Dakota adopted verbatim the provisions that unquestionably would have denied the slayer's share to his issue.⁴⁹ At least one Pennsylvania case, however, has held that a specific devise or bequest to the slayer would be included in the residuary estate, and if the slayer was named as a residuary beneficiary, his share would pass to the other residuary beneficiaries.⁵⁰

Among states that have slayer statutes not based on the Wade model, Kentucky has allowed the slayer's children to take from the decedent's estate, holding that the legislature had not intended to punish "an innocent child."⁵¹ In *McGhee v. Banks*,⁵² however, the Georgia Court of Appeals ruled against reading that state's anti-lapse statute in conjunction with the slayer statute. In *McGhee* a husband killed his wife. The husband had a daughter from a previous marriage who was not an heir of the murdered wife. The trial court had applied the state anti-lapse statute⁵³ so that the entire estate, which would have gone to the husband under the wife's will, passed to the husband's daughter. Because under the slayer statute, the property should have gone to the heirs of the person killed, the court of appeals reversed. Since the husband's daughter was not the wife's heir, the wife's property passed to her own nieces and nephew.⁵⁴ The *Misenheimer* plaintiffs cited *McGhee* as support for their case, but the court refused to follow it.⁵⁵

Ironically, a North Carolina court should have no difficulty in following the Georgia court if faced with facts similar to *McGhee*. The North Carolina

46. Wade, *supra* note 24, at 721.

47. U.S. CONST. art. III, § 3: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

48. IDAHO CODE § 15-2-803 (1979); OR. REV. STAT. § 112.455-.555 (1981); PA. STAT. ANN. tit. 20, § 8802 (Purdon 1975); R.I. GEN. LAWS § 33-1.1-1 to -1.1-16 (1969); S.D. CODIFIED LAWS ANN. § 29-9-2 (1976); WASH. REV. CODE ANN. § 11.84.010 to .84.900 (1967).

For an exhaustive study of slayer statutes in all jurisdictions, see Maki & Kaplan, *Elmer's Case Revisited: The Problem of the Murdering Heir*, 41 OHIO ST. L.J. 905 (1980).

49. S.D. CODIFIED LAWS ANN. § 29-9-2 (1976).

50. *In re Taylor's Estate*, 34 Delaware County 557 (Pa. C. 1948).

51. *Bates v. Wilson*, 313 Ky. 572, 574, 232 S.W.2d 837, 838 (1950).

52. 115 Ga. App. 155, 154 S.E.2d 37 (1967).

53. GA. CODE § 113-812 (1933) (current version at GA. CODE ANN. § 53-2-103 (1982)).

54. *McGhee*, 115 Ga. App. at 156, 154 S.E.2d at 39 ("We are convinced that to include heirs of the person killing who are not also heirs of the person killed . . . would not carry out the reasonable legislative intent [of the slayer statute].").

55. *Misenheimer*, 62 N.C. App. at 710, 303 S.E.2d at 417.

anti-lapse statute provides that when a beneficiary predeceases the testator, the beneficiary's issue take the property, provided they also would be testator's heirs under the Intestate Succession Act.⁵⁶ Under the facts of *McGhee* the slayer-husband's daughter was not the wife's heir, so she would not have taken anything from the victim-wife's estate under the anti-lapse statute. John Misenheimer's sons, however, were also Isam Misenheimer's heirs. If application of the anti-lapse statute had been the only question in administering Isam's will, John's sons could have taken John's share by substitution because they were both John's issue and Isam's heirs.

In considering *McGhee*, the *Misenheimer* court also was unpersuaded by the Georgia court's distinction between the actual death of a beneficiary, which would trigger the anti-lapse statute, and the fictive prior "death" of a slayer-beneficiary under the slayer statute. The Georgia court did not agree that a death in words could operate as a death in deed, so it held the slayer statute and the anti-lapse statute to operate exclusively of each other.⁵⁷ The North Carolina court had no such metaphysical inhibitions. For that, slayer's issue in this state can be glad.

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56. N.C. GEN. STAT. § 31-42(a) (1976). See *supra* note 9.

57. *McGhee*, 115 Ga. App. at 157-58, 154 S.E.2d at 39-40.

A Solution for Drafting Errors in Post-December 31, 1978 Charitable Remainder Trusts: *State ex rel. Edmisten v. Sands*

Federal estate tax laws permit a deduction for transfers to charitable organizations.¹ Prior to 1969 estate planners frequently used split-interest gifts to obtain this deduction. Property would be transferred in trust for both a private and charitable use and the estate would deduct the present value of the charitable interest. In the Tax Reform Act of 1969 Congress reacted to a perceived abuse² of split-interest gifts by prohibiting deduction of the value of the charitable interest unless the transfer was in a prescribed form.³ In *State ex rel. Edmisten v. Sands*⁴ the testator's will attempted to establish a particular type of charitable remainder trust known as a charitable remainder unitrust.⁵ During administration of the estate, it was discovered that the will lacked several administrative provisions that the Internal Revenue Service (IRS) requires in all instruments governing charitable remainder unitrusts.⁶

1. I.R.C. § 2055 (1982).

2. Congressional intent to correct past abuses is set forth in H.R. REP. NO. 413, 91st Cong., 1st Sess. 58 (1969), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 1645, 1704.

The rules of present law for determining the amount of a charitable contribution deduction in the case of gifts of remainder interests in trust do not necessarily have any relation to the value of the benefit which the charity receives. This is because the trust assets may be invested in a manner so as to maximize the income interest with the result that there is little relation between the interest assumptions used in calculating present values and the amount received by the charity.

See also *Ellis First Nat'l Bank v. United States*, 550 F.2d 9, 15-16 (Ct. Cl. 1977); *Gillespie v. Commissioner*, 75 T.C. 374, 377-78 (1980).

3. I.R.C. § 2055(e)(2) (1982). The restrictions on the form of split-interest gifts produce a high correlation between the interest assumptions used in calculating the present value of the charitable interest and the amount received by the charity. Thus, the amount of the charitable deduction matches the amount the charity ultimately receives, eliminating the abuses discussed *supra* note 2. The following four types of split-interest gifts are allowed: (1) charitable remainder trusts, I.R.C. § 664(d) (1982); (2) pooled income funds, *id.* § 642(c)(5); (3) remainder interests in a farm or personal residence, *id.* § 170(f)(3)(B); and (4) guaranteed annuity interests, *id.* § 2055(e)(2)(B).

I.R.C. § 664(d) (1982) defines two types of charitable remainder trusts—charitable remainder annuity trusts and charitable remainder unitrusts. A charitable remainder annuity trust is defined in section 664(d)(1) as a trust that distributes at least 5% of the corpus at least once a year to a private beneficiary. The term may extend for the life of the private beneficiary or not more than 20 years. The remainder must go to charity. A charitable remainder unitrust as defined in section 664(d)(2) is similar, but the private beneficiary receives a fixed percentage of the fair market value of the corpus, valued annually.

A pooled income fund is a fund established by a charity to which donors contribute property for which they have retained income interests in a private beneficiary. The annual distribution to each private beneficiary is determined by the income of the pooled assets. Guaranteed annuity interests are deductible if the annual income distributed to the charity is either a sum certain or a fixed percentage of the trust assets. A discussion of pooled income funds, remainder interests in a farm or personal residence, and guaranteed annuity interests can be found in Moore, *Estate Planning Under the Tax Reform Act of 1969: The Uses of Charity*, 56 VA. L. REV. 565 (1970).

4. 307 N.C. 670, 300 S.E.2d 387 (1983).

5. See *supra* note 3. For a discussion of the charitable remainder unitrust provisions of the Internal Revenue Code, see *infra* text accompanying notes 9-16.

6. See *infra* notes 12-16 and accompanying text.

Consequently, the IRS denied the deduction claimed for the charitable remainder and proposed an increase in estate tax liability. The North Carolina Supreme Court, however, upheld an order construing the will and trust to include the requisite administrative provisions.⁷

This note examines *Sands* and other cases granting similar relief for defective instruments governing charitable remainder trusts, the effect on the IRS of construction orders made during the post-1969 Tax Reform Act transition period, and the public policy arguments favoring such construction orders. The note also analyzes the North Carolina Supreme Court's use of North Carolina General Statutes section 36A-53(a)⁸ to uphold the construction order entered by the trial court in *Sands*.

To qualify as a charitable remainder unitrust, the trust must distribute at least once a year to a private beneficiary a fixed percentage (at least five percent) of the fair market value of the trust assets, valued annually.⁹ The trust term may extend for the life of the private beneficiary or for not more than twenty years.¹⁰ Upon termination of these distributions, the trust must provide for transfer of the remainder interest to a charitable organization recognized by the IRS.¹¹ In addition to the rules limiting the dispositive terms of the trust, the regulations promulgated under section 664 by the Treasury Department require that the governing instrument contain certain administrative provisions.¹² The Code also includes prohibitions against self-dealing,¹³ excess business holdings,¹⁴ investments that jeopardize the charitable purpose of the trust,¹⁵ and certain taxable expenditures.¹⁶

The 1969 revisions that contained the split-interest gift restrictions apply

7. See *infra* text accompanying notes 30-36.

8. N.C. GEN. STAT. § 36A-53(a) (Supp. 1983).

9. I.R.C. § 664(d)(2)(A)-(B) (1982).

10. *Id.* § 664(d)(2)(A).

11. *Id.* § 664(d)(2)(C).

12. See Treas. Reg. § 1.664-1(b) (1972) (noting the applicability of I.R.C. § 4947(a)(2) to charitable remainder trusts). I.R.C. § 4947(a)(2) (1982) subjects charitable remainder trusts to many of the private foundation rules. I.R.C. § 508(e) (1982) sets forth the rules relating to the required provisions in instruments governing private foundations and charitable remainder trusts under I.R.C. § 4947(a)(2) (1982). See *infra* text accompanying notes 13-16. Section 508(d)(2)(B) disallows a charitable deduction for transfers to trusts that do not contain provisions required under § 508(e).

13. I.R.C. § 4941 (1982). Acts of self-dealing as outlined in § 4941(d)(1) may include: (1) the sale, exchange, or leasing of property between a private foundation and a disqualified person; (2) the lending of money or other extension of credit between a private foundation and a disqualified person; (3) the furnishing of goods, services, or facilities between a private foundation and a disqualified person; (4) the payment of compensation by a private foundation to a disqualified person; (5) the transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation; or (6) the agreement by a private foundation to give money or other property to a government official. A disqualified person is defined in § 4946 and includes any manager of the foundation, anyone connected with a manager of the foundation, and anyone connected with the creator of the foundation.

14. *Id.* § 4943. A private foundation has excess business holdings if it and all disqualified persons own more than an aggregate 20% interest in a business.

15. *Id.* § 4944. Investments made without ordinary business care and prudence jeopardize the charitable purpose.

16. *Id.* § 4945. Taxable expenditures include amounts paid by a foundation: (1) to influence

to decedents dying after December 31, 1969.¹⁷ The complexity of these restrictions, however, led to a series of transition rules allowing amendments to non-conforming instruments.¹⁸ The present transition period covers instruments executed before December 31, 1978, and authorizes amendments through December 31, 1981.¹⁹

In *Sands*²⁰ the testator's will directed the executor to transfer the residue of the testator's estate to a charitable remainder unitrust. The trustee was instructed to distribute annually the lesser of the trust income or five percent of the fair market value of the trust assets,²¹ valued annually, to the decedent's sisters for life. The trust was to terminate upon the death of the last surviving sister, with the remainder to pass free of trust to a local church. Clearly, the trust met the dispositive requirements of Internal Revenue Code section 664(d)(2),²² but the will creating the trust failed to impose a prohibition against self-dealing and omitted several other required trust administration provisions.²³ Since the will was executed on August 23, 1979, more than seven months after the last grace period had expired, any reformation of the will would not have qualified for recognition under the transition rules.²⁴ The IRS disallowed the deduction of the charitable remainder because of the omission and proposed an increase in estate tax liability.

North Carolina's Attorney General, representing the charity and the public,²⁵ filed a complaint in superior court seeking an order construing the will to include the administrative provisions or, alternatively, an order retroactive to

legislation; (2) to influence the outcome of a public election; (3) as a grant to an individual for travel, study, or other similar purposes; and (4) as a grant to an organization other than a charity.

Rev. Rul. 72-395, 1972-2 C.B. 340 gives examples of language that will satisfy the administrative provision requirements. See also Wren, *Charitable Remainder Trusts: Some Considerations to Draftmanship*, 8 U. RICH. L. REV. 25 (1973).

17. Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(d), 83 Stat. 487, 580.

18. The Treasury Department granted the original transition period in Treas. Reg. § 1.664-1(f)(3) (1972). This regulation gave trusts created after July 31, 1969, but before December 31, 1972, until December 31, 1972, time to be amended. If the change resulted from judicial construction, Rev. Rul. 74-283, 1974-1 C.B. 283 provided that the construction would be effective as long as legal proceedings were initiated before December 31, 1972.

In 1974 Congress granted instruments executed after July 31, 1969, but before September 21, 1974, a grace period ending December 31, 1975, to amend nonconforming instruments or to initiate legal proceedings for construction. Act of Oct. 26, 1974, Pub. L. No. 93-483, § 3(a), 88 Stat. 1456, 1457-58 (codified as amended at I.R.C. § 2055(e)(3) (1982)). The Tax Reform Act of 1976, Pub. L. No. 94-455, § 1304(a), 90 Stat. 1520, 1715, expanded the transition period to cover instruments executed before December 31, 1977, and extended the cut-off date to December 31, 1977. The Revenue Act of 1978, Pub. L. No. 95-600, § 514(a), 92 Stat. 2763, 2883-84, extended the cut-off date to December 31, 1978. In 1980 Congress again amended § 2055(e)(3) to extend the cut-off date for instruments executed before December 31, 1978 to December 31, 1981. Act of Dec. 28, 1980, Pub. L. No. 96-605, § 301(a), 94 Stat. 3521, 3530.

19. I.R.C. § 2055(e)(3) (1982).

20. 307 N.C. 670, 300 S.E.2d 387 (1983).

21. Under Treas. Reg. § 1.664-3(a)(1) (1972), the lesser of the trust income or 5% of the fair market value of the assets, valued annually, is a permissible alternative for distribution.

22. See *supra* text accompanying notes 9-11.

23. See *supra* text accompanying notes 12-16.

24. See *supra* text accompanying notes 17-19.

25. N.C. GEN. STAT. § 36A-52(c) (Cum. Supp. 1983) grants the Attorney General power to enforce charitable trusts.

the decedent's death reforming the will to include the administrative provisions.²⁶ The trial court first noted the public policy of preserving charitable transfers whenever possible.²⁷ The court then reasoned that the failure to qualify the trust as a charitable remainder unitrust increased the estate tax liability and reduced the amount of the charitable bequest. According to the court, the testator intended to leave the maximum amount to charity and any reduction constituted a partial failure of the charitable bequest. The trial court concluded that this failure permitted it to invoke North Carolina General Statutes 36A-53(a), (b)²⁸ and order an administration of the trust in accordance with IRS requirements to fulfill the charitable intention of the testator.²⁹

On appeal, the North Carolina Supreme Court³⁰ noted that section 36A-53(b)³¹ applied only to instruments executed before December 31, 1978. The court rejected application of section 36A-53(b) as the basis for a construction or reformation order since the will had been executed on August 23, 1979, but upheld application of section 36A-53(a).³² According to the court, a trust must meet the three following conditions to qualify for relief under this subsection: (1) it must be a charitable trust; (2) it must be impracticable of fulfillment; and (3) the testator must not have provided any alternate disposition of the property.³³ The court found that the trust in *Sands* met the first and last conditions.³⁴ The court also found that the second condition was fulfilled, because the phrase "impracticable of fulfillment," as used in section 36A-53(a) and defined in section 36A-53(d), includes the failure of a charitable remainder trust "expressly [to] include a provision prohibiting the trustee from engaging in any act of self-dealing."³⁵ The court reasoned that the legislature intended

26. *Sands*, 307 N.C. at 672, 300 S.E.2d at 389.

27. See, e.g., N.C. GEN. STAT. § 36A-52(a) (Cum. Supp. 1983):

Declaration of Policy.—It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes . . . are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to affect the policy herein declared.

28. *Id.* § 36A-53(a)-(b). Section 36A-53(a) gives superior court judges the authority to order an administration if: (1) the testator manifested a general intention to devote the property to charity; (2) the trust has become illegal, impossible, or impracticable of fulfillment; and (3) no alternative disposition of the property was made. Section 36A-53(b) gives the court the authority to amend wills executed before December 31, 1978, so that charitable gifts will qualify for a federal estate tax deduction under the split-interest gift provisions of the Internal Revenue Code.

29. *Sands*, 307 N.C. at 672, 300 S.E.2d at 389.

30. *Sands* was certified for direct transfer to the North Carolina Supreme Court pursuant to N.C. GEN. STAT. § 7A-31 (1981 & Cum. Supp. 1983).

31. See *supra* note 28.

32. See *supra* note 28.

33. *Sands*, 307 N.C. at 675, 300 S.E.2d at 390.

34. *Id.* at 675, 300 S.E.2d at 391 ("Mr. Sands' intent [to provide scholarships for Methodist children] could hardly be more manifestly expressed . . . [T]he will does not provide for an alternate disposition of the corpus in the event the trust fails as a charitable trust.").

35. *Id.* at 676, 300 S.E.2d at 391. N.C. GEN. STAT. § 36A-53(d) (Cum. Supp. 1983) defines "impracticable of fulfillment as:

[T]he failure of any trust for charity, testamentary or inter vivos, (including, . . . charitable remainder trusts described in section 664 of the Internal Revenue Code of 1954 . . .) to include, if required to do so by section 508(e) or section 4947(a) of the Internal

section 36A-53(a) to apply whenever a charitable remainder trust failed to incorporate "the 'boilerplate' required by IRS regulations."³⁶ Thus, the application of section 36A-53(a) as a basis for relief was justified.

In fashioning an order to fulfill the testator's intent as directed by section 36A-53(a), the court noted that the IRS treats an instrument as speaking from its effective date.³⁷ A reformation order might be viewed to speak only from the date of entry,³⁸ and thus would not ensure favorable tax treatment of the trust. An order of construction, however, treats the instrument as if it had always contained the provisions, thus ensuring a charitable deduction and fulfillment of the trust purpose.³⁹ Consequently, the court affirmed the trial court's construction order and vacated the order of reformation. In evaluating the soundness of the court's holding, it is necessary to consider the background against which the case was decided.

Instruments drafted after the revision of the split-interest gift rules often proved defective because the complexity of the provisions led many drafters to omit language critical to favorable tax treatment of the charitable interest. State courts became an important vehicle for saving the charitable deduction, and orders construing or reforming charitable remainder trust instruments similar to that granted in *Sands* were common under the transition rules.⁴⁰ For example, in *Estate of Bird*,⁴¹ a New York Surrogate's Court construed a trust that did not contain administrative provisions required by the regulations. A New York statute had obviated the need for amendment of trust instruments to preserve favorable tax status by providing for administration of private charitable trusts and split-interest trusts in accordance with federal requirements.⁴² The New York court granted construction of the trust in *Bird* based on this statute. Other cases also have demonstrated the willingness of state courts to grant the relief sought, as long as the executor or trustee was seeking construction of administrative rather than dispositive provisions.⁴³

These results were justified on public policy grounds. A construction or-

Revenue Code of 1954 . . . , the provisions relating to governing instruments set forth in section 508(e)

Since the *Sands* trust was charitable and required by § 508(e) and § 4947(a) to include the provisions relating to governing instruments in § 508(e), *see supra* text accompanying notes 12-16, any failure to include the various administrative provisions made the trust "impracticable of fulfillment."

36. *Sands*, 307 N.C. at 676, 300 S.E.2d at 391.

37. *Id.* at 677, 300 S.E.2d at 392.

38. *Id.*

39. *Id.*

40. *See, e.g., In re Estate of Burdon-Miller*, 456 A.2d 1266 (Me. 1983); *In re Estate of Barker*, 82 Misc. 2d 974, 370 N.Y.S.2d 404 (Surr. Ct. 1975); *In re Will of Hammer*, 81 Misc. 2d 25, 362 N.Y.S.2d 753 (Surr. Ct. 1974); *Estate of Bird*, 69 Misc. 2d 1015, 332 N.Y.S.2d 85 (Surr. Ct. 1972).

41. 69 Misc. 2d 1015, 332 N.Y.S.2d 85 (Surr. Ct. 1972).

42. N.Y. EST. POWERS & TRUSTS LAW § 8-1.8 (McKinney Supp. 1983-84).

43. *See supra* note 40. *Cf. Shriners' Hosp. for Crippled Children v. Maryland Nat'l Bank*, 270 Md. 564, 312 A.2d 546 (1973) (reading the will as a whole testator would prefer enforcement of dispositive provisions to loss of the charitable deduction; court has no power to modify an instrument when the action would conflict with testator's intent).

der during the transition period preserved a charitable deduction for the estate. This decrease in the estate tax liability increased the amount ultimately available for charitable purposes, which furthered the policy favoring charitable contributions.⁴⁴ These orders also promoted the policy favoring enforcement of the Internal Revenue Code. Any relief, to be effective, had to order compliance with the 1969 Tax Reform Act and regulations. Thus, these orders helped prevent a recurrence of the earlier abuses of split-interest gifts. Construction orders also made charitable remainder trusts more available to people who could not afford an estate planning specialist. The complex 1969 revisions had removed drafting of charitable remainder trusts from the competency of general practitioners.⁴⁵ People unable to retain the services of an estate planning specialist might have avoided charitable remainder trusts. Construction orders, however, led more general practitioners to recommend charitable remainder trusts, since they knew that a minor drafting defect could be cured. In addition to the public policy favoring construction orders, several state legislatures explicitly granted relief guaranteeing charitable remainder trust status.⁴⁶ Orders construing wills to include the requisite provisions merely followed public policy and these statutes.

In nontransition-period cases it was uncertain whether state courts would display the same willingness to grant relief solely on public policy grounds. Some statutes obviating the need for trust amendments did not apply to nontransition cases.⁴⁷ Additionally, in *Commissioner v. Estate of Bosch*⁴⁸ the United States Supreme Court held that when federal estate tax liability depends on a state-created property right, the IRS is not bound by a state court determination of that right unless the state's highest court had ruled on the question. The IRS implicitly indicated that *Bosch* would apply to nonqualifying charitable remainder trusts when it suspended the application of *Bosch* in transition-period cases.⁴⁹ Thus, in deciding whether to grant a nontransition-period construction order, state courts had to balance public policy in favor of the order against the absence of a statute and the possibility that the order might be moot because the IRS would not be bound.

The first test of a court's willingness to grant relief in a nontransition-period case arose in *In re Will of Stalp*.⁵⁰ In *Stalp* the testatrix left property in

44. See, e.g., *supra* note 27. See also *Keith v. Scales*, 124 N.C. 497, 515, 32 S.E. 809, 812 (1899) ("Courts incline strongly in favor of charitable gifts, and take special care to enforce them.").

45. This problem with the 1969 revisions was identified in *Pedrick, And then to Charity: Charitable Remainder Trusts and the Federal Estate Tax*, 17 INST. ON EST. PLAN. §§ 303-07 (1983).

46. See, e.g., CAL. CIV. CODE §§ 2271.1-2271.2 (West Supp. 1984); MD. EST. & TRUSTS CODE ANN. §§ 14-301 to -308 (1974 & Supp. 1983); N.C. GEN. STAT. § 36A-53(b) (Cum. Supp. 1983); N.Y. EST. POWERS & TRUSTS LAW § 8-1.8 (McKinney Supp. 1983-84).

47. See, e.g., N.C. GEN. STAT. § 36A-53(b) (Cum. Supp. 1983) (applies only to wills executed before December 31, 1978).

48. 387 U.S. 456 (1967) (IRS not bound by state court's determination of the effect of an instrument releasing a general power of appointment).

49. Rev. Rul. 74-283, 1974-1 C.B. 157. See also *Wissbrun, Bosch and its Aftermath: The Effect of State Court Decisions on Federal Tax Questions*, 114 TR. & EST. 8 (1975).

50. 79 Misc. 2d 412, 359 N.Y.S.2d 749 (Surr. Ct. 1974).

trust to pay one hundred dollars a month to her aunt for life and the remainder to a hospital. The aunt's income interest did not comply with the required annual distribution of at least five percent of the trust corpus, as required in the charitable remainder trust rules.⁵¹ The executor petitioned for a construction of the trust instrument to save the charitable deduction even though the action fell between amendments to the transition rules. The court granted relief by segregating the private annuity interest from the charitable interest, stating that public policy compelled the result notwithstanding its nonbinding effect on the IRS. The result in nontransition-period cases remained uncertain after *Stalp*, however, because the court seemed influenced by a pending amendment to the transition rules.⁵²

Last Will and Testament of Kander,⁵³ however, resolved any remaining doubt, at least in New York, in favor of nontransition-period construction orders. In *Kander* the testator directed that ninety percent of the income and remainder from a trust established by his will be paid to charity. The remaining ten percent was devised to a private beneficiary and an unrecognized charity. Despite the absence of an applicable transition rule, the court ordered segregation of the two interests into two trusts so that the ninety percent interest would qualify for a charitable deduction. The court reasoned that any other result "would be inconsistent with reason and justice."⁵⁴

The trial court's decision in *Sands* followed the view of the New York courts in *Stalp* and *Kander* that public policy⁵⁵ compels a construction order. The trial court also used the statutory authority in section 36A-53(a) to grant the construction order. But *Sands* presented an even stronger case for construction. Not only did public policy and section 36A-53(a) support construction, but the supreme court did not have to consider the decision's possible inconclusive effect on the IRS.⁵⁶ Viewed in this light, the North Carolina Supreme Court's decision in *Sands* was justified.

Arguably, however, section 36A-53(a) did not support the construction order in *Sands*. The words "illegal," "impossible," and "impracticable of fulfillment" used in section 36A-53(a) connote a total failure of a charitable gift rather than mere disqualification for a federal estate tax deduction. Disqualification of the trust in *Sands* would have reduced the amount available to the charity but would not have made the gift any less enforceable. A greater failure than that in *Sands* should be required to invoke the power granted in section 36A-53(a). Section 36A-53(b) strengthens this view because it specifically mentions the failure of a trust to qualify for a federal estate tax deduction

51. See *supra* text accompanying note 9.

52. *Stalp*, 79 Misc. 2d at 421, 359 N.Y.S.2d at 756. See also *In re Will of Rayvid*, 88 Misc. 2d 372, 388 N.Y.S.2d 211 (Surr. Ct. 1976) (later case granting similar relief decided between amendments).

53. 115 Misc. 2d 386, 454 N.Y.S.2d 229 (Surr. Ct. 1982).

54. *Id.* at 388, 454 N.Y.S.2d at 231.

55. See *supra* text accompanying notes 44-46.

56. Because the decision came from the state's highest court, the IRS had to accept the court's determination and allow the charitable deduction. See *supra* text accompanying notes 48-49.

under the charitable remainder trust rules.⁵⁷ If the legislature had wanted disqualification to invoke the authority in section 36A-53(a) it would have specifically mentioned it in that section or in the definition of impracticable of fulfillment.⁵⁸

Moreover, the court was not without a statutory alternative. The Charitable Remainder Trusts Administration Act⁵⁹ states that:

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 . . . of the Code in the absence of this Article shall be administered in accordance with this Article.⁶⁰

The Act contains all of the administrative provisions necessary to qualify the trust as a charitable remainder trust.⁶¹ This statute is more clearly applicable in *Sands* than is section 36A-53(a) because it specifically mentions failure to qualify for a deduction as a condition to its applicability. Moreover, the IRS has recognized this type of statute as effective to preserve a charitable deduction.⁶² The trial court did not use the Act because it was not enacted until after the court had decided the case.⁶³ The Act was passed during the pendency of the appeal, however, and made retroactive to the creation date of the trust.⁶⁴ Given the Act's clearer applicability and its acceptance by the IRS, the supreme court in *Sands* should have considered employing its provisions instead of affirming the use of section 36A-53(a).

The use of section 36A-53(a) instead of the Charitable Remainder Trusts Administration Act creates problems because the court had to specify the relief granted to save the charitable deduction.⁶⁵ The court's distinction between reformation and construction is not justified. Reformation has been defined as "a remedy to parties and the privies of parties to written instruments, to rectify them where they fail, through mistake or fraud, to conform

57. N.C. GEN. STAT. § 36A-53(b) (Cum. Supp. 1983) provides:

In the case of a will executed before December 31, 1978, . . . if a federal tax deduction is not allowed at the time of the decedent's death . . . any judge may . . . order an amendment to the trust so that the remainder interest is in a trust which is a charitable remainder [trust].

58. See *supra* note 35.

59. N.C. GEN. STAT. §§ 36A-59.1 to -59.7 (Cum. Supp. 1983).

60. *Id.* § 36A-59.2.

61. *Id.* §§ 36A-59.4 to -59.6.

62. As noted in *supra* note 12, charitable remainder trusts are subject to the governing instrument requirements of I.R.C. § 508(e) (1982). Treas. Reg. § 1.508-3(d)(1) (1972) states that governing instruments will be deemed to meet the § 508(e) requirements if valid provisions of state law either require the foundation to operate in conformity with the mandatory language (as in the Charitable Remainder Trusts Administration Act) or treat the language as being contained in the governing instrument. These rules apply without regard to any transition rules. See also Rev. Rul. 75-38, 1975-1 C.B. 161.

63. The Charitable Remainder Trusts Administration Act was enacted on June 18, 1982. The trial court entered its order on February 16, 1982.

64. Charitable Remainder Trusts Administration Act, ch. 1252, § 2, 1982 N.C. Sess. Laws 149 states that "this act relates back to the date of creation of the trust."

65. See *supra* text accompanying notes 37-39.

with the real agreement.”⁶⁶ Construction, on the other hand, is “an effort to find the mind of the testator as expressed in the will.”⁶⁷ In *Sands* the court added trust administration language that mistakenly had been omitted from the will, when it should have discerned the intended meaning of language contained in the will. This process falls within the definition of reformation, yet the court classified it as construction to save the charitable deduction.⁶⁸ Instead of using the two doctrines interchangeably, the court could have granted general relief under the Charitable Remainder Trusts Administration Act. This basis for relief would have preserved the charitable deduction⁶⁹ and the integrity of the two doctrines.

Whether based on the Charitable Remainder Trusts Administration Act or section 36A-53(a), the *Sands* decision probably will not lead to judicial construction of defective *private* trusts so that they too will qualify for favorable tax treatment. Although the policy that supports making tax favored trusts more available to the average taxpayer⁷⁰ also applies to private express trusts, no public policy favors these conveyances and no specific statutory authority to grant relief exists. Furthermore, the use of charitable remainder trusts is limited. Favorable construction of other trusts would result in increased judicial supervision of private express trusts. This might unduly burden the courts and probably would override any factors in favor of extending *Sands* to other trusts.

The North Carolina Supreme Court's construction of the will and trust in *Sands* certainly benefited the private income beneficiaries and the charitable remainderman. More importantly, the result demonstrated the court's willingness to forgive technical drafting errors that could jeopardize a charitable deduction. Yet given the somewhat strained application of section 36A-53(a), in future cases the courts of North Carolina should consider granting relief pursuant to the recently enacted Charitable Remainder Trusts Administration Act. Either alternative, however, should appeal to attorneys in North Carolina. Armed with a healthy respect for the complex charitable remainder trust rules and two avenues for correcting mistakes, practitioners should not hesitate to recommend these trusts to effect their clients' charitable aims.

DANIEL LOUIS JOHNSON, JR.

66. *Henderson v. Henderson*, 158 Tenn. 452, 453, 14 S.W.2d 714, 715 (1929).

67. *Baker v. Edge*, 174 N.C. 100, 102, 93 S.E. 462, 463 (1917).

68. See *supra* text accompanying notes 37-39.

69. See *supra* notes 61-64 and accompanying text.

70. See *supra* text accompanying note 45.

The Safe Roads Act: The Dram Shop Provisions

A study conducted by the National Highway Traffic Safety Administration revealed that in 1979 two million of the nation's traffic accidents were related to alcoholic beverage consumption.¹ Fifty-five percent of fatal accidents, twenty-five percent of nonfatal accidents, and eight percent of accidents causing only property damage involved alcoholic beverage consumption.² Teenage drivers who drank were involved in accidents more often than older drivers who drank.³ If North Carolina statistics mirror these national results, more than half of the 1320 persons killed last year in North Carolina traffic accidents⁴ died in alcohol-related crashes. The North Carolina General Assembly responded to the problem of underage drunken drivers by enacting dram shop provisions⁵ as part of the 1983 Safe Roads Act.⁶ The dram shop provisions⁷ allow persons injured in vehicular accidents caused by the negligent driving of intoxicated, underage drinkers to sue the commercial vendors who furnished the underage persons with alcoholic beverages. Recent common-law decisions⁸ have expanded the basis of liability of those who supply alcoholic beverages. This note reviews the history of dram shop liability, examines the dram shop provisions of the Safe Roads Act, and explores recent common-law developments.

At common law a person was not liable for harm caused by an intoxicated person to whom he furnished alcoholic beverages.⁹ The rationale for denying recovery was that "the drinking of the liquor, not the remote furnishing of it, was the proximate cause of the injury."¹⁰ In *Sutton v. Duke*¹¹ the North Carolina Supreme Court defined proximate cause: "In this jurisdiction, to warrant a finding that negligence . . . was a proximate cause of an injury, it must appear that the tort-feasor should have reasonably foreseen that injuri-

1. NAT'L CENTER FOR STATISTICS AND ANALYSIS, U.S. DEPT OF TRANSP., PUB. NO. 806-269, ALCOHOL INVOLVEMENT IN TRAFFIC ACCIDENTS: RECENT ESTIMATES FROM THE NATIONAL CENTER FOR STATISTICS AND ANALYSIS, 8 (1982). For purposes of these statistics, "alcohol-related" means an accident involving a driver or pedestrian with a blood alcohol concentration greater than or equal to .01.

2. *Id.* at 6-7.

3. A. WILLIAMS, TEENAGE DRIVERS AND ALCOHOL USE (Insurance Inst. for Highway Safety, Research Note # 101 1982).

4. N.C. DEPT OF TRANSP., COLLISION REPORTS AND EVALUATION SECTION, TRAFFIC DATA BRANCH, NORTH CAROLINA TRAFFIC ACCIDENT FACTS 1 (1982).

5. N.C. GEN. STAT. § 18B-120 to -129 (1983).

6. Safe Roads Act of 1983, ch. 435, 1983 N.C. Adv. Legis. Serv. 52, 89-92.

7. *Id.* § 37.

8. *Chastain v. Litton Systems*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 2454 (1983); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

9. *Spencer v. Fisher*, 161 N.C. 116, 76 S.E. 731 (1913) (dictum); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 395 S.E.2d 734 (1983).

10. *Hutchens v. Hankins*, 63 N.C. App. 1, 5, 303 S.E.2d 584, 587, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

11. 277 N.C. 94, 176 S.E.2d 161 (1970).

ous consequences were likely to follow from his negligent conduct."¹² Because one can foresee that injurious consequences are likely to follow from serving alcohol to an intoxicated or underage person, the concept of proximate causation must embrace more than foreseeability. One commentator has observed that courts sometimes rely on proximate cause to hold a defendant not liable when the actual basis for the decision is public policy: "These cases probably reflect a judgment that under the circumstances a wrongdoer other than the defendant should be held responsible rather than a determination that the risk causing injury is outside the scope of defendant's conduct."¹³ The policy determination that the real culprit is the individual consuming the liquor rather than the person furnishing it, is one explanation for the common-law rule excluding the alcohol provider from liability. Many courts, however, no longer adhere to the common-law rule.¹⁴ These courts recognize a cause of action against suppliers of alcoholic beverages either on the basis of negligence per se¹⁵—violation of criminal statutes prohibiting the sale of such beverages to minors¹⁶ and visibly intoxicated persons¹⁷—or ordinary negligence.¹⁸

Because no action existed at common law, a number of states enacted dram shop acts during the prohibition movement in the late nineteenth century.¹⁹ Sixteen states presently have such laws.²⁰ North Carolina enacted a limited dram shop act in 1874;²¹ the General Assembly repealed this statute in 1971.²² Thus, no statutory basis for dram shop liability existed in North Caro-

12. *Id.* at 107, 176 S.E.2d at 168-69.

13. Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C.L. REV. 961, 971 (1972).

14. For a discussion of the common-law rule, its underlying rationale, and departures from the rule, see *Hutchens v. Hankins*, 63 N.C. App. 1, 5-8, 303 S.E.2d 594, 587-89, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

15. Negligence per se results from the violation of a statute designed to protect the class of persons in which the plaintiff is included against the risk of harm that has occurred as a result of the violation. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 36 (4th ed. 1971); *see also Hutchens v. Hankins*, 63 N.C. App. 1, 19, 303 S.E.2d 584, 595, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

16. *E.g.*, *Davis v. Shiappacosse*, 155 So. 2d 365 (Fla. 1963); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Pike v. George*, 434 S.W.2d 626 (Ky. 1968).

17. *E.g.*, *Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 363 U.S. 903 (1960); *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

18. *Chastain v. Litton Systems*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 2454 (1983); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Mason v. Roberts*, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

19. *Dram Shop Liability I—Statutory Liability*, FOR THE DEFENSE, Dec. 1973, at 129; Mosher, *Dram Shop Liability and the Prevention of Alcohol-Related Problems*, 40 J. OF STUD. ON ALCOHOL 773 (1979).

20. *See, e.g.*, ALA. CODE § 6-5-71 (1981); ALASKA STAT. § 04.21.020 (1980); CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1983); CONN. GEN. STAT. ANN. § 30-102 (1975); FLA. STAT. ANN. § 768.125 (Hart. Supp. 1982); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1983); IOWA CODE ANN. § 123.92 (West Supp. 1983); ME. REV. STAT. ANN. § 340.95 (1954); MICH. STAT. ANN. § 18.993 (Callaghan 1980); MINN. STAT. ANN. § 340.95 (West Supp. 1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1982); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1964); R.I. GEN. LAWS § 3-11-1 (1976); VT. STAT. ANN. tit. 7, § 501 (1972).

21. Act of Jan. 29, 1874, ch. 68, § 2, 1873 N.C. Sess. Laws 94.

22. Act of July 16, 1971, ch. 872, § 3, 1971 N.C. Sess. Laws 1372.

lina when the Safe Roads Act²³ passed in 1983.

Although the portion of the Act dealing with dram shop liability²⁴ creates a cause of action traditionally unavailable at common law, it is limited in scope. Dram shop liability is ordinarily strict liability.²⁵ Section 18B-121(1) of the North Carolina General Statutes, however, provides that a defendant seller is liable only if he or his agent *negligently* furnishes alcohol to an underage person.²⁶ Presumably, a defendant would have a defense against liability under this statute if he reasonably relied on an identification card with a falsified birth date presented by an underage buyer.²⁷

Another indication of the Act's restricted scope is that while many other dram shop statutes compensate any alcohol-related injury,²⁸ section 18B-121(3) provides compensation only in cases of injury arising out of a vehicular accident.²⁹ The injury must also be caused by the impaired driving of a person under the age required for the legal purchase of alcoholic beverages.³⁰ Sales to persons over the drinking age that result in injury do not give rise to a cause of action under the Act.

Even if these conditions are satisfied, section 18B-121(1) limits the class of defendants who may be held liable under the Act to licensed suppliers of alcoholic beverages.³¹ Social hosts, therefore, are exempt from statutory liability. Section 18B-123 also exempts certain enumerated classes of licensees.³²

Although the dram shop provisions are limited in nature, a number of provisions modify the common law. In cases of multiple defendants, anyone furnishing a beverage will be liable if the beverage "contributes to, in whole or in part, an underage driver's being subject to an impairing substance."³³ At common law, when the combined negligence of several actors brought about a

23. Safe Roads Act of 1983, ch. 435, 1983 N.C. Adv. Legis. Serv. 52.

24. *Id.* § 37.

25. *Konsler v. United States*, 288 F. Supp. 895 (N.D. Ill. 1968); W. PROSSER, *supra* note 15, § 81.

26. N.C. GEN. STAT. § 18B-121(1) (1983).

27. N.C. GEN. STAT. § 18B-122 (1983) provides:

Proof of good practices (including but not limited to, instruction of employees as to laws regarding the sale of alcoholic beverages, training of employees, enforcement techniques, admonishment to patrons concerning laws regarding the purchase or furnishing of alcoholic beverages, or detention of a person's identification documents in accordance with G.S. 18B-129 and inquiry about the age or degree of intoxication of the person), evidence that an underage person misrepresented his age, or that the sale or furnishing was made under duress is admissible as evidence that the permittee was not negligent.

28. For example, courts have allowed recovery under the Illinois Dram Shop Act, ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1983) when an intoxicated person fractured another person's skull in a bar, *Osborn v. Leuffgen*, 381 Ill. 295, 45 N.E.2d 622 (1942), an intoxicated person killed a bartender, *Meade v. Boggiano*, 127 Ill. App. 2d 344, 262 N.E.2d 310 (1970), and an intoxicated person shot his wife, *Edenburg v. Riggins*, 13 Ill. App. 3d 830, 301 N.E.2d 132 (1973).

29. N.C. GEN. STAT. § 18B-121(3) (1983).

30. *Id.* § 18B-121(1).

31. *Id.*

32. *Id.* § 18B-125. These include licensees who hold a: brown bagging permit, *id.* § 18B-1001(7), special occasion permit, *id.* § 18B-1001(b), limited special occasion permit, *id.* § 18B-1001(9), special one time permit, *id.* § 18B-1002, commercial permit, *id.* § 18B-1100, or any combination of the above.

33. *Id.* § 18B-121(2).

single, indivisible injury to a plaintiff, no one defendant was liable unless his contribution to plaintiff's harm was "substantial" or "material."³⁴ The General Assembly presumably included section 18B-121(2) in the dram shop provisions to reduce the inevitable litigation and confusion in cases involving multiple suppliers of beverages. By requiring only that negligently supplied alcoholic beverages contribute in some "part" to an underage person's impairment,³⁵ this section relieves a plaintiff of the burden of proving that the contribution of any one defendant rises to the elusive level of "substantiality."³⁶

The dram shop provisions also permit recovery by an expansive class of plaintiffs for a wide array of injuries. Compensable injury is defined as including, though not limited to, "personal injury, property loss, loss of means of support, or death."³⁷ Under this provision, if an intoxicated, underage person negligently causes an automobile collision, dependents of injured third parties as well as the dependents of the intoxicated driver have a cause of action against the seller of the alcohol for loss of support. Section 18B-121(2) makes clear that a cause of action by dependents of the intoxicated driver is not barred by the underage driver's contributory negligence: "Nothing in G.S. 28A-18-2(a) or subdivision (1) of this section shall be interpreted to preclude recovery under this Article for loss of support or death on account of injury to or death of the underage person."³⁸ The intoxicated, underage driver, however, does not have any cause of action against the seller because an "aggrieved party" under section 18B-121(1) "does not include the underage

34. RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965); W. PROSSER, *supra* note 15, § 41. Substantiality is a slippery concept usually defined in terms of what it is not—e.g., a match in a forest fire. W. PROSSER, *supra* note 15, § 41.

35. N.C. GEN. STAT. § 18B-121(2) (1983).

36. The extent that § 18B-121(2) modifies the common law is uncertain. Read literally, this section dispenses with causation in fact. In cases of multiple suppliers, the alcohol supplied by any one will always contribute in some "part" to an underage person's impairment. Should liability arise when an underage person drinks a small quantity of liquor at a second bar after consuming such a large quantity of liquor at the first bar that the accident would have occurred in spite of the contribution of the second bar?

The legislature created a cause of action under the Safe Roads Act based upon the negligent sale of alcoholic beverages. In any negligence action a plaintiff must prove not only that the defendant acted unreasonably but also that the defendant's conduct was the actual cause of injury. RESTATEMENT (SECOND) OF TORTS § 432 (1965). Because the accident would have occurred despite the contribution of the second bar, the alcoholic beverages served by the second bar owner are not the actual cause of injury. Thus, under the common law, the second bar owner would not be liable. Arguably, the same requirement of actual causation exists in the negligence action created by the Safe Roads Act. If so, the effect of § 18B-121(2) is to relieve a plaintiff of the burden of going forward with evidence that the contribution of any one defendant is substantial. A defendant, however, would not be precluded from presenting evidence that the accident would have occurred without its contribution.

37. N.C. GEN. STAT. § 18B-121(2) (1983). In contrast to this provision, which explicitly allows recovery for economic harm, at common law if a person suffers loss as result of injury to another, recovery is limited to compensation for harm to relational interests. W. PROSSER, *supra* note 15, § 125. In a consortium action, for example, a spouse can recover only for loss of society, comfort, and affection. See *Nicholson v. Hugh Chatham Mem. Hosp.*, 300 N.C. 295, 266 S.E.2d 818 (1980).

38. N.C. GEN. STAT. § 18B-121(2) (1983). At common law, contributory negligence of the underage driver barred recovery by his dependents or survivors for economic or relational losses. W. PROSSER, *supra* note 15, § 125.

person."³⁹

Finally, section 18B-121(3) may also revise the common law. This section provides that "[a]n aggrieved party has a claim for relief for damages against a permittee or local Alcoholic Beverage Control Board if . . . the injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while impaired."⁴⁰ A literal reading suggests that a cause of action will be recognized if the underage driver's negligent operation of his vehicle rather than his impaired condition caused the plaintiff's injuries. In most cases involving drunken driving, a person's impaired condition causes his negligent driving and the cause of injury is the alcohol negligently supplied. Suppose, however, that an underage person was knowingly driving with bad brakes, and that brake failure, rather than his impaired condition, caused the accident. Under common law, the bad brakes would be the proximate cause of injury, and the party furnishing alcoholic beverages to the underage person would not be liable.⁴¹

Does section 18B-121(3) imply, however, that once an underage person becomes impaired any subsequent accident caused by his negligence, whether due to his impaired condition, will give rise to a cause of action against the party who supplied the underage person with alcohol? The General Assembly may have recognized that in a small number of cases an underage person's impaired condition plays no part in bringing about an accident he negligently caused. Thus, the General Assembly may have assumed that society's interest in deterring drunken driving and minimizing litigation outweighs the defendant's interests in these few cases. Perhaps the General Assembly consciously decided to foreclose debate over the cause of accidents involving intoxicated underage drivers. Read literally, section 18B-121(3) conclusively presumes that an accident involving an intoxicated, underage driver is caused by his drunken condition.

On the other hand, section 18B-121(3) can be read to stipulate that "the underage driver's negligent operation of a vehicle *while so impaired*" must be the proximate cause of the injury.⁴² Arguably, the words "while so impaired" require that impairment contribute to the negligent driving. Thus construed, the statute requires that negligent driving due to impairment cause the injury. In the context of a negligence action this construction is preferable.

In addition to the statutory cause of action created by the dram shop provisions, a common-law cause of action is available under North Carolina law. Section 18B-128 provides that "[t]he creation of any claim for relief by the statute may not be interpreted to abrogate or abridge any claim for relief under the common law."⁴³ In two recent cases applying North Carolina law,

39. N.C. GEN. STAT. § 18B-121(1) (1983).

40. *Id.* § 18B-121(3) (1983).

41. See *Bell v. Page*, 271 N.C. 396, 156 S.E.2d 711 (1967); *Pinyan v. Settle*, 263 N.C. 578, 139 S.E.2d 863 (1965); *Reason v. Singer Sewing Mach. Co.*, 259 N.C. 264, 130 S.E.2d 397 (1963).

42. N.C. GEN. STAT. § 18B-121(3) (1983).

43. *Id.* § 18B-128.

*Hutchens v. Hankins*⁴⁴ and *Chastain v. Litton Systems*,⁴⁵ courts have found providers of alcohol liable for injuries caused by intoxicated drivers over the age required for the legal purchase of alcohol—a situation outside the scope of the dram shop provisions. In these cases, as under the statute, liability was predicated on negligence.

In *Hutchens* the North Carolina Court of Appeals upheld a cause of action against a tavern that served a large quantity of beer to an adult patron, including some allegedly after he had become intoxicated. Fifteen minutes after leaving the tavern, the patron's car collided with another vehicle, killing plaintiff's husband and injuring plaintiff and her son.⁴⁶ Plaintiff argued that the tavern was negligent per se on the basis of the tavern's violation of North Carolina General Statutes section 18A-34,⁴⁷ which prohibited the sale of alcoholic beverages by a licensee to a person known to be intoxicated.⁴⁸

The *Hutchens* court agreed with plaintiff that statutes giving rise to a per se cause of action based on negligence do not create a new cause of action, but establish a minimum standard for what constitutes reasonable care.⁴⁹ For a criminal statute to set a minimum standard of care so that its violation is negligence per se, the court noted that the statute must be one to promote safety, the plaintiff must be a member of the protected class, and the defendant must be a person upon whom the statute imposes specific duties.⁵⁰ The court construed one of the purposes of section 18A-34 to be "the protection of the community at large from the possible injurious consequences of contact with an intoxicated person."⁵¹ Because plaintiff was a member of the general public and defendant was a licensee to whom the alcohol control laws applied, the court adopted "the requirements of G.S. 18A-34 as the minimum standard of conduct for defendant-licensees."⁵² Therefore, defendant's conduct in selling alcoholic beverages to a person known to be intoxicated was negligent per se. The court, however, did not decide whether social hosts and off-premises retailers were subject to liability, or whether an intoxicated person served alcoholic beverages could recover for his own injuries.⁵³

44. 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

45. 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 2454 (1983).

46. *Id.* at 3, 303 S.E.2d at 586.

47. This statute was repealed in 1981 but a similar statute is codified at N.C. GEN. STAT. § 18B-305 (1983).

48. N.C. GEN. STAT. § 18A-34(a)(2) (repealed by ch. 412, § 1, 1981 N.C. Session Laws 438).

49. *Hutchens*, 63 N.C. App. at 13, 303 S.E.2d at 592.

50. *Id.* at 15, 303 S.E.2d at 593 (quoting *Marusa v. District of Columbia*, 484 F.2d 828, 834 (D.C. Cir. 1973)).

51. *Id.* at 16, 303 S.E.2d at 593.

52. *Id.*

53. *Id.* at 5, 303 S.E.2d at 587. The court did find that one purpose of the statute prohibiting sales to persons known to be intoxicated was the protection of these persons from the adverse consequences of intoxication. *Id.* at 16, 303 S.E.2d at 593. Nevertheless, *Hutchens* recognizes a cause of action based on negligent behavior. Thus, contributory negligence should bar recovery. See *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965) (statute prohibiting sale of intoxicants to intoxicated persons and giving rise to action for negligence does not eliminate defense of contributory negligence). *Contra* *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965).

Because N.C. GEN. STAT. § 18B-305(a) (1983) is violated only by "knowingly" selling to

Prior to *Hutchens* the United States Court of Appeals for the Fourth Circuit had concluded in *Chastain v. Litton Systems*⁵⁴ that the North Carolina Supreme Court would impose civil liability on a licensee who violates a law prohibiting the sale of alcoholic beverages to an intoxicated person.⁵⁵ Defendant in that case, however, was not a licensee but an employer who sponsored a Christmas party during working hours for its employees, one of whom became intoxicated and caused an automobile accident after leaving work.⁵⁶ Because defendant was not a seller of alcohol, plaintiff could not argue negligence per se based on a violation of section 18A-34. Nevertheless, the court stated that the laws prohibiting licensees from selling alcoholic beverages to intoxicated persons "disclose state policy toward persons who dispense alcoholic beverages in capacities other than as social hosts."⁵⁷ On the strength of this policy the court upheld plaintiff's cause of action against the employer on ordinary negligence principles:

[W]e conclude that Litton was negligent if it failed to exercise ordinary care in furnishing . . . alcoholic beverages to Beck knowing that he had become intoxicated. This negligence would be a proximate cause of Beck's collision with Chastain if Litton could have reasonably foreseen that Beck, while intoxicated, would probably drive his motor vehicle on a public street and cause a collision.⁵⁸

The *Chastain* rationale is broader than the principles of liability recognized in *Hutchens*. The court allowed plaintiffs to recover despite the absence of a statute explicitly proscribing defendant's conduct. The common-law actions recognized in *Hutchens* and *Chastain* supplement the enforcement mechanism established in the Safe Roads Act. They fill a void left by the Act's failure to recognize a cause of action arising out of sales to adult patrons. The extent to which these cases expand liability, however, depends on what policies the courts extract from the Safe Roads Act. If the policy behind the Safe Roads Act is merely the protection of the general motoring public from the dangers of drunken driving, the application of these cases will be limited.⁵⁹ Whether state policy includes the protection of other members of the public, or the intoxicated individuals themselves, must await further development. Although both cases involved automobile accidents, the same negligence principles also should apply to other injuries caused by intoxicated patrons. An innocent bystander injured in a barroom brawl, for example, should be able to maintain a cause of action under the rules laid down in these cases.⁶⁰ Further-

intoxicated persons, excluding off-premises retailers who have little opportunity to observe the intoxicated state of customers is unnecessary to protect their interests.

54. 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 2454 (1983).

55. *Id.* at 961.

56. *Id.* at 959.

57. *Id.* at 961.

58. *Id.* at 962.

59. *Cf. Hutchens*, 63 N.C. App. at 16, 303 S.E.2d at 593 (purpose of laws prohibiting sale of alcoholic beverages to persons already intoxicated is protection of community from injurious consequences of contact with an intoxicated person).

60. In *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981), the North Carolina Supreme Court recognized that injuries inflicted by intentional criminal acts of third

more, these cases provide broader procedural protection than the Safe Roads Act. Whereas a three year limitations period applies to common-law claims,⁶¹ the statute of limitations applicable to the dram shop provisions is one year.⁶²

In conclusion, the common-law rule that a person is not legally responsible for harm caused by an intoxicated person to whom he furnished alcoholic beverages has been substantially modified in North Carolina. The North Carolina General Assembly and courts applying North Carolina law have recognized a cause of action against suppliers of alcoholic beverages. The dram shop provisions are restricted in scope and apply only to sales to underage persons. In contrast, the judicially recognized cause of action permits recovery for harm caused by sales to persons over the drinking age. The negligence per se theory adopted by the North Carolina Court of Appeals in *Hutchens* is based on the violation of a statute prohibiting the sale of alcoholic beverages to intoxicated persons. In *Chastain* the United States Court of Appeals for the Fourth Circuit extracted from that statute a state policy that supports a cause of action founded in ordinary negligence. Although these decisions already provide a significant addition to the statutory cause of action, the ultimate scope of the judicially created action depends on the way in which the North Carolina courts construe state policy.

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persons may be compensable in a negligence action. *Foster* upheld a cause of action against a shopping mall by a shopper who was assaulted in the parking lot.

61. N.C. GEN. STAT. § 1-52(16) (1983) (the three year period does not accrue until injury becomes apparent or ought reasonably to have become apparent, if the action is brought within ten years).

62. *Id.* § 18B-126. This section adopts the statute of limitations of N.C. GEN. STAT. § 1-54 (1983), which provides for a one year limitations period.

Martin v. Volkswagen of America, Inc.: Crashworthiness in North Carolina

In *Martin v. Volkswagen of America, Inc.*¹ the United States Court of Appeals for the Fourth Circuit returned to the problem of predicting whether North Carolina would accept the products liability doctrine of crashworthiness. No reported North Carolina case addresses this issue, and given the absence of any significant production of motor vehicles in the state, the chance of its being so addressed in the near future is remote.² Faced with this vacuum in the state law, the court of appeals followed its own enigmatic precedent, *Wilson v. Ford Motor Co.*,³ and held that North Carolina would not adopt the theory. *Martin* is significant primarily because it provided a forum to discuss the basis for rejecting the crashworthiness doctrine in *Wilson*.

Crashworthiness, a relatively recent products liability theory, first gained prominence in the United States Court of Appeals for the Eighth Circuit in *Larsen v. General Motors Corp.*⁴ A court applying the crashworthiness doctrine imposes liability on a manufacturer for injuries incurred in motor vehicle accidents to the extent the injuries are enhanced by defects that, though unrelated to the cause of the accident, are caused by the "second collision"⁵ of the occupants with the interior of the passenger compartment. This enhancement consists of any injuries in excess of those that "probably would have occurred as a result of the impact . . . absent the defective design."⁶

Because crashworthiness is a negligence theory,⁷ the defect must result from some negligence of the manufacturer in the design or construction of the vehicle.⁸ The manufacturer is negligent when it violates the duty to "use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision."⁹ This duty of reasonable care in design also includes a duty to "inspect and to test for designs that

1. 707 F.2d 823 (4th Cir. 1983).

2. *Id.* at 828 n.1. See *infra* note 63.

3. 656 F.2d 960 (4th Cir. 1981). In *Wilson* the court of appeals concluded that the district court's refusal to recognize the crashworthiness doctrine was not reversible error. The court stated that the district court had made a careful review of the "related State cases and the several and divergent federal court determinations on the issue." *Id.*

4. 391 F.2d 495 (8th Cir. 1968). General Motors was held liable for negligence in the design of the Corvair steering assembly which, although not the cause of the accident, resulted in the transmission of the force of a head-on collision through the displacement of the steering shaft towards the driver's head. Other designs then in use would not have allowed such displacement.

5. *Id.* at 502.

6. *Id.* at 503.

7. A crashworthiness action could be brought under strict liability or warranty as well as negligence. Its essential elements—a defect not the proximate cause of the accident and enhancement of crash injuries as a result of the defect—are generally compatible with these theories. A warranty action would require privity of contract and an express or implied warranty that the defect was not present. Recent automobile manufacturer advertising in North Carolina could supply the warranty element. See *infra* note 108. A strict liability action would require that the defect be unreasonably dangerous.

8. *Larsen*, 391 F.2d at 503.

9. *Id.* at 502.

would cause an unreasonable risk of foreseeable injury,"¹⁰ and a duty to warn of the failure to perform such tests and inspections or the presence of a known, dangerous design feature.¹¹ There is no requirement, however, that the manufacturer "design an accident-proof or fool-proof vehicle or even one that floats on water."¹²

Only two years before *Larsen* the United States Court of Appeals for the Seventh Circuit rejected the proposition that Indiana law would recognize the validity of the crashworthiness theory in *Evans v. General Motors Corp.*¹³ The *Evans* court held that while an automobile manufacturer had a "duty to design its product to be reasonably fit for the purpose for which it was made, without hiding defects which would make it dangerous for persons so using it,"¹⁴ the intended purpose did not "include [the car's] participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."¹⁵ Thus, *Evans* stands for the proposition that an automobile manufacturer is not liable for injuries caused by a defect that did not contribute to the cause of the initial collision.¹⁶

The *Larsen* definition of the duty of automobile manufacturers generally has prevailed over the definition in *Evans*.¹⁷ In fact, in 1977 *Evans* was overruled by the Seventh Circuit.¹⁸ The *Evans* rationale, however, is still followed by those federal courts that reject crashworthiness.

Although no North Carolina court has addressed the issue of crashworthiness, there is a series of cases in which the federal courts in North Carolina have attempted to predict whether North Carolina courts would adopt the doctrine. The first was *Bulliner v. General Motors Corp.*,¹⁹ decided in 1971, in which the United States District Court for the Eastern District of North Carolina determined that North Carolina would not adopt the doctrine because North Carolina law required a "causal relationship between the alleged negligence and the accident."²⁰ The court's consideration of crashworthiness was inappropriate and unnecessary, however, because the al-

10. *Id.* at 505.

11. *Id.*

12. *Id.* at 502.

13. 359 F.2d 822 (7th Cir. 1966). *Evans* was brought in an Indiana federal district court. Decedent was killed in a collision when the left side of the car collapsed on him because of the design of the car's frame. Plaintiff alleged that use of the design was negligent because a frame design with side rails that would have better protected the decedent was available. Because Indiana law had not addressed the crashworthiness issue the court was forced to anticipate the response of the Indiana Supreme Court. *Id.* at 826 (Kiley, J., dissenting).

14. *Id.* at 824.

15. *Id.* at 825.

16. *Id.*

17. See *Sealey v. Ford Motor Co.*, 499 F. Supp. 475, 478-79 (E.D.N.C. 1980). See also *Huff v. White Motor Corp.*, 565 F.2d 104, 110-11 (7th Cir. 1977).

18. *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977) (brought in the United States District Court for the Southern District of Indiana).

19. 54 F.R.D. 479 (E.D.N.C. 1971).

20. *Id.* at 482. The front wheel of plaintiff's van fell off and caused the vehicle to swerve into a ditch. The wheel failure allegedly was caused by negligent design of the wheel retention mechanism.

leged negligence would have been the proximate cause of the accident, not of any enhancement of injuries.²¹ Thus, the *Bulliner* holding on crashworthiness is dictum.²²

After *Bulliner* the United States District Court for the Western District of North Carolina decided *Alexander v. Seaboard Air Line R.R.*,²³ which involved the collision of a car with a locomotive. The court reviewed the considerable precedent in accord with *Evans*²⁴ and what little was in accord with *Larsen*.²⁵ The *Alexander* court read *Larsen* as requiring a manufacturer to design a vehicle to be absolutely safe in any conceivable collision, including one with a speeding locomotive.²⁶ Since North Carolina had not addressed crashworthiness, the district court looked to general North Carolina products liability law. It found that while a manufacturer has a duty to anticipate the probable results of normal uses of its product, there was no similar duty regarding the results of abnormal, reasonably unforeseeable, or criminal uses.²⁷ The court considered the "patently careless and improvident conduct"²⁸ of plaintiff to be clearly abnormal and reasonably unforeseeable. Fearing that acceptance of *Larsen* would loosen the requirement of causation, and let in a flood of absurd claims, the court expressly rejected the crashworthiness doctrine.²⁹ The court of appeals affirmed, but held it "unnecessary to discern and apply a nonexistent North Carolina rule of law"³⁰ because damage from impact with the train was so great that the alleged defect could not have been a proximate cause of any additional injury.

In *Simpson v. Hurst Performance, Inc.*,³¹ decided in 1977, a floor-mounted

21. *Id.* The court already had ruled that there was insufficient evidence of design negligence. *Id.* Thus the court's prediction was unnecessary.

22. *Sealey v. Ford Motor Co.*, 499 F. Supp. 475, 478 (E.D.N.C. 1980).

23. 346 F. Supp. 320 (W.D.N.C. 1971), *aff'd*, No. 71-1915, slip op. (4th Cir., Apr. 25, 1972). The facts in *Alexander* were rather unsympathetic. Plaintiff drove his Volkswagen into the side of a locomotive as it sped through a railroad crossing. The car traveled a considerable distance under the wheels of the train, crushing the gas tank located in the front of the car. This resulted in a fire which completely destroyed the car and injured plaintiff. Plaintiff alleged that negligent design caused the gas cap to fly off on impact, resulting in the fire.

24. *Id.* at 324-26.

25. *Id.* at 323-24.

26. *Id.* at 327. The *Alexander* court disregarded *Larsen*'s reasonableness limitation as to risks that must be eliminated, *Larsen*, 391 F.2d at 503, and asked: "Must [the manufacturer] foresee and design a vehicle to withstand a collision with a 114-ton locomotive engine pulling a freight train traveling at 45 miles per hour?" *Alexander*, 346 F. Supp. at 327. There was little chance of plaintiff winning regardless of the theory used.

27. *Alexander*, 346 F. Supp. at 327 (citing *Corprew v. Geigy Chem. Corp.*, 271 N.C. 485, 492, 157 S.E.2d 98, 103 (1967)).

28. *Alexander*, 346 F. Supp. at 327 (quoting *Kientz v. Carlton*, 245 N.C. 236, 242, 96 S.E.2d 14, 18 (1957)).

29. *Id.*

30. *Alexander v. Seaboard Air Line R.R.*, No. 71-1915, slip op. (4th Cir., April 25, 1972).

31. 437 F. Supp. 445 (M.D.N.C. 1977), *aff'd*, 588 F.2d 1351 (1981). Plaintiff was a passenger seated in the middle of the car's bench-type front seat. The car originally had a gearshift mounted on the steering column, but a previous owner had replaced it with a floor-mounted gearshift made by defendant. The auto was involved in a head-on collision and plaintiff was thrown forward and impaled on the gearshift. Plaintiff alleged that defendant gearshift manufacturer was negligent in failing to warn purchasers and users that the unit was dangerous when installed in an automobile with a bench-type front seat.

gearshift was deemed a patent danger.³² Therefore, its manufacturer was not negligent in failing to warn of the danger of a passenger being impaled on it in a head-on collision. The court determined, on the strength of the *Bulliner* and *Alexander* decisions, that even if negligence had been found, North Carolina courts would not have imposed liability under the crashworthiness theory.³³

Larsen was adopted first in North Carolina by the United States District Court for the Middle District in North Carolina in *Isaacson v. Toyota Motor Sales*.³⁴ In *Isaacson* a car that had stopped for a raised drawbridge was struck in the rear. It burst into flames and killed the passengers. The complaint alleged that negligent design caused the gas tank to rupture, filling the passenger compartment with gasoline fumes.³⁵ The *Isaacson* court rejected the earlier federal court decisions dealing with the crashworthiness doctrine,³⁶ and maintained that North Carolina, while not a products liability innovator, would be responsive to the near unanimity in other jurisdictions and adopt *Larsen*.³⁷

The *Isaacson* court believed that two arguments from *Larsen* would be persuasive to North Carolina courts. First, it would be irrational to differentiate, as the *Evans* court had, between defects that caused accidents, and defects that merely enhanced the injuries received in accidents. As long as some other event, no matter how trivial, actually began the causal chain, a court following *Evans* would insulate manufacturers from liability, no matter how gross the negligence or how catastrophic its consequences. It "would invite a harsh result to hold as a matter of law that a manufacturer is under no duty to manufacture an automobile which is reasonably safe in the event of an accident when the technology to produce such an automobile may be available."³⁸ Second, despite contentions that *Larsen* mandated a floating "Sherman tank"³⁹ design standard, under the crashworthiness theory the manufacturer need eliminate only unreasonable dangers in accordance with general negligence principles. These principles contemplate a balancing of the burden of protection against the possible harm to be avoided.⁴⁰

32. The court stated that:

The duty of reasonable care comprehends a duty to warn of danger and consequently a manufacturer of product which to his actual or constructive knowledge involves dangers to users has a duty to give warning of such dangers. *Stegall v. Catawba Oil Co.*, 260 N.C. 459, 133 S.E.2d 138 (1963). However, the manufacturer is not liable for injury to the user by reason of a condition which is plainly observable. *Douglas v. W. C. Mallison & Son*, 265 N.C. 362, 144 S.E.2d 138 (1965).

Id. at 446-47.

33. *Id.* at 447. The argument could be made that this is dictum. The finding that defendant manufacturer was not negligent made consideration of the crashworthiness doctrine unnecessary.

34. 438 F. Supp. 1 (E.D.N.C. 1976). *Isaacson* was decided 14 months before *Simpson*.

35. *Id.* at 4.

36. *Id.* at 5-6. The court considered the *Bulliner* crashworthiness conclusion, see *supra* note 21, as dictum; it affirmed *Alexander* on the basis of the severity of the collision, considering treatment of the crashworthiness issue unnecessary. See *supra* note 30 and accompanying text.

37. *Isaacson*, 438 F. Supp. at 7.

38. *Id.* at 8.

39. See *Alexander*, 346 F. Supp. at 327.

40. *Isaacson*, 438 F. Supp. at 8.

"The manufacturer does not have to make a product which is 'accident-proof' or 'fool-

After ruling that the North Carolina courts would apply the crashworthiness theory, the court examined defendant's contention that even conceding a duty to make the vehicle reasonably crashworthy, no reasonable steps could have been taken to make the vehicle safe in such a violent collision.⁴¹ The court found insufficient evidence to rule as a matter of law on this contention, and denied defendant's motion for summary judgment.⁴²

The next case to examine crashworthiness in North Carolina was *Sealey v. Ford Motor Co.*⁴³ In *Sealey* the passengers burned to death after a ruptured gas tank leaked fumes into the passenger compartment. Plaintiffs contended that negligent design of the fuel tank had allowed it to leak when the car rolled over in an accident. The parties agreed that the facts presented a classic crashworthiness situation.⁴⁴ The court then considered the basic rationale for the doctrine and determined that the reasoning in *Evans* was unrealistic.⁴⁵ The court cast its vote with the overwhelming majority of jurisdictions and adopted the *Larsen* doctrine.⁴⁶

In 1981, despite recent cases such as *Isaacson* and *Sealey* and similar assessments from courts in other circuits,⁴⁷ the United States Court of Appeals for the Fourth Circuit held in *Wilson v. Ford Motor Co.*⁴⁸ that a district court had not committed reversible error by ruling that "the North Carolina Supreme Court would not hold a manufacturer liable for injuries arising from defects which neither caused nor contributed to the accident."⁴⁹ The district court had adopted the questionable, older precedents of *Bulliner* and *Alexander*. The court of appeals' three paragraph per curiam opinion gave no specific reasons for its conclusion; a footnote, however, stated that the North Carolina Supreme Court's recent rejection of strict liability in *Smith v. Fiber Control Corp.*⁵⁰ "fortifies our belief that if called upon the Supreme Court of North Carolina would also reject the second crash theory."⁵¹ Given the

proof'. Liability is imposed only when an unreasonable danger is created. Whether or not this has occurred should be determined by general negligence principles, which involve 'a balancing of the likelihood of harm if it happens against the burden of precautions which would be effective to avoid the harm.'⁵⁵

Id. (quoting Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 818 (1962) (quoting 2 HARPER & JAMES, TORTS § 28.4, at 1542 (1956))). This was the first opinion of the North Carolina district courts to mention that *Larsen* does not require manufacturers to design a "Sherman tank" as was suggested in *Alexander*, 436 F. Supp. at 327. The omission of this reasonableness element from the earlier district court opinions is an indication that their analyses of *Larsen* were incomplete.

41. *Isaacson*, 438 F. Supp. at 9-10.

42. *Id.*

43. 499 F. Supp. 475 (E.D.N.C. 1980).

44. *Id.* at 477-78. The court, however, found no North Carolina precedent to apply to crashworthiness, and also found a split of authority in the federal courts sitting in North Carolina.

45. *Id.* at 479.

46. *Id.* at 478-79.

47. *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833 (3rd Cir.), *cert. denied*, 454 U.S. 1031 (1981).

48. 656 F.2d 960 (4th Cir. 1981).

49. *Id.*

50. 300 N.C. 669, 268 S.E.2d 504 (1980).

51. *Wilson*, 656 F.2d at 960 n.1.

supreme court's reasons for declining to accept strict liability, this analogy between strict liability and crashworthiness is tenuous.⁵²

Thus, the stage was set for *Martin v. Volkswagen of America, Inc.*⁵³ The federal district court had denied summary judgment in favor of defendant auto manufacturer on a crashworthiness claim.⁵⁴ On appeal, the United States Court of Appeals for the Fourth Circuit determined that reversal was required by *Wilson*, since it is the practice of the court to consider panel decisions as binding precedent until overruled en banc.⁵⁵ Thus, the denial of a rehearing en banc amounted to a decision to adopt *Wilson* as definitive. Judge Murnaghan dissented from the denial to criticize *Wilson's* validity. This prompted Chief Judge Phillips to concur specially in the per curiam opinion.⁵⁶

Judge Murnaghan argued that *Wilson's* prediction that North Carolina would follow *Evans* and reject *Larsen* was "simply wrong."⁵⁷ First, he stated that the rule in *Wilson* was one of proximate cause:

The case holds that, however foreseeable in fact the likelihood of injury might be, an automobile manufacturer, as a matter of law, is free to ignore the inevitable consequences of its negligence when the chain of events triggering a plaintiff's injury (including injury due to the negligent construction of the vehicle) originates with the negligence of a third party.⁵⁸

North Carolina tort law, however, recognizes no such bright line test; the issue of proximate cause in negligence actions goes to the jury in virtually all cases.⁵⁹ Second, Judge Murnaghan cited with approval the 1981 United States Court of Appeals for the Third Circuit case, *Seese v. Volkswagenwerk A.G.*,⁶⁰ which affirmed a New Jersey district court's conclusion that North Carolina would accept the crashworthiness theory. The *Seese* court believed that given the "absence of any expression by North Carolina and a split of authority by federal courts in that state, a prediction as to the law North Carolina would adopt can only be based on the greater persuasiveness of one of the conflicting theories, with an eye to the nationwide trend"⁶¹ Both the majority and

52. The *Smith* court did not address the merits of strict liability, but based its rejection of the doctrine on its incompatibility with the requirement of N.C. GEN. STAT. § 99B-4 (1979) that the defenses of contributory negligence and assumption of risk be available in products liability actions. *Smith*, 300 N.C. at 678, 268 S.E.2d at 509-10. Crashworthiness, in contrast to strict liability, is a negligence theory, *Larsen*, 391 F.2d at 503, and is compatible with those defenses, see *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 842 (3rd Cir.), cert. denied, 454 U.S. 1031 (1981).

53. 707 F.2d 823 (4th Cir. 1983).

54. *Martin v. Smith*, 534 F. Supp. 804 (W.D.N.C. 1982).

55. *Martin*, 707 F.2d at 827 (Murnaghan, J., dissenting).

56. *Id.* at 825 (Phillips, C.J., concurring). Judge Phillips served on the panel that decided *Wilson*, 656 F.2d 960.

57. *Id.* at 827 (Murnaghan, J., dissenting).

58. *Id.*

59. *Id.*; See also *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979).

60. 648 F.2d 833 (3rd Cir.), cert. denied, 454 U.S. 1031 (1981).

61. *Id.* at 841. In *Seese* the court examined the federal precedents in North Carolina on the crashworthiness issue and decided to follow the reasoning in *Isaacson* and *Sealey* as more persuasive and consistent with the law in other jurisdictions. *Id.* at 830-40. The court further concluded that: "we take it as beyond peradventure that an automobile manufacturer today has some legal

dissenting opinions in *Seese* conceded that North Carolina would accept crashworthiness; the dissent differed principally on the refusal to remand for a new trial on damages.⁶²

Judge Murnaghan also argued that because it was unlikely that a state court would have an opportunity to consider the issues,⁶³ it was the duty of the circuit judges to rehear the case and not "shrug off an erroneous decision on the grounds that, if incorrect, it will all in due course be set straight by a North Carolina court."⁶⁴ The probable, and in his opinion distasteful, alternative to overruling the case en banc would be the gradual application of various North Carolina authorities to "construct narrow distinctions stringently circumscribing *Wilson* and in effect restricting it to the very facts of the particular case."⁶⁵ In fact, the order reversed in *Martin* had attempted something analogous, distinguishing *Wilson* on the ground that the pleadings in *Martin* had alleged that defendant's negligence was a direct and proximate cause of the fatal injuries, instead of merely enhancing them.⁶⁶ In both cases, however, the ultimate proximate cause of the accident was not the defect alleged by the plaintiff.

The trial court in *Martin* also had argued that *Wilson* was not "in harmony with accepted principles of North Carolina tort law."⁶⁷ It cited five such principles that conflicted with the *Wilson* rationale: (1) "proximate cause of an injury is a factual question for the jury, rather than a question of law for the court;"⁶⁸ (2) "[t]here may be more than one proximate cause of an injury;"⁶⁹ (3) "[i]f the negligence of an actor is a proximate cause of any part of the

obligation to design and produce a reasonably crashworthy vehicle.'" *Id.* at 841 (quoting *Huddell v. Levin*, 537 F.2d 726, 735 (3rd Cir. 1976)).

62. *See id.* at 849-850 (Adams, J., dissenting).

63. The absence of a significant producer of motor vehicles in the state suggests that diversity jurisdiction will almost surely exist, or that the suit will be brought in some other state, whose capacity to deal with North Carolina law should be no greater than ours. . . . North Carolina has not adopted a referral statute permitting certification of a controlling question of state law to the North Carolina Supreme Court A case is not likely to generate damage claims of \$10,000 or less, and no car manufacturer is apt to fail to remove when sued in a North Carolina court so long as *Wilson* and the panel opinion in the instant case remain dispositive.

Martin, 707 F.2d at 828 n.1 (Murnaghan, J., dissenting).

Judge Murnaghan's logic, however, may not be sound. A plaintiff wishing to go to state court could defeat diversity by joining the manufacturer's local distributor; without complete diversity, removal to the federal courts is impossible. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Instead, the lack of North Carolina decisions on crashworthiness may be due to desire by North Carolina plaintiffs' attorneys to take advantage of federal rules of discovery or jury selection. It also could have resulted from a willingness to risk that the federal courts might apply crashworthiness, rather than risk facing the traditionally conservative North Carolina courts. With *Martin* and *Wilson* firmly rejecting crashworthiness, there no longer appears to be any reason for plaintiffs' attorneys to sue in federal court.

64. *Martin*, 707 F.2d at 828 (Murnaghan, J., dissenting).

65. *Id.*

66. *See Martin*, 534 F. Supp. 804, 806 (W.D.N.C. 1982). Plaintiff alleged that had the gas tank not been negligently designed, the victims would have suffered only insignificant injuries; instead they were burned to death.

67. *Id.*

68. *Id.* (citing *Snell v. Cauble Sand & Rock Co.*, 267 N.C. 613, 618, 148 S.E.2d 608, 611 (1966)); *Taney v. Brown*, 262 N.C. 438, 444, 137 S.E.2d 827, 831 (1964); *Short v. Chapman*, 261 N.C. 674, 680, 136 S.E.2d 40, 45 (1964).

69. *Id.* (citing *Hester v. Miller*, 41 N.C. App. 509, 512, 255 S.E.2d 318, 320 (1979)).

injuries, he is liable for that part;"⁷⁰ (4) "[d]efendants' negligence, in order to be actionable, need not be the sole proximate cause of injury, *nor* the *last* act of negligence;"⁷¹ (5) "[i]f the intervening act of a third person is reasonably foreseeable, it does not insulate a previously negligent party from liability for injuries caused by or contributed to by that previous negligence."⁷²

Chief Judge Phillips defended *Wilson* in his special concurrence. He warned against use of the "gentle pressure tactics of 'assuming' that the state courts will necessarily follow a view proclaimed by the federal court to be 'enlightened.'" ⁷³ He argued that looking at what state courts have recently said as well as the "basic doctrinal premises they have seemed most consistently to hold"⁷⁴ is a better means of forecasting state law than extrapolating the trend of "enlightened" law in other jurisdictions. Thus, he believed that the only valid criticism of *Wilson* would be one that challenged the rationality of the assumptions *Wilson* made based on "indicators" in North Carolina law.⁷⁵ This view, however, puts the critic at a disadvantage since the *Wilson* court did not reveal its assumptions, and the district court decision it summarily affirmed was not published. The only discernible "indicator" in *Wilson* was the reference to North Carolina's rejection of strict liability in *Smith*.⁷⁶ Now, of course, there is Chief Judge Phillips' special concurrence.

Chief Judge Phillips cited in his *Martin* concurrence three "indicators" supporting the assumption in *Wilson* that North Carolina would reject crashworthiness. "First and foremost is the fact that North Carolina has at this late date not yet joined the crashworthiness 'trend.'" ⁷⁷ The lack of an appropriate case to consider the doctrine was dismissed as a minor obstacle, as "[c]ourts minded to join 'enlightened trends' in decisional law have no difficulty reaching out in 'near' cases to join up."⁷⁸

This argument is not persuasive. A court unsure about the wisdom of an innovative rule of law may avoid reaching it until the experience of other jurisdictions has cast some light upon the subject, embracing the rule only when careful examination of other precedent indicates it to be just and prudent. This is exactly what North Carolina did in abandoning the requirement of privity

70. *Id.* (citing *Wise v. Vincent*, 265 N.C. 647, 652, 144 S.E.2d 877, 881 (1965)).

71. *Id.* at 807 (citing *Batts v. Faggart*, 260 N.C. 641, 133 S.E.2d 504 (1963); *Richardson v. Grayson*, 252 N.C. 476, 113 S.E.2d 922 (1960)). See also *Hester v. Miller*, 41 N.C. App. 509, 512, 255 S.E.2d 318, 320 (1979).

72. *Martin*, 534 F.Supp. at 807 (citing *Brown v. Atlantic Coast Line R.R.*, 276 N.C. 398, 404, 172 S.E.2d 502, 506 (1970)).

73. *Martin*, 707 F.2d at 825 (Phillips, C.J., concurring specially).

74. *Id.*

75. *Id.*

76. See *supra* note 50 and accompanying text.

77. *Martin*, 707 F.2d at 826 (Phillips, C.J., concurring specially).

78. *Id.*

To dismiss this with the suggestion that it has not been possible to join because an appropriate case has not yet been presented and to forecast that—because of diversity's refuge—it will not likely be presented in the future denigrates the wit both of the North Carolina courts and of counsel practicing in those courts.

in products liability negligence claims.⁷⁹ Furthermore, the converse of Chief Judge Phillips' argument is that a court set on rejecting a doctrine will do so, even though only in dictum.⁸⁰ Thus, if North Carolina actually preferred *Evans*, there should be state court decisions "joining-up" with that unenlightened trend.

Chief Judge Phillips advanced *Miller v. Miller*⁸¹ as an example of a case in which the "join-up" easily could have been accomplished.⁸² In *Miller* the North Carolina Supreme Court held that, as a matter of law, the failure to wear a seat belt, absent special circumstances, was not contributory negligence. Using *Miller* to demonstrate North Carolina's unwillingness to accept crashworthiness in 1983 is inappropriate for several reasons. First, *Miller* was decided only nine days after *Larsen*, which makes it highly unlikely that the crashworthiness rationale was considered. Second, *Miller* was not a products liability case; it dealt with contributory negligence in an action against the driver of an automobile for personal injuries suffered by a passenger.⁸³ Third, to "reach out" and impose a duty on manufacturers to use reasonable care not to expose consumers to an unreasonable risk of injury in a collision, the *Miller* court would have had to impose an analogous duty on the public to fasten their seat belts whenever riding in an automobile. This would have denied plaintiff recovery by imposing a standard of care almost universally disregarded, a result the court was anxious to avoid.⁸⁴ This failure of the "reasonable man" to recognize the duty to wear seat belts was the true basis of the court's refusal to impose such a duty. That the omission actually did not cause the collision was icing on the cake.⁸⁵

Chief Judge Phillips' second "indicator" was North Carolina's reluctance to adopt such liberal tort theories as strict liability and comparative negligence.⁸⁶ This analogy is questionable, however, because the crashworthiness theory does not dispense with negligence, as does strict liability, nor does it seek to apportion fault between the defendant and the plaintiff. Instead, crashworthiness merely sharpens the focus on proximate cause, recognizing two distinct proximate causes instead of one, and imposes the familiar liability of a joint tort-feasor. Thus, the measure of recovery is not changed; it is only spread more equitably among the blameworthy.

The last "indicator" suggested by Chief Judge Phillips consisted of "the guidance to be had from recent doctrinal expressions by North Carolina's highest court."⁸⁷ Judge Phillips conceded that crashworthiness is in large part a question of proximate cause, and that North Carolina generally considers

79. See *Corprew v. Geigy Chem. Corp.*, 271 N.C. 485, 490-97, 157 S.E.2d 98, 102-06 (1967).

80. See *Bulliner*, 54 F.R.D. at 482. See also *supra* note 26.

81. 273 N.C. 228, 160 S.E.2d 65 (1968).

82. *Martin*, 707 F.2d at 826 (Phillips, C.J., concurring specially).

83. *Miller*, 273 N.C. at 229-30, 160 S.E.2d at 67.

84. See *id.* at 237-38, 160 S.E.2d at 73.

85. *Id.* at 237, 160 S.E.2d at 73.

86. *Martin*, 707 F.2d at 826 (Phillips, C.J., concurring specially).

87. *Id.*

proximate cause a question for the jury. He contended, however, that conceptually "there is strong indication that the North Carolina Supreme Court presently identifies the 'first impact' as the critical and sole one for proximate causation—hence tort liability—analysis."⁸⁸ Such an analysis would preclude the crashworthiness defect as a valid proximate cause of injuries.⁸⁹ Judge Phillips stated that the *Miller* court had relied on this analysis when it determined that the failure to fasten seat belts was not contributory negligence per se.⁹⁰

The difficulty of apportioning damages also was advanced by Chief Judge Phillips as an alternate ground for the *Miller* decision.⁹¹ This characterization minimizes the importance of the *Miller* court's devoting the first seven pages of its opinion to resolving whether "the occupant of an automobile [has] a duty to use an available seat belt *whenever* [the car] is operated on a public highway."⁹² It was only after answering that question in the negative that the *Miller* court added: "It would be a harsh and unsound rule which would deny all recovery to the plaintiff, whose mere failure to buckle his seat belt in no way contributed to the accident, and exonerate the active tort-feasor but for whose negligence the plaintiff's omission would have been harmless."⁹³ The *Miller* court gave several other minor justifications, then discussed at length the difficulties of apportioning damages between a negligent defendant and contributorily negligent plaintiff, which it deemed a problem that "cannot be dismissed lightly."⁹⁴ The court, however, did not base its decision on that ground. Rather, the court espoused it as one of a number of factors reinforcing the dispositive holding that the customary conduct of the reasonably prudent man does not include wearing his seat belt.⁹⁵

Although Chief Judge Phillips' reasoning was faulty in applying his three "indicators," he was correct when he said that the first step in predicting the future of the law in a jurisdiction is to look to the present status of the general state law. Thus, if the crashworthiness theory is compatible with North Carolina products liability tort law, federal courts are justified in predicting that North Carolina would accept the crashworthiness doctrine.

In North Carolina a products liability claim sounding in tort must include the same elements as any negligence claim: (1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach; and (4) loss because of the injury.⁹⁶ Thus, for the crashworthiness theory to be

88. *Id.* at 827.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Miller*, 273 N.C. at 230, 160 S.E.2d at 68.

93. *Id.* at 237, 160 S.E.2d at 73.

94. *Id.* at 238-40, 160 S.E.2d at 73-74.

95. *Id.* at 238, 160 S.E.2d at 73.

96. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E.2d 190, 194 (1980) (citing W. PROSSER, *HORNBOOK OF THE LAW OF TORTS* § 30 (4th ed. 1971)).

compatible with North Carolina law, each of these essential elements must be established.

The manufacturer's standard of care under the crashworthiness theory is compatible with the duty of care under North Carolina products liability law. In the leading case of *Corprew v. Geigy Chemical Corp.*⁹⁷ the North Carolina Supreme Court quoted this definition with approval:

Since the liability is to be based on negligence, the defendant is required to exercise the care of a reasonable man under the circumstances. His negligence may be found over an area quite as broad as his whole activity in preparing and selling the product. He may be negligent first of all in designing it, so that it becomes unsafe for the intended use. He may be negligent in failing to inspect or test his materials, or the work itself, to discover possible defects, or dangerous propensities.⁹⁸

The duty to eliminate any unreasonable risk to the passengers in the event of collision is not dissimilar to this duty to inspect and test the work and materials to discover possible defects or dangerous propensities.

Even if there is no duty in North Carolina to eliminate unreasonable risks of injury to passengers in the event of a collision, there is such a duty under federal law. The National Traffic and Motor Vehicle Safety Act⁹⁹ was passed in 1966, shortly after the decision in *Evans*, and declared the necessity of establishing motor vehicle safety standards.¹⁰⁰ "Motor vehicle safety" was defined as:

the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.*¹⁰¹

The intent of the Act was to authorize the creation of standards that would impose a duty of care on the auto industry identical to that required under the crashworthiness theory. The standards are binding on the states¹⁰² and specify the testing and degree of protection required of the automobile manufacturer. These standards began coming out in 1971 and regulated, among other things, occupant impact with the interior of the passenger compartment,¹⁰³ protection of the driver from injury caused by the steering column,¹⁰⁴ reten-

97. 271 N.C. 485, 157 S.E.2d 98 (1967).

98. *Id.* at 491, 157 S.E.2d at 102-03 (quoting W. PROSSER, LAW OF TORTS § 665 (3rd ed. 1964)).

99. 15 U.S.C. §§ 1381-1431 (1982).

100. Standards promulgated under this legislation are located in Federal Motor Vehicle Safety Standards, 49 C.F.R. §§ 571.201-571.302 (1983).

101. 15 U.S.C. § 1391(1) (1982) (emphasis added).

102. 15 U.S.C. § 1392(d) (1982).

103. *E.g.*, Federal Motor Vehicle Safety Standards, 49 C.F.R. § 571.201 (occupancy protection in interior impacts), § 571.208 (occupant crash protection) (1983).

104. *Id.* § 571.203 (protection for driver from impact with steering mechanism), § 571.204 (steering control rearward displacement).

tion of passengers within the vehicle in a collision,¹⁰⁵ and seatbelts and child restraints.¹⁰⁶ North Carolina indicated its support of this effort by enacting the Vehicle Equipment Safety Compact.¹⁰⁷ Somewhat surprisingly, the manufacturers themselves acknowledge this responsibility to protect the passenger in their advertising, touting efforts to eliminate risks to the passenger upon impact.¹⁰⁸

Thus, there is ample evidence that it is reasonable to require automobile manufacturers to eliminate unreasonable risks of injury in the event of a collision, and that the duty is not incompatible with the North Carolina products liability standard of due care.

The second essential element in a products liability tort action is a breach of the duty owed. This could be found in any failure of the manufacturer to eliminate unreasonable risk of injury.¹⁰⁹

The third essential element is that the injury be caused directly or proximately by the breach. Thus, the crashworthiness defect must be established as a proximate cause of the injuries sustained. Logically, it is not accurate to say that one event can be the sole proximate cause for all the injuries suffered in a crashworthiness situation. It *is* accurate, however, to say that the initial impact is the sole proximate cause of the injuries which would have been suffered in the crash absent the crashworthiness defect. The initial impact is also a proximate cause of the enhancement of injury suffered as a result of the crashworthiness defect, since there would be no injuries at all without that initial impact. By the same token, however, the crashworthiness defect is also a proximate cause of the enhancement of injuries, for without the defect the enhancement of injuries would not have occurred. The cause of the collision and the crashworthiness defect would be concurrent proximate causes, and the manufacturer and the person responsible for the collision would be joint tortfeasors with regard to the enhancement of injuries. It cannot, however, accurately be said that the initial impact is the sole proximate cause of the enhancement of injuries, because it alone could not have caused the enhancement.

To deny that the crashworthiness defect is a proximate cause of enhancement of injuries imposes complete liability on the person responsible for the initial collision, regardless of how harmless it would have been in the absence of the manufacturer's negligence. When the other driver is without insurance or appreciable assets, denial of the manufacturer's liability for its negligence

105. *Id.* § 571.206 (door locks and door retention systems), § 571.210 (seat belt assembly anchorages).

106. *Id.* § 571.207 (seating systems), § 571.209 (seat belt assemblies), § 571.213 (child restraint systems).

107. N.C. GEN. STAT. § 20-183.13 (1983).

108. General Motors has been running television advertisements in North Carolina touting their continuing efforts to improve the crashworthiness of their automobiles (over 150 new automobiles demolished in crash tests).

109. In *Larsen* the breach was the improper design of the steering column, a solid column which projected beyond the wheel base in such a way as to present an obvious danger of rearward displacement towards the driver in an accident.

would leave the plaintiff without compensation for his injuries, even those attributable to the crashworthiness defect. Chief Judge Phillips stated that this harsh result was required by the "in no way contributed to the accident"¹¹⁰ language in *Miller*. This interpretation of *Miller*, however, is refuted by that court's subsequent language:

Furthermore, it is safe to assume that, if an unbelted plaintiff sustained an injury in an automobile accident, he would also have suffered some injury—albeit minor—from buffeting even had he been wearing his seat belt. Therefore, since plaintiff could have suffered some injury as a result of the *occurrence* which resulted *solely* from the defendant [driver]'s negligence, defendant's plea of contributory negligence would not be good as to those injuries.¹¹¹

Therefore the North Carolina Supreme Court, rather than using "purely conceptual [analysis] . . . identifi[ying] the 'first impact' as the critical and sole one for proximate causation,"¹¹² has given a strong indication that it would use a concurrent proximate cause analysis similar to that advanced above.

This indication was reinforced in the 1980 North Carolina Supreme Court case of *City of Thomasville v. Lease-Afex, Inc.*,¹¹³ a products liability case actually considering the enhancement of damages allegedly caused by negligent design. Defendant installed a fire suppression system on a bulldozer used by plaintiff at a sanitary landfill. The bulldozer caught fire and was badly damaged when the fire suppressant system failed to operate. The court reversed summary judgment for defendant on the negligent design and warranty claims, holding that if the system had failed to function properly, it must have "caused at least some of the damage to plaintiff's bulldozer."¹¹⁴ Thus, recognition of the crashworthiness defect as a proximate cause of the enhancement of damages is consistent with North Carolina products liability law.

The last element in a negligence cause of action is that there be loss because of the injury. The question is not so much whether there was damage as how to determine what part of the damage is attributable to each cause. It would be difficult in many cases to differentiate between damage solely due to the original impact and damage due to enhancement of injuries caused by the crashworthiness defect. In *Miller* the court addressed the problem, and noted that the difficult task of apportioning damages already was performed by North Carolina courts in applying the doctrine of "avoidable consequences."¹¹⁵ This doctrine imposes the duty on a plaintiff to minimize the injuries caused by another; the plaintiff's failure to do so will defeat his recov-

110. *Martin*, 707 F.2d at 826 (Phillips, C.J., concurring specially). See *Miller*, 273 N.C. 228, 237, 160 S.E.2d 65, 73 (1968).

111. *Miller*, 273 N.C. at 238, 160 S.E.2d at 73.

112. *Martin*, 707 F.2d at 827.

113. 300 N.C. 651, 268 S.E.2d 190 (1980).

114. *Id.* at 657, 268 S.E.2d at 195. This case is not a complete parallel to the crashworthiness situation as there is no dispute that the "standard of care of a reasonably prudent fire suppression system manufacturer is to manufacture a system which functions properly." *Id.* at 656, 268 S.E.2d at 194.

115. *Miller*, 273 N.C. at 239-40, 160 S.E.2d at 74.

ery to the extent of the resulting aggravation of injuries.¹¹⁶ This aggravation of damages often cannot be calculated with certainty, and in a close case a court may rightly refuse to allocate damages between the plaintiff and defendant.¹¹⁷ When the allocation is between two defendants, however, there is no reason not to hold them jointly and severally liable casting the burden on each to prove what part of the damages is not allocable to his negligence. This treatment of damages is consistent with the concern for the plight of the worthy plaintiff voiced in *Miller*.¹¹⁸ Similarly, the Court in *Lease-Afex, Inc.* displayed no reluctance to allow damages when it would be hard to apportion them between the causes of the injuries.¹¹⁹ Thus, damages in a crashworthiness cause of action are acceptably ascertainable under North Carolina law.

It appears that because of the compatibility of the crashworthiness doctrine with North Carolina products liability law, North Carolina would accept the crashworthiness theory. Moreover, it is unlikely that North Carolina courts will have the opportunity to rule on the issue. Thus, it is critical that the divided federal courts in North Carolina have a clear and well-reasoned precedent to follow. *Martin v. Volkswagen of America, Inc.* is particularly disappointing in this respect. Thorough analysis of relevant North Carolina law reveals that the arguments advanced by those courts predicting the rejection of crashworthiness are not well-grounded, while the arguments for its acceptance are compelling.

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116. *Id.*

117. *Id.* at 240, 160 S.E.2d at 74.

118. *Id.* at 238, 160 S.E.2d at 273.

119. *Lease-Afex, Inc.*, 300 N.C. at 657, 268 S.E.2d at 195.

Mazza v. Huffaker : Sex with the Patient's Spouse is Negligent Psychiatric Treatment

Psychiatric malpractice is one of the fastest growing areas of professional liability.¹ Although patients long have been able to sue their doctors for injuries occurring during the course of their medical treatment,² psychiatrists traditionally have been free from malpractice litigation.³ This relative immunity has existed for several reasons. The psychiatric profession's diverse therapeutic techniques have made it difficult to establish definite standards of care. In addition, trials involving psychiatric treatments often involve complex medical, legal, and factual issues and rely on conflicting expert testimony.⁴ This complexity and confusion, which reflects the subjectiveness of mental health standards, has made it difficult for a patient to win a verdict from a jury of laypersons.⁵ The recent surge in psychiatric malpractice litigation, however, has included many cases involving factual issues that any juror could comprehend and malpractice issues that do not generate conflicting expert testimony.⁶ These latter cases have included the prescription, as medical treatment, of sexual relations between the psychiatrist and the patient.⁷

Sexual relations between patient and psychiatrist always have been recognized as a violation of medical ethics.⁸ Civil liability, however, was established only recently by the 1968 case of *Nicholson v. Han*.⁹ Since *Nicholson* such civil litigation has increased; there now exists an established malpractice cause of action for a patient whose psychiatrist has sex with her as part of prescribed therapy.¹⁰ Although in the early 1970s sexual relations were some-

1. Wilkinson, *Psychiatric Malpractice: Identifying Areas of Liability*, TRIAL, Oct. 1982, at 73.

2. J. GUNTHER, THE MALPRACTITIONERS 3 (1978).

3. Rothblatt & Leroy, *Avoiding Psychiatric Malpractice*, 9 CAL. W.L. REV. 260, 260 (1973).

4. *Id.*

5. *Id.*

6. For example, in some cases the jury has had to determine whether the psychiatrist actually had sex with his patient. See *infra* notes 12-13 and accompanying text.

7. Gentry, *Psychiatric Liability: Abuse of the Therapist-Patient Relationship*, TRIAL, May 1980, at 26; see *infra* notes 9-15 and accompanying text. One recent survey indicated that five to ten percent of the nation's psychotherapists have had some form of physical contact with female patients under the guise of medical treatment. Dietz, *Psychotherapists, Patients and Sex*, Boston Globe, Jan. 31, 1982, at 1, col. 1.

8. The Hippocratic Oath of the Physician states, "Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female and male persons . . ." (quoted in 1982 MED. TRIAL TECH. Q. 201, 203). The ethical code of the American Psychiatric Association expressly states, "Sexual activity with a patient is unethical." Lange & Hirsh, *Legal Problems of Intimate Therapy*, 1982 MED. TRIAL TECH. Q. 201, 203.

9. 12 Mich. App. 35, 162 N.W.2d 313 (1968) (recognizing cause of action but denying recovery because the action had been abolished); see Annot., 33 A.L.R.3d 1393 (1970).

10. See *Cotton v. Kambly*, 101 Mich. App. 537, 300 N.W.2d 627 (1980) (psychiatrist liable for medical malpractice after inducing the patient to have sex under the guise of psychiatric treatment); *Roy v. Hartogs*, 85 Misc. 2d 891, 381 N.Y.S.2d 587 (1976) (psychiatrist who had sexual intercourse with patient as part of treatment was liable for medical malpractice). See also 25 ATLA L. REP. 98 (1982) (discussing cases involving malpractice claims based on psychiatrists sexually abusing their patients); Gentry, *supra* note 7, at 26-29. Because the reported cases dealing

times advocated as proper therapy,¹¹ the American Psychiatric Association has adopted¹² the view of experts in the psychiatric field today that sexual contact between patient and psychiatrist harms the patient and departs from accepted standards of medical practice.¹³ The courts have recognized the mental damage resulting from this type of treatment¹⁴ and have granted relief to patients injured by it.¹⁵

The North Carolina Court of Appeals recently decided its first malpractice case based on a psychiatrist's sexual endeavors.¹⁶ Unlike most recent cases in other jurisdictions,¹⁷ however, *Mazza v. Huffaker* involved sexual relations between the psychiatrist and the patient's spouse. *Mazza* involved Dr. Huffaker, a psychiatrist who for four years had been treating Mr. Mazza for manic depressive psychosis. During this continuing treatment, Huffaker also began to see Mrs. Mazza on a professional basis. Eventually, this relationship became personal. Shortly thereafter, Mr. Mazza moved out of his home, but continued treatment with Huffaker. One night, he went home and discovered Huffaker having sexual intercourse with Mrs. Mazza. It was out of this incident that the lawsuit arose.¹⁸ The jury found Huffaker liable for medical malpractice for having sex with his patient's wife.

The court of appeals affirmed.¹⁹ In holding that a patient can suffer mental and emotional harm sufficient for a malpractice action by witnessing the psychiatrist's private sexual actions with another, the court extended the rationale in most sexual intimacy cases.²⁰ Furthermore, as a result of the jury instructions and special verdict, the decision may have substantial effects on general medical malpractice principles in North Carolina.

The jury was instructed to find malpractice if it determined that any one of the following was true: (1) that defendant violated the standard of care;²¹

with sexual relations between psychiatrist and patient have involved male psychiatrists and female patients, this note will refer to psychiatrists as men and patients as women.

11. See Lange & Hirsh, *supra* note 8, at 204-05; Riskin, *Sexual Relations Between Psychotherapists and Their Patients: Toward Research or Restraint*, 67 CALIF. L. REV. 1000 (1979).

12. Roy v. Hartogs, 85 Misc. 2d 891, 895, 381 N.Y.S.2d 587, 590 (1976) (Markowitz, J., concurring).

13. *Id.*; Riskin, *supra* note 11, at 1012.

14. Sex as treatment aggravates a patient's mental condition. Roy v. Hartogs, 85 Misc. 2d 891, 902, 381 N.Y.S.2d 587, 596 (1976); Anonymous v. Berry, No. 78-8182-CA, Division H (Fla. Duval County Cir. Ct. Mar. 14, 1979), noted in 22 ATLA L. REP. 447, 473 (1979). The sexual abuse also can destroy the patient's family and married life. Walker v. Parsons (Cal. App. San Diego Super. Ct. July 7, 1981), noted in 68 A.B.A. J. 1353, 1354 (1982). The sex also delays the patient's recovery from her original mental illness. Combs v. Silverman, No. LE 596 (Va.-Richmond Cir. Ct. Feb. 5, 1982), noted in 25 ATLA L. REP. 98, 98-100 (1982).

15. See cases cited *infra* note 14. See generally 25 ATLA L. REP. 98 (1982).

16. *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833 (1983).

17. See *supra* notes 6-14 and accompanying text.

18. *Mazza*, 61 N.C. App. at 175-76, 300 S.E.2d at 837.

19. 61 N.C. App. 170, 300 S.E.2d 833 (1983).

20. An argument can be made that the "other person" must be a relative because the trial testimony was limited to references to sexual acts between the psychiatrist and the patient's relative. *Id.* at 177, 300 S.E.2d at 838.

21. Record at 198, *Mazza*, 61 N.C. App. 170, 300 S.E.2d 833 (1983) (the jury was asked to determine whether defendant failed to use that degree of professional learning, skill, and ability

(2) that defendant failed to recognize and guard against the transference or counter-transference phenomena in his treatment of Mrs. Mazza; (3) that defendant abandoned Mr. Mazza as a patient; or (4) that defendant continued to treat Mr. Mazza after becoming emotionally and sexually involved with Mr. Mazza's wife.²² The jury rendered a special verdict finding that defendant committed medical malpractice in his treatment of Mr. Mazza,²³ but the verdict did not reveal the basis of the finding. Thus, each of the grounds enumerated in the jury instructions arguably constitutes malpractice in North Carolina. Such a decision could have a profound effect on North Carolina malpractice principles. First, by finding no error in the jury's determination that Huffaker's conduct violated the standard of care, the court created a stricter duty and higher standard of care for psychiatrists than for other medical doctors. Psychiatrists now may be held liable for private actions, unrelated to the treatment of the claimant.²⁴ Second, allowing a jury to determine that Huffaker was liable in malpractice to Mr. Mazza for treatment rendered to Mrs. Mazza created a unique cause of action on behalf of a third person.²⁵ Finally, the remaining grounds for malpractice coupled with certain rulings represent an unprecedented liberalization of the court's attitude toward a malpractice claimant.

Mazza's primary impact on North Carolina law is the adoption of a higher standard of care for psychiatrists than for other doctors. To establish liability for malpractice, a plaintiff must prove that the psychiatrist's care was not in accordance with the standards of practice among members of his profession with similar training and experience in the same or a similar community.²⁶ Traditionally, malpractice has been based on the negligent "treatment or care" administered to the plaintiff by the psychiatrist.²⁷ *Mazza*, however, did not involve allegations of negligent "treatment" of plaintiff. Rather, the negligent conduct was private, unrelated to any medical treatment, and was exercised with a person other than plaintiff. Thus, *Mazza* differs from cases in other jurisdictions in which courts have held that negligence only arises from conduct performed as part of the treatment or employment.²⁸ For example, in

that others similarly situated ordinarily possess or whether defendant used his position of trust and confidence to harm his patient).

22. *Id.* For a definition of transference, see *infra* text accompanying note 36.

23. *Mazza*, 61 N.C. App. at 173, 300 S.E.2d at 836.

24. See *infra* notes 26-34 and accompanying text.

25. See *infra* notes 35-41 and accompanying text.

26. N.C. GEN. STAT. § 90-21.12 (1981) provides:

Defendant shall not be liable for the payment of damages unless the trier of fact is satisfied . . . that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.

27. See *supra* notes 10-15; see generally Furrow, *Defective Mental Treatment: A Proposal for the Application of Strict Liability to Psychiatric Service*, 58 B.U.L. REV. 391 (1978).

28. *E.g.*, *City of Green Cove Springs v. Donaldson*, 348 F.2d 197 (5th Cir. 1965) (police officer stopped plaintiff for speeding and then raped her in his police car; held that the officer's employer was not vicariously liable since the rape was not within the scope of the officer's employment); *Hess v. Frank*, 47 A.D.2d 889, 367 N.Y.S.2d 30 (1975) (psychiatrist had uttered abusive

*Hess v. Frank*²⁹ a New York court held that although the psychiatrist's conduct would cause mental anguish to the patient, he could not be guilty of malpractice if the conduct of which he complained was unrelated to the medical treatment being rendered.³⁰

Mazza cited the unique psychiatrist-patient relationship and the corresponding psychiatrist's duties as justification for its ruling that Huffaker's conduct was malpractice.³¹ The psychiatrist's duty to maintain the patient's trust and confidence was recognized as absolutely essential to the effectiveness of the therapy rendered.³² Although all doctors have the duty to maintain a patient's trust and confidence,³³ this trust is not as essential to the effectiveness of physical treatment as it is for mental therapy. Thus, a breach of trust arising out of conduct unrelated to the treatment should not make a nonpsychiatrist liable for malpractice.³⁴ Similarly, a doctor's personal activities should not be restricted by the threat of malpractice unless the activities would harm the professional treatment being rendered. Limiting *Mazza* to psychiatrists would adhere to this proposition.

The second major effect of *Mazza* is the creation of a unique third-party medical malpractice cause of action. The court allowed Mr. Mazza to recover on a malpractice claim arising from treatment Huffaker rendered to Mrs. Mazza while she was his patient. The court of appeals found no error in the trial court's instruction that the jury must find Huffaker guilty of malpractice in his treatment of Mr. Mazza if Huffaker "failed to recognize and guard against the transference or counter-transference phenomenon"³⁵ between himself and Mrs. Mazza while she was a patient.

Transference and counter-transference are common phenomena in psychiatric therapy. Transference occurs when the patient transfers emotions the patient has towards someone else to the psychiatrist. Counter-transference occurs when the psychiatrist transfers feelings that the psychiatrist has towards

language to patient during a regularly scheduled therapy session; the language was found not to be part of the treatment and thus not professional misconduct).

29. 47 A.D.2d 889, 367 N.Y.S.2d 30 (1975).

30. *Id.*

31. *Mazza*, 61 N.C. App. at 176-77, 300 S.E.2d at 837-38. See also D. DAWIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 43 (1973). Cf. *Whitehurst v. Boehm*, 41 N.C. App. 670, 674, 255 S.E.2d 761, 764 (1979) (same rules govern duty and liability for physicians and surgeons). No pre-*Mazza* North Carolina case had held a psychiatrist to a higher standard than other doctors. A special duty for psychiatrists, however, has been advocated by medical experts and other commentators. *Mazza*, 61 N.C. App. at 176-77, 300 S.E.2d at 837-38; D. DAWIDOFF, *supra*, at 43; Dawidoff, *Insanity, Intimacy and Infidelity: Trends in Psychiatric Malpractice*, TRIAL, June 1977, at 27.

32. *Mazza*, 61 N.C. App. at 176-77, 300 S.E.2d at 837-38.

33. *Id.* at 176, 300 S.E.2d at 837.

34. The doctor should be held liable for his actions under other causes of action that would be available to the patient. See *infra* notes 48-52 and accompanying text.

35. *Mazza*, 61 N.C. App. at 180, 300 S.E.2d at 840. The court attempted to justify the jury instruction by claiming that its purpose was to enable the jury to determine whether Huffaker and Mrs. Mazza had sexual relations. *Id.* at 180-81, 300 S.E.2d at 840. If this was the instruction's purpose, however, the instruction could simply have read, "Do you find that Mrs. Mazza and Dr. Huffaker had sexual relations?" Using the phenomenon as a basis for the jury's findings resulted in granting Mr. Mazza a malpractice action for a wrong done to his wife, not to him.

someone else to his patient.³⁶ The psychiatrist's abuse of the transference phenomena gives the patient a cause of action for malpractice.³⁷ In *Walker v. Parsons*³⁸ a California psychiatrist had the female patient transfer her feelings concerning her husband and family to him.³⁹ He then abused the transference by making the patient believe he loved her and by having sexual relations with her. The patient brought a malpractice claim for this abuse and was awarded 4.6 million dollars in damages.⁴⁰

The transference and counter-transference cases establish that a patient whose psychiatrist abuses the transference has a malpractice action against the psychiatrist. In *Mazza*, however, the psychiatrist-patient relationship existed between Huffaker and Mrs. Mazza, not Mr. Mazza. Mr. Mazza was therefore given the right to pursue a malpractice claim under a cause of action that traditionally belonged to Mrs. Mazza.⁴¹ Thus, *Mazza* expands the scope of transference cases by holding that the spouse of the patient also will have a cause of action for malpractice. This result is unprecedented.

Although a husband should be granted relief if he suffers from his wife's psychiatrist abusing the transference, no justification exists for allowing that recovery under a malpractice claim. The husband does not have a doctor-patient relationship in the rendering of the negligent treatment (the abuse of transference).⁴² Allowing the husband to recover for malpractice violates the longstanding principle that a doctor-patient relationship must exist to maintain a malpractice suit.⁴³ In addition, a third-party action gives rise to the possibility of two parties recovering against a defendant under one cause of action. If the wife and husband both choose to sue a doctor for abuse of the transference phenomenon, they will be able to do so, each recovering under a malpractice claim that should be the wife's alone.⁴⁴

One jurisdiction has allowed a husband to recover against his wife's doctor as a result of the doctor's negligent treatment, but the recovery was not based on malpractice. The California Supreme Court recognized that a hus-

36. *Id.* at 180, 300 S.E.2d at 840.

37. See *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968) (en banc) (psychiatrist mishandled the transference phenomenon, stimulated patient's romantic involvement with him, triggering her divorce and destruction of her family life; court held that patient had a malpractice action); *Landau v. Werner*, 105 Sol. J. 257 (Q.B.) (psychiatrist permitted social contacts to intrude upon his professional treatment of patient, causing her to become suicidal when he stopped the relationship; defendant held guilty of malpractice), *aff'd*, 105 Sol. J. 1008 (C.A. 1961).

38. (Cal. App. San Diego Super. Ct. July 7, 1981), noted in 68 A.B.A.J. 1353, 1354 (1982). See also *Wilkinson*, *supra* note 1, at 77; 24 ATLA L. REP. 290, 295-97 (1981).

39. *Id.*

40. *Id.*

41. Mrs. Mazza also was seeing Dr. Huffaker as a patient. Their psychiatrist-patient relationship was independent of the relationship between Mr. Mazza and Huffaker. Thus, if Mrs. Mazza had been subjected to negligent treatment by Huffaker, she, not her husband, should bring the malpractice claim.

42. Although Mr. Mazza and Dr. Huffaker had a psychiatrist-patient relationship, it did not encompass the treatment being rendered to Mrs. Mazza. Thus, Dr. Huffaker did not owe Mr. Mazza a psychiatrist-patient duty.

43. See *Easter v. Lexington Memorial Hosp.*, 303 N.C. 303, 305-06, 278 S.E.2d 253, 255 (1981).

44. See *supra* note 41 and accompanying text.

band had a cause of action for negligent infliction of emotional distress when a doctor's erroneous diagnosis that the wife had syphilis resulted in the breakup of their marriage.⁴⁵ The court held that the doctor owed the husband a duty to exercise due care in diagnosing his wife since the risk of harm from a misdiagnosis was reasonably foreseeable.⁴⁶ The court also held that the husband had a cause of action for loss of consortium occasioned by the emotional injury to his wife that resulted from the negligent diagnosis.⁴⁷

The California case is analogous to *Mazza*. In each, the negligent medical treatment of the wife contributed to a breakup of the marriage, resulting in severe emotional harm to the husband. Neither husband had a doctor-patient relationship related to the negligent medical treatment. Under the *Mazza* analysis, the husband has a malpractice cause of action. Under the California rule, separate tort actions alleging negligent infliction of emotional distress and loss of consortium are the proper causes of action. Mr. Mazza could have sought redress for Huffaker's actions under any of the following claims: (1) negligent infliction of emotional distress;⁴⁸ (2) intentional infliction of emotional distress;⁴⁹ (3) loss of consortium;⁵⁰ (4) criminal conversation;⁵¹ or (5) breach of contract.⁵² The North Carolina Court of Appeals, however, has stretched medical malpractice principles unnecessarily by allowing Mr. Mazza to win a verdict by asserting his wife's unasserted claim for abuse of the transference phenomenon.

Mr. Mazza's recovery for a wrong done to him as a result of his wife's psychiatric treatment may indicate that North Carolina is liberalizing its view toward malpractice claimants. The case contradicts North Carolina courts' conservative attitude toward compensating injured persons for adverse medical results.⁵³ Certain other rulings in *Mazza* also portend a more liberal view toward malpractice claimants and toward malpractice principles in general. One such ruling was the court of appeals' holding that there was no error in the trial court's instruction that Huffaker was liable for malpractice if his conduct was an "abandonment" of Mr. Mazza as a patient.⁵⁴

It is generally recognized that a doctor who abandons his patient is guilty

45. *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 930-31, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

46. *Id.*

47. *Id.* at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839.

48. North Carolina long has recognized the torts of negligent and intentional infliction of emotional distress. See *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979); *Morrow v. Kings Dep't Stores*, 57 N.C. App. 13, 290 S.E.2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E.2d 210 (1982). See generally Byrd, *Recovery for Mental Anguish In North Carolina*, 58 N.C.L. REV. 435 (1980).

49. See *supra* note 48.

50. See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

51. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 874-88 (4th ed. 1971).

52. See *Anclote Manor Found. v. Wilkinson*, 263 So. 2d 256 (Fla. Dist. Ct. App. 1972). See also *infra* notes 69-70 and accompanying text.

53. See REP. OF THE N.C. PROF. LIABILITY INS. STUDY COMM'N 3 (Mar. 12, 1976).

54. *Mazza*, 61 N.C. App. at 178-79, 300 S.E.2d at 839 (1983); see *supra* note 22 and accompanying text.

of malpractice if injury results.⁵⁵ Abandonment is a unilateral act by the medical practitioner and has been found to exist in cases in which the doctor refused to attend a patient,⁵⁶ left a patient during an operation,⁵⁷ failed to attend to a patient despite a promise to do so,⁵⁸ or discharged a patient prematurely.⁵⁹ Each of these cases involved a doctor's direct action or inaction in relation to the treatment being rendered. By construing Huffaker's activity with Mr. Mazza's wife as abandonment, the court recognized that "abandonment" also can be inferred from a doctor's actions that are private and unrelated to the patient's treatment.

This holding also could be construed as a rule that a doctor "abandons" his patient by acting in conflict with the patient's interest, since these conflicting actions would not be conducive to providing proper health care. This principle, however, would give the patient a right to restrict his doctor's non-professional activity by the threat of a malpractice suit. Such a result unnecessarily expands the scope of negligent malpractice and violates the policies underlying the cause of action.

Another ruling indicating a more liberal attitude toward malpractice claimants was the award of damages. Mr. Mazza was awarded \$17,000 in compensatory damages for the cost of medical services rendered to both Mr. and Mrs. Mazza prior to Huffaker's negligent conduct.⁶⁰ These damages were upheld on appeal.⁶¹ The court of appeals stated that all medical treatments given by Huffaker were rendered worthless by his subsequent sexual relations with Mrs. Mazza.⁶²

This award is unique in two respects. First, prior to *Huffaker* no North Carolina court had awarded as damages the cost of medical treatments *prior* to the negligent act. To the contrary, the North Carolina Supreme Court has held that a plaintiff is not entitled to recover for medical expenses incurred prior to the negligence of which he or she complains.⁶³ *Mazza* may open a new avenue for plaintiffs seeking malpractice damages. Many innovative arguments now could be made on behalf of plaintiffs suing doctors who have rendered ongoing treatment. A fatal negligent act by the doctor arguably would "destroy or make worthless" all treatment administered up until the negligence.⁶⁴

55. *Wilson v. Martin Memorial Hosp.*, 232 N.C. 362, 61 S.E.2d 102 (1950).

56. *Cortez v. Macias*, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980); *Vann v. Harden*, 187 Va. 555, 47 S.E.2d 314 (1948).

57. *Burnett v. Layman*, 133 Tenn. 323, 181 S.W. 157 (1915).

58. *Fortner v. Koch*, 272 Mich. 273, 261 N.W. 762 (1935).

59. *Collins v. Meeker*, 198 Kan. 390, 424 P.2d 488 (1967).

60. *Mazza*, 61 N.C. App. at 187-88, 300 S.E.2d at 844.

61. *Id.*

62. *Id.*

63. *Blaine v. Lyle*, 213 N.C. 529, 196 S.E. 833 (1938) (girl who had been treated by doctor for over one year could not recover expenses incurred for treatment rendered prior to negligent act).

64. A hypothetical situation can demonstrate this point. A patient with a heart condition must receive treatment regularly over the course of four years. During the last treatment, the doctor negligently injects the wrong medicine into the patient. As a result the patient must incur a

The court failed to recognize one important factor in its affirmation of the award for past medical fees—plaintiff had benefitted from receiving those psychiatric treatments. He was able to work, carry on a family life, and engage in a relatively normal life during the course of Huffaker's four year treatment. The award should have been set off by the benefits received by Mr. Mazza. No subsequent act can make worthless what already was received.⁶⁵

The second unique aspect of the compensatory damages award was the inclusion of Mrs. Mazza's medical expenses.⁶⁶ The expenses incurred by Mrs. Mazza were for treatments she received as a patient of Huffaker, independent of the treatments Mr. Mazza was receiving.⁶⁷ Thus, the award compensates Mr. Mazza for expenses incurred by another. Here again, the court granted Mr. Mazza relief under a claim exercisable by his wife, not him.⁶⁸

Although husbands long have been able to recover their spouse's medical expenses, a malpractice claim is not the proper vehicle. Florida allowed a husband to recover expenses in a breach of contract action when the psychiatrist was found guilty of abusing the counter-transference phenomenon and causing the wife's suicide.⁶⁹ The court held that because the psychiatrist breached a contract with a patient and destroyed the benefit anticipated from skillful treatment, the party paying for the patient's care was entitled to recover payments made under the contract.⁷⁰ Recovery also was conditioned expressly on proof that the psychiatrist's breach destroyed the possibility of rendering beneficial treatments—the wife's subsequent suicide was proof that the treatments were not beneficial.⁷¹ In *Mazza*, however, there was no finding that Mrs. Mazza did not benefit from Huffaker's treatments. To the contrary, testimony at trial tended to show that the treatments received by Mrs. Mazza were helpful.⁷²

The award of damages for permanent injury also embodies a more liberal view toward malpractice claimants. Traditionally, North Carolina has maintained a high threshold of proof to warrant permanent damage instructions.⁷³ The evidence must show with reasonable certainty that the injury is permanent.⁷⁴ The plaintiff must overcome this burden by the greater weight of the

heart transplant or die. In either situation, *Mazza* would allow the patient or his estate to recover all medical expenses that the patient had incurred up to that last treatment.

65. In *Hess v. Frank*, 47 A.D.2d 889, 367 N.Y.S.2d 30 (1975), the court denied a patient's claim for the cost of past psychiatric treatments. The court held that payments made for treatments rendered were not recoverable.

66. *Mazza*, 61 N.C. App. at 187-88, 300 S.E.2d at 844.

67. See *supra* note 41 and accompanying text.

68. See *supra* note 41 and accompanying text.

69. *Anclote Manor Found. v. Wilkinson*, 263 So. 2d 256 (Fla. Dist. Ct. App. 1972).

70. *Id.* at 257.

71. *Id.*

72. Record at 131. The testimony tended to show that the treatment was instrumental in Mrs. Mazza's reconciliation with her father.

73. See, e.g., *Caison v. Cliff*, 38 N.C. App. 613, 248 S.E.2d 362 (1978).

74. *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760 (1965); *Caison v. Cliff*, 38 N.C. App. 613, 616, 248 S.E.2d 362, 363 (1978).

evidence.⁷⁵ The only evidence in *Mazza* tending to prove a permanent injury was testimony by plaintiff's expert that Mr. Mazza never again would be able to form a medical relationship with a psychiatrist.⁷⁶ No expert testified that this would harm plaintiff's mental health permanently.⁷⁷ No doubt the *Mazza* evidence implies some pain and suffering. It is doubtful that the limited expert testimony met the North Carolina Supreme Court's strict standard of proof of a reasonable certainty of permanent injury.

Two additional rulings by the court of appeals were incorrect. First, the court of appeals upheld the trial court's decision to allow an expert witness to state an opinion concerning the professional ethics of Huffaker's conduct.⁷⁸ It is well established that in a malpractice action the psychiatrist's liability is conditioned on a violation of the standard of care.⁷⁹ Testimony on ethical standards is irrelevant to establishing negligence and should have been omitted.⁸⁰ Also, it is possible that the expert's unnecessary testimony on the ethical standard confused the jurors and caused them to attribute greater credibility to the expert's other testimony concerning the proper standard of care. The court's failure to omit the evidence denied defendant's statutory right to a judgment based on the standard of care in the community,⁸¹ and was prejudicial error.

The final error in *Mazza* was the trial court's instruction that the jury must find malpractice if it determined that Huffaker continued to treat Mr. Mazza after becoming emotionally and sexually involved with Mrs. Mazza.⁸² This instruction preempted the jury's role by conclusively establishing that the sexual conduct violated the standard of care. The jury was left with only a factual question whether the couple had sex, not whether having sex violated the standard of care. Thus, Huffaker was denied his right to a jury determination of whether he violated the standard of care. Because the instruction had the same effect as a directed verdict conditioned on a factual finding that the psychiatrist had sex with the patient's wife, the instruction should have been ruled prejudicial error.

Mazza significantly expanded medical malpractice principles. Several of the changes are welcome. Raising the standard of care for psychiatrists, awarding past medical expenses if offset by the benefits consumed, and decreasing the burden of proof for permanent injury will provide more protec-

75. *Dolan v. Simpson*, 269 N.C. 438, 442, 152 S.E.2d 523, 526 (1967).

76. *Mazza*, 61 N.C. App. at 185-86, 300 S.E.2d at 843.

77. The North Carolina Supreme Court historically has required expert testimony to establish a reasonable certainty of permanent injury. See, e.g., *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760 (1965).

78. The court did not find error in this testimony because the ethical standard was equivalent to the standard of care. *Mazza*, 61 N.C. App. at 183-84, 300 S.E.2d at 842.

79. *Id.* at 174-75, 300 S.E.2d at 837; N.C. GEN. STAT. § 90-21.12 (1981).

80. Cf. *Logan v. District of Columbia*, 447 F. Supp. 1328 (1978) (doctor's breach of the confidentiality of the doctor-patient relationship not recognized as malpractice even though the conduct was found to be an ethical violation).

81. N.C. GEN. STAT. § 90-21.12 (1981), quoted *supra* note 26.

82. *Mazza*, 61 N.C. App. at 179-80, 300 S.E.2d at 839; see also *supra* notes 26-34 and accompanying text.

tion for claimants. Granting third parties a cause of action, defining "abandonment" of the patient broadly, allowing an expert to prejudice the jury's decisionmaking role, and giving the trial judge a right to preempt needlessly the jury's charge, however, are not desired results. The supreme court should take action to overrule these aspects of *Mazza*. If the court is unwilling to do so, it should at least limit application of the less desirable results to unique factual situations such as that occurring in *Mazza*. Such a limited interpretation would diminish their effects on North Carolina malpractice principles since a similar factual pattern is unlikely to occur frequently.

KAREN ANN POPP

Payne v. Cone Mills Corp.: Should A Doctor's Suspicions Bar A Plaintiff's Meritorious Claim?

Byssinosis,¹ more commonly referred to as brown lung disease, afflicts textile workers who are repeatedly exposed to raw cotton dust.² In North Carolina byssinosis is considered an occupational disease.³ A textile worker who contracts byssinosis is entitled to file a claim for workers' compensation benefits,⁴ but the claim must be filed within two years⁵ of the date on which both prongs of a two-prong test are satisfied.⁶ The first prong requires that the claimant be disabled. The second prong requires that the claimant has been informed, through a doctor's diagnosis, that his textile job caused or contributed to his disease.⁷ Whether an ambiguous, speculative diagnosis could give a patient sufficient information to satisfy the notice prong was the central issue in *Payne v. Cone Mills Corp.*⁸

In *Payne* the court of appeals held that a claimant, who filed his claim in 1979, had received sufficient notice in 1970 of the occupational nature of his disease to initiate the two-year limitation period.⁹ In 1970 Payne's doctor informed him that he "suspected" Payne "might be allergic to some airborne

1. Byssinosis is a disease caused by prolonged exposure to cotton dust with symptoms of nasal irritation, dry irritating cough, and wheezing respiration of asthmatic character. C. FRANKEL, 5A LAWYER'S MEDICAL CYCLOPEDIA § 33.59a, at 82 (rev. ed. 1972).

2. Bouheys, Schoenberg, Beck & Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, 5 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 607, 616 (Service Vol. 1978) (report of study finding excessive chronic lung disease among all types of textile workers who are exposed to substantial levels of dust including carders, spinners, yarn preparers, and weavers); Dickie & Chosy, *Some Important Occupational Diseases*, 3 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 729, 742 (Service Vol. 1975).

3. See *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 101, 301 S.E.2d 359, 369 (1983) (chronic obstructive lung disease as well as byssinosis compensable occupational disease in North Carolina); *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 95, 265 S.E.2d 144, 145 (1980).

N.C. GEN. STAT. § 97-53 (1979) authorizes compensation for byssinosis:

The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article

. . . .

(13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

4. N.C. GEN. STAT. § 97-52 (1979) provides:

Disablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Worker's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases

5. *Id.* § 97-58 (b) & (c). See *infra* notes 22-24 and accompanying text.

6. *Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 712-13, 304 S.E.2d 215, 222 (1983); *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 98-99, 265 S.E.2d 144, 147 (1980).

7. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 97-99, 265 S.E.2d 144, 147-48 (1980).

8. 60 N.C. App. 692, 299 S.E.2d 847 (1983), *disc. rev. denied*, 308 N.C. 387, 302 S.E.2d 252 (1983).

9. *Id.* at 698, 299 S.E.2d at 850.

allergen at work.”¹⁰ His claim for disability compensation, filed nine years after that diagnosis, was barred by expiration of the limitation period.¹¹ It is far from certain, however, that the speculative diagnosis Payne received in 1970 was sufficient to apprise him that he had contracted a permanent, disabling, occupational disease, for which he was required to file a claim against his employer within two years or forego his right to receive compensatory payment. Although Payne did not receive a conclusive diagnosis of byssinosis until 1979, the court of appeals held that the earlier, inconclusive diagnosis was sufficient to begin the limitation period.¹²

The *Payne* decision reformulates the notice prong of the two-pronged test established by the North Carolina Supreme Court in *Taylor v. J.P. Stevens & Co.*¹³ Instead of commencing the limitation period on the day the claimant received actual notice, the *Payne* decision suggests that a plaintiff must file his claim when he knew or should have known of the nature and work-related qualities of his disease. Although the court claimed to have applied the *Taylor* rule favoring plaintiff—that a claimant need not file his claim until a doctor has informed him of the nature and work-related cause of his disease¹⁴—it is difficult to reach the court’s conclusion using the *Taylor* test. Furthermore, even if the court intended to follow and apply the *Taylor* test, the court undercut strong policies supporting workers’ compensation¹⁵ in applying the facts to the test, by evaluating those facts in a light unfavorable to the worker. If courts follow the *Payne* approach in similar cases, other claimants may find their workers’ compensation claims barred by the time they learn conclusively that they are afflicted with a compensable disease.

A better approach, more consistent with the guiding principle of workers’ compensation that “industry [must] take care of its [own] wreckage,”¹⁶ would require strict application of *Taylor*’s notice requirement—that the two-year limitation period does not run until a qualified physician unambiguously informs the plaintiff of the nature and work-related cause of his disease.¹⁷ Moreover, in applying this requirement to specific cases, courts should evaluate the knowledge that each plaintiff actually gained from his diagnosis in light of all surrounding circumstances, including the plaintiff’s education, the specificity of the diagnosis, and the extent to which workers generally were aware of the particular occupational hazard at the time the diagnosis was given. If these guidelines had been followed the *Payne* court probably would not have barred plaintiff’s claim.

The facts of the *Payne* case were as follows. Claimant James R. Payne, a

10. *Id.* at 696, 299 S.E.2d at 849.

11. *Id.* at 698, 299 S.E.2d at 850.

12. *Id.*

13. 300 N.C. 94, 97-99, 265 S.E.2d 144, 147-48 (1980).

14. *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850.

15. *See, e.g.*, Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943).

16. Morrison v. Burlington Indus., 304 N.C. 1, 14, 282 S.E.2d 458, 468 (1981) (quoting Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943)).

17. *Taylor*, 300 N.C. at 101, 265 S.E.2d at 148.

cotton mill worker, had received hospital treatment in 1970 for asthmatic bronchitis secondary to exposure to textile particles. His doctor advised him not to return to work because he "suspected that he might be allergic to some airborne allergen at work."¹⁸ It was not until 1979 that Payne was diagnosed conclusively as having byssinosis.¹⁹ Although the Industrial Commission ruled that the doctor had not advised Payne of the nature and work-related cause of his disease in 1970, the court of appeals held that the evidence did not support this ruling. Therefore, plaintiff's claim was dismissed for lack of jurisdiction.²⁰

In making its determination, the court of appeals addressed two questions: (1) did the court in *Taylor* correctly construe sections 97-58(b) and 97-58(c); and (2) given a proper construction, did the Industrial Commission correctly find the facts? In conclusory language, the court stated that to satisfy section 97-58 the communication by the physician to the plaintiff must inform the plaintiff of the nature and work-related cause of the disease and his resulting disability. The court decided that the physician's 1970 diagnosis had satisfied the statutory requirements.²¹ A study of the *Payne* evidence and the facts found by the appellate court raises a significant question whether the court actually applied the test it outlined.

In *Taylor*, when the North Carolina Supreme Court first instituted the requirement that the claimant be informed of the nature and work-related cause of his disease, the court construed ambiguous language in North Carolina General Statutes section 97-58, subsections (b) and (c), by interpreting the legislature's intent.²² The statute provides:

(b) . . . The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has the same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be.²³

The court reasoned that if a literal interpretation of the language of the statute contravened the manifest purpose of the statute, the goals behind the statute should control.²⁴

Construing the statute in this light, the court has held that the time period begins running upon the occurrence of two events: disability and notice. First, to be disabled, an employee must have suffered injury from an occupational disease that renders him incapable of earning the wages he was receiv-

18. *Payne*, 60 N.C. App. at 696, 299 S.E.2d at 849.

19. *Id.* at 695, 299 S.E.2d at 848-49.

20. *Id.* at 698, 299 S.E.2d at 850. The plaintiff must establish compliance with the statute's two-year time limit for the Industrial Commission to have jurisdiction over his claim. See *infra* note 29.

21. *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850.

22. *Taylor*, 300 N.C. at 101-02, 265 S.E.2d at 148. See *infra* note 39 and accompanying text.

23. N.C. GEN. STAT. § 97-58 (b) & (c) (1979).

24. *Taylor*, 300 N.C. at 102, 265 S.E.2d at 148-49.

ing when the incapacitating injury occurred.²⁵ Second, an employee is considered "on notice" when he is first advised by a physician that he has the disease, even though disability may have occurred much earlier.²⁶ Recognizing that byssinosis is an "insidious"²⁷ disease with peculiar associated problems, the *Taylor* court held that an employee is not informed of his disease until a physician notifies him of "the nature and work-related quality of the disease."²⁸ This standard was designed to reduce the likelihood that unaware deserving claimants might lose their compensation rights by passage of time.²⁹

In 1981 the North Carolina Court of Appeals had two occasions to apply the *Taylor* notification standard. In *Poythress v. J.P. Stevens and Co.*³⁰ plaintiff's physician diagnosed her condition as byssinosis resulting from "inhalation of cotton lint fibers leading to a disease of the lung characterized by foreign body reaction in a febrile but coughing patient."³¹ The diagnosis was made in 1963. As a result of her doctor's diagnosis and recommendation, claimant retired five months later. She did not file a claim for workers' com-

25. See *Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 709, 304 S.E.2d 215, 220 (1983) (a worker is incapable of earning wages that he was receiving when he is unable to work as he had in the past; whether claimant still was able to earn the same hourly wage was not determinative of the question).

26. *Id.* at 706, 304 S.E.2d at 218 (1983); *Taylor*, 300 N.C. at 102, 265 S.E.2d at 149.

27. *Taylor*, 300 N.C. at 101, 265 S.E.2d at 148.

28. *Id.*, at 102, 265 S.E.2d at 149. See also *McCall v. Cone Mills Corp.*, 61 N.C. App. 118, 122-23, 300 S.E.2d 245, 247 (1983); *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850; *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 561, 284 S.E.2d 175, 178 (1981).

29. Although the courts reduced the likelihood that unsuspecting diseased claimants might lose their right to receive compensation, the courts heightened the procedural requirements related to this statute. See *Dowdy v. Fieldcrest Mills, Inc.*, 398 N.C. 701, 704-05, 304 S.E.2d 215, 218 (1983); *Poythress v. J.P. Stevens & Co.*, 54 N.C. App. 376, 378-79, 283 S.E.2d 573, 576-77 (1981). For example, § 97-58(c) is not considered a statute of limitations to be pleaded and proved by the defendants. Instead, in *Poythress* the court of appeals held that the section's two-year time limit is a condition precedent with which plaintiffs must comply before jurisdiction is conferred on the Industrial Commission. *Poythress*, 54 N.C. App. at 378-79, 283 S.E.2d at 576-77; *Dowdy*, 308 N.C. at 704, 304 S.E.2d at 218. Because the claimant bears the burden of proving that his claim was filed timely, failure to meet this condition creates an absolute jurisdictional bar. Unlike a statute of limitations, for which the jurisdictional bar may be waived by the defendant's failure to raise it, an employer cannot waive the bar caused by the expiration of the workers' compensation period. *Poythress*, 54 N.C. App. at 379, 283 S.E.2d at 577. See also *Dowdy*, 308 N.C. at 705, 304 S.E.2d at 218 (jurisdiction is challengeable at any time throughout the proceeding).

Since § 97-58(c) creates a condition precedent to establishing the jurisdiction of the Industrial Commission, appellate courts must review de novo the evidence supporting an Industrial Commission ruling on whether the claimant filed his claim within the prescribed time period. *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976); *Richards v. Nationwide Homes*, 263 N.C. 295, 303-04, 139 S.E.2d 645, 651 (1965). The Industrial Commission's findings of substantive facts are conclusive on appeal when supported by competent evidence. N.C. GEN. STAT. § 97-86 (1979) states: "The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact, but either party to the dispute may . . . appeal from the decision of said Commission to the court of appeals for errors of law" See also *Walston v. Burlington Indus.*, 304 N.C. 670, 677, 285 S.E.2d 822, 828 (1981), *amended on reh'g*, 305 N.C. 296, 285 S.E.2d 822 (1983); *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 464 (1981). Jurisdictional facts found by the Industrial Commission are not conclusive on appeal, however, because jurisdiction is a question of law. Higher courts have the power and, indeed, the duty to consider all the evidence in the record, and make independent findings of jurisdictional facts. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261; *Richards*, 263 N.C. at 303-04, 139 S.E.2d at 651.

30. 54 N.C. App. 376, 283 S.E.2d 573 (1981).

31. *Id.* at 378, 283 S.E.2d at 575.

pensation until 1977.³² The court of appeals held that plaintiff had been informed of the nature and work-related cause of her disease in 1963.³³

In *McKee v. Crescent Spinning Co.*³⁴ the court of appeals reached the opposite result. Claimant, Roy E. McKee, filed his claim in 1978, twelve years after a doctor informed him that he had "a breathing problem"³⁵ and "if it doesn't get better soon he had better get out of the mill."³⁶ Four years after McKee's first diagnosis, another physician told him that he had "brown lung." Neither physician, however, further explained the cause of his sickness. McKee continued to work in the mill until 1971.³⁷ The *McKee* court considered the recommendation to "get out of the mill" only an admonition, not specific enough to relay the causation of the breathing problem to claimant. The "brown lung" diagnosis, which was clearly meaningless to claimant, also failed to explain the cause of the disease.³⁸

The *Taylor* court adopted the "nature and work-related cause" formulation of the notice requirement because it found that the legislature never intended that (1) a plaintiff would have to make a correct medical diagnosis of his own condition prior to notification from a doctor to make his claim timely, or that (2) the statutory scheme would be construed to render the time for notice and filing of the claim inequitably short.³⁹ In the *McKee* opinion, the court of appeals noted a third justification for the notice requirement: a plaintiff should not be required to inquire further and discover the relationship between his condition and his employment if his doctor fails to inform him adequately.⁴⁰

The court of appeals' ruling in *Payne* violated all three of these policies. By finding that *Payne* indeed had been informed of the nature and work-re-

32. *Id.*

33. *Id.* at 383, 283 S.E.2d at 578.

34. 54 N.C. App. 558, 284 S.E.2d 175 (1981).

35. *Id.* at 559, 284 S.E.2d at 176.

36. *Id.* at 562, 284 S.E.2d at 178.

37. *Id.* at 559, 284 S.E.2d at 176.

38. *Id.* at 562, 284 S.E.2d at 178.

39. *Taylor*, 300 N.C. at 102, 265 S.E.2d at 149. North Carolina's workers' compensation time limitation rule is more favorable to plaintiffs than other states' rules. There are six different rules for determining when the statute of limitations begins to run on a workers' compensation claim. See Annot., 11 A.L.R.2d 277 (1950). Arranged from the most to the least onerous to plaintiffs, the time limitation period begins to run (1) at the time the negligent act occurred; (2) at the time of the last industrial exposure; (3) when the disease is contracted; (4) whenever the plaintiff should have known of the disease's causation; (5) when disability results; and (6) the North Carolina approach, see *supra* text accompanying notes 25-29. The numerous philosophies embraced by the states are a product of their differing statutes and judicial interpretations.

When the North Carolina Supreme Court adopted the *Taylor* test instead of a "knew or should have known" standard, the court placed North Carolina among the states lending the most favorable treatment to workers' compensation plaintiffs stricken with byssinosis. As noted by *Taylor*, the "insidious" nature of byssinosis with its peculiar associated problems requires a liberal reading of § 97-58 to afford plaintiffs their rightful opportunity to file claim. *Taylor*, 300 N.C. at 97, 265 S.E.2d at 146. By comparison to other states' positions, North Carolina could have provided more liberal treatment to plaintiffs only by construing § 97-58 as a statute of limitations, cf. *McKinney v. Feldspar Corp.*, 612 S.W.2d 157, 158 (Tenn. 1981) (construing that state's versions of § 97-58) instead of a jurisdictional condition precedent.

40. *McKee*, 54 N.C. App. at 563, 284 S.E.2d at 178.

lated cause of his disease⁴¹ when his physician only had advised him that he "suspected" the disease was connected causally to Payne's occupation,⁴² the court of appeals implied that Payne either should have diagnosed his own condition based on information from which a qualified medical doctor could only speculate, or should have inquired further about the relationship between his condition and his employment by seeking a second, more concrete opinion. By holding that such a vague diagnosis triggered the statutory time period, the court of appeals rendered the time for filing the claim inequitably short.⁴³

Implicit in the *Payne* court's holding is the notion that, in 1970, Payne knew or should have known from his doctor's diagnosis that he had contracted a compensable occupational disease. It is, however, not at all certain that Payne knew anything at all about byssinosis in 1970. Textile workers generally were poorly educated about the symptoms of byssinosis and their rights to compensation for occupational disability.⁴⁴ It was not until 1980, ten years after Payne's diagnosis, that a widely read North Carolina newspaper publicized the problem of byssinosis.⁴⁵ If the *Payne* court had considered claimant's probable lack of knowledge about the disease in 1970, it is doubtful that it would have found his doctor's speculative diagnosis to be sufficient notification to start the running of the statutory time period.

In two other cases decided later in 1983, North Carolina courts again held that the Industrial Commission lacked jurisdiction to hear plaintiffs' claims because more than two years had elapsed since the plaintiffs were informed of the nature and work-related cause of their diseases. The facts in these cases, *McCall v. Cone Mills, Inc.*⁴⁶ and *Dowdy v. Fieldcrest Mills, Inc.*,⁴⁷ however, strongly indicated that the plaintiffs actually had received notice, as required in section 97-58, of their occupational diseases. The *McCall* case was decided just one month after the court of appeals rendered the *Payne* decision. In that case claimant's decedent, Martin McCall, had been diagnosed as suffering from "allergic pneumonitis due to exposure to cotton fibers and hypertensive vascular disease."⁴⁸ The record was unclear whether his doctor told him that he had byssinosis.⁴⁹ Shortly after discharge from the hospital, decedent retired, in part because his physician had informed him that "his lungs were full of lint" and it's "going to kill you."⁵⁰ From this evidence, the *McCall* court found that decedent had been informed sufficiently of his disease, its nature,

41. *Payne*, 60 N.C. App. at 698, 299 S.E.2d at 850.

42. *Id.* at 696, 299 S.E.2d at 849.

43. *But see Poythress*, 54 N.C. App. at 375, 283 S.E.2d at 579 (A claimant has no right to be told that he has a claim for workers' compensation; he need be told only the nature and work-related aspect of his disease for the two-year time limit to begin to run.).

44. *See Poythress*, 54 N.C. App. at 381, 283 S.E.2d at 579.

45. *See Brown Lung: A Case of Deadly Neglect*, The Charlotte Observer, Feb. 3-10, 1980 (byssinosis series). This Pulitzer Prize winning feature documented the varied aspects of byssinosis for the paper's approximately 170,000 readers.

46. 61 N.C. App. 118, 300 S.E.2d 245 (1983).

47. 308 N.C. 70, 304 S.E.2d 215 (1983).

48. *McCall*, 61 N.C. App. at 121, 300 S.E.2d at 247.

49. *Id.* at 120-21, 300 S.E.2d at 246-47.

50. *Id.* at 121, 300 S.E.2d at 247.

and its relation to his work to begin the running of the two-year time limit.⁵¹

Five months after the *Payne* case, the North Carolina Supreme Court reviewed the same time-limit jurisdiction issue in *Dowdy*.⁵² Like *McCall*, *Dowdy* presented much stronger evidence supporting the expiration of the two-year limit than *Payne*. Five years before Dowdy filed his claim for workers' compensation, his doctor informed him that he was "severely disabled and he should not be exposed any further to airborne irritants namely cigarette smoke and industrial dust."⁵³ The examining doctor also stated that the "impairment is *probably* due in part to the cotton dust exposure in spite of the fact that the diagnosis of byssinosis is not warranted in view of the only occasional occurrence of complaints in relation to cotton dust exposure."⁵⁴ The doctor found that Dowdy, a cigarette smoker, had chronic obstructive lung disease with distinct aggravation by cotton dust exposure.⁵⁵ He encouraged Dowdy to refrain from smoking and avoid exposure to cotton dust.⁵⁶ On this evidence, the court held that Dowdy had been informed by a medical authority of his occupational disease, its nature, and its relation to his employment. Apparently, when Dowdy's doctor told him that his disease "severely restricted his ability to breath," he was informed of the nature of the disease. By relating the disease "to cotton dust in [Dowdy's] work environment at the defendant's mill," the doctor was deemed to have informed Dowdy of the work-related cause.⁵⁷ Although chronic obstructive lung disease was not recognized as a compensable disease in 1973,⁵⁸ that fact was irrelevant for section 97-58 purposes.⁵⁹

The *Taylor* court may have intended its two-pronged test to establish a bright-line standard that would require all questions of doubtful notification to be resolved in the claimant's favor.⁶⁰ If that was the court's intention, it has been obscured by the holdings of *Poythress*, *McKee*, *McCall*, *Dowdy*, and *Payne*. These five cases do not fall on one side or the other of a bright-line

51. *Id.* at 122-23, 300 S.E.2d at 247.

52. 308 N.C. at 701, 304 S.E.2d at 215.

53. *Id.* at 707, 304 S.E.2d at 219.

54. *Id.* (emphasis added).

55. *Id.*

56. *Id.* at 706, 304 S.E.2d at 219.

57. *Id.* at 712-13, 304 S.E.2d at 222.

58. See *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 101, 301 S.E.2d 359, 369 (1983) (chronic obstructive lung disease recognized as a compensable occupational disease under certain circumstances); Note, *Workers' Compensation-Rutledge v. Tultex Corp./Kings Yarn: Leaving Precedent in the Dust?*, 62 N.C.L. REV. 573 (1984).

59. *Poythress*, 54 N.C. App. at 380, 283 S.E.2d at 576.

60. Although § 97-58 is a condition precedent to obtaining jurisdiction, *Poythress*, 54 N.C. App. at 375-79, 283 S.E.2d at 576-77; *Dowdy*, 308 N.C. at 704, 304 S.E.2d at 218; see *supra* note 29, it closely resembles a statute of limitations in its purpose. See *Lunkin v. Triangle Farm, Inc.*, 208 La. 538, 543, 23 So. 2d 209, 210 (1945) (discussing purposes of a workers' compensation statute of limitations). The North Carolina Supreme Court has cautioned that "the statute of limitations . . . is not such a meritorious defense that [judicial interpretation] should be strained in aid of it." *Hardbarger v. Deal*, 258 N.C. 31, 35, 127 S.E.2d 771, 774 (1962) (quoting *Rochester v. Tub*, 54 Wash. 2d 71, 74, 337 P.2d 1062, 1064 (1959)). By analogy, courts should not stretch facts unnecessarily in defendant's favor to find that the two-year time limit prescribed by § 97-58 has expired.

standard, but may be arranged more appropriately along a continuum of fact situations—ranging from those with facts clearly showing that the plaintiff had received notice sufficient to satisfy the *Taylor* test to those with facts demonstrating that the plaintiff had received no diagnosis that triggered the running of the statute. *McCall* and *Poythress* may be placed together at one end of the continuum because they both exemplify situations in which plaintiff clearly received the notice mandated by *Taylor*; both claimants received affirmative diagnoses that their diseases were caused by cotton lint.⁶¹ *McKee* appears at the other end of the continuum because its facts show that plaintiff did not receive adequate *Taylor* notice. A doctor advised McKee to leave the mill only if his condition failed to improve, but did not even speculate about the cause of the disease.⁶² From this, McKee could draw only a vague inference that his mill work either aggravated or contributed to his already well-developed disease. The *Dowdy* facts fall between these two ends, closer to the notice end. The diagnosis that Dowdy's condition was "probably" due to cotton dust⁶³ indicated that the doctor offered his opinion within a reasonable degree of medical certainty. Given the very nature of the disease, affirmative diagnosis often is difficult.⁶⁴ Thus, this diagnosis was sufficient to notify a plaintiff according to the *Taylor* guidelines.

The *Payne* facts fall somewhere between the notice in *Dowdy* and the lack of notice in *McKee*. Dowdy was told that his disease was "probably" caused by cotton dust;⁶⁵ Payne's physician only "suspected" that his breathing problems resulted from agents in the mill environment.⁶⁶ The court of appeals implied that Payne knew or should have known from this diagnosis that he had an occupational disease.⁶⁷ McKee, on the other hand, did not have even the benefit of speculation as to the cause of his disease.⁶⁸

By implicitly holding Payne to a "knew or should have known" standard of notification, the *Payne* court transformed section 97-58 from a claimant-favorable statute, as construed by the *Taylor* and *McKee* courts, to a defendant-favorable statute. *Payne* permitted a speculative diagnosis, rendered at a time when public awareness of the byssinosis problem was minimal, to satisfy the *Taylor* rule. The holding in *Payne* circumvented the purpose of the statute by causing the time limit to run before claimant received actual notification of the nature and cause of his disease.

Payne's departure from the *Taylor* approach should not be followed and should be disapproved by the North Carolina Supreme Court. In future cases the North Carolina appellate courts should hold that the two-year limitation

61. *McCall*, 61 N.C. App. at 120-23, 300 S.E.2d at 246-47; *Poythress*, 54 N.C. App. at 378, 283 S.E.2d at 575.

62. *McKee*, 54 N.C. App. at 561-62, 284 S.E.2d at 178.

63. *Dowdy*, 308 N.C. at 707, 304 S.E.2d at 219.

64. See *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 640, 256 S.E.2d 692, 696 (1979).

65. *Dowdy*, 308 N.C. at 708, 304 S.E.2d at 221.

66. *Payne*, 60 N.C. App. at 696, 299 S.E.2d at 849.

67. See *supra* notes 44-45 and accompanying text.

68. *McKee*, 54 N.C. App. at 561, 284 S.E.2d at 178.

period does not begin to run until a qualified physician *unambiguously* informs the plaintiff of the nature and work-related cause of his disease. In each case, the question whether the claimant was adequately informed about his disease should be answered with reference to the plaintiff's individual knowledge and the overall public awareness of the occupational disease at the time of the diagnosis. Courts should guard against any construction of section 97-58 that would permit the time limit to run before the claimant receives meaningful notification of the nature and cause of his disease.

TAMARA PATTERSON BARRINGER

Diaz v. United States Textile Corp.: Accidental Injuries Arising Out of and In the Course of Employment

An injury is compensable under the North Carolina Workers' Compensation Act¹ only if it is an "injury by accident arising out of and in the course of employment"² The worker need not show negligence attributable to the employer, and contributory negligence on the part of the claimant is not a bar to compensation.³ In *Diaz v. United States Textile Corporation*,⁴ however, the North Carolina Court of Appeals denied compensation to an employee and intimated that the employee's contributory negligence was the basis for the court's refusal to affirm the Industrial Commission's award of compensation.⁵ If the contributory negligence doctrine was the basis for the court's decision, the *Diaz* holding represents an erroneous application of North Carolina's workers' compensation law.⁶ This note examines the *Diaz* court's construction of the phrase "injury by accident arising out of and in the course of employment."

Carlos Diaz worked as an electrician for defendant. The Industrial Commission found that his duties included installing certain machines in defendant's textile plant, and adapting the machines to the existing voltage at the plant.⁷ In the course of these duties, Diaz entered one of the electrical substations located on defendant's premises to determine whether the power source "was resistant enough to bear the load of the charge that was going to be put upon it He gained entrance to the enclosed sub-station by placing a

1. N.C. GEN. STAT. §§ 97-1 to -122 (1979 & Cum. Supp. 1983).

2. *Id.* § 97-2(6) (1979). This phrase has been the subject of much judicial analysis. See, e.g., Note, *Workmen's Compensation—Accident Arising Out of and In Course of Employment In North Carolina*, 10 N.C.L. REV. 373, 373 (1932).

There is only one exception to the rule that an injury must occur accidentally to be compensable: occupational diseases are compensable even though they do not occur as the result of accident. N.C. GEN. STAT. § 97-52 (1979).

3. This change in the common law resulted from the fact that,

[w]orkers' compensation laws were a statutory compromise. The . . . acts assured workers compensation for injuries arising out of and in the course of employment without their having to prove negligence on the part of the employer. In exchange for the employer's loss of common law defenses . . . the employee gave up his right to common law verdicts In effect, tort liability was replaced with no fault liability.

Andrews v. Peters, 55 N.C. App. 124, 125, 284 S.E.2d 748, 749 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). Furthermore, "It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery." *Archie v. Greene Bros. Lumber Co.*, 222 N.C. 477, 480, 23 S.E.2d 834, 836 (1943) (quoting *Chambers v. Union Oil Co.*, 199 N.C. 28, 33, 153 S.E. 594, 596 (1930)). See also *Hartley v. North Carolina Prison Dep't*, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962); *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 91, 63 S.E.2d 173, 175-76 (1951); see *infra* note 31 and accompanying text.

4. 60 N.C. App. 712, 299 S.E.2d 843, *disc. rev. denied*, 308 N.C. 386, 302 S.E.2d 250 (1983).

5. The court found that claimant's injuries were not the result of an accident because he "should have known" that his actions would result in "severe electrical burns." *Id.* at 717, 299 S.E.2d at 846.

6. See *infra* note 31 and accompanying text.

7. *Diaz*, 60 N.C. App. at 714, 299 S.E.2d at 845.

wooden stepladder against the fence . . . and climbing over [it]."⁸ While inside, Diaz "made an inspection of the transformer and discovered a piece of wood, approximately two to three feet long resting between a wire and one of the transformers. He did nothing about the board at that time, and left the sub-station."⁹ After a coffee break, Diaz "decided to reenter the substation and remove the piece of wood to avoid a serious accident When he reached the piece of wood, he gave it a hard blow with his left hand . . . [and] received a great electrical shock."¹⁰ As a result, both of plaintiff's arms had to be amputated."¹¹

The Commission found that claimant "sustained an injury by accident arising out of and in the course of his employment,"¹² and awarded compensation. The court of appeals reversed.¹³ The evidence presented to the Commission was conflicting. First, evidence was presented that cast doubt on whether the injury was an accident. The court noted the alleged existence of a suicide note.¹⁴ Furthermore, Diaz offered contradictory explanations of why he attempted to remove the board—initially explaining that "he needed a board inside the fence,"¹⁵ but later testifying that "the piece of wood could fall and provoke an accident, so I decided to remove it."¹⁶ Moreover, both Diaz's coworkers and others investigating the incident testified that they found no board inside the substation.¹⁷ Second, evidence was presented that cast doubt on whether Diaz's injury occurred "in the course of employment." Diaz had never entered the electrical substation before¹⁸ and had not been directed to do so.¹⁹

Although these factors cast doubt on the Commission's decision, "[t]he finding of the Commission . . . is conclusive if supported by any competent evidence."²⁰ The court's review is "limited . . . to two questions of law . . . : (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact . . . justify . . . the legal conclusions and decisions."²¹ Thus, the determination of whether an accident arises out of and in the course of employment is a mixed

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 713, 299 S.E.2d at 844.

12. *Id.* at 714, 299 S.E.2d at 845.

13. *Id.* at 717, 299 S.E.2d at 847.

14. *Id.* The record does not state when, and under what circumstances, the alleged suicide note written by plaintiff was found. The court deemed it unnecessary to consider defendant's contention that the note should be admitted into evidence because of the court's disposition of the case. *Id.*

15. *Id.* at 716, 299 S.E.2d at 846. A deputy sheriff testified that Diaz offered this explanation to him at Duke Hospital. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 714, 299 S.E.2d at 845.

19. *Id.* at 716, 299 S.E.2d at 846.

20. *Cole v. Guilford County*, 259 N.C. 724, 726, 131 S.E.2d 308, 310 (1963).

21. *Henry v. Lawrence Leather Co.*, 231 N.C. 447, 449, 57 S.E.2d 760, 762 (1950).

question of law and fact,²² one in which the court must give due regard to the Commission's findings.

The statutory condition that an injury is compensable only if caused by an "accident arising out of and in the course of employment" is intended to separate work-related injuries from nonwork-related injuries.²³ Its primary function is to determine the relationship between injury and employment.²⁴ The test is composed of three parts, the first of which requires that the injury be the result of an accident.²⁵ The North Carolina courts define "accident" as "an unlooked for and untoward event . . . not expected or designed by the person who suffers the injury."²⁶ An accidental injury is fortuitous and unintentional.²⁷

The court in *Diaz*, however, held that the evidence did not satisfy the requirements of injury by accident.²⁸ This was because the claimant, "an experienced electrician, *should have known* that if he hit a wet board with his bare hand while standing on wet grass and while the board was resting on a wire with at least 3,000 volts of electricity running through it, he would receive severe electrical burns."²⁹

Whether a claimant "should have known" is not the appropriate test; rather, the standard is whether claimant "expected or designed" the injury.³⁰ The court's holding implies that *Diaz*'s injuries were not by accident because he was negligent. The court's finding was an erroneous application of workers' compensation law because even gross negligence is no defense to a compensation claim.³¹ The elimination of contributory negligence is a foundation of the Workers' Compensation Act.³²

The second and third requirements of the test, that the accident "arise out of" and "in the course of" employment "are not, and should not be, applied entirely independently [D]eficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other."³³ At this point, however, it will be helpful to examine the phrases separately.

The phrase "arising out of the employment" refers to the origin or cause of the injury.³⁴ It is not enough that the injury occurs at the workplace; rather, it must be "a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation

22. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

23. *Watkins v. City of Wilmington*, 290 N.C. 276, 281, 225 S.E.2d 577, 581 (1976).

24. *Id.*

25. *See* N.C. GEN. STAT. § 97-2(6) (1979).

26. *Hensley v. Farmers Fed'n Coop.*, 246 N.C. 274, 278, 98 S.E.2d 289, 292 (1957).

27. *See Smith v. Cabarrus Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940).

28. *Diaz*, 60 N.C. App. at 717-18, 299 S.E.2d at 846.

29. *Id.* at 717, 299 S.E.2d at 846 (emphasis added).

30. *See supra* note 27 and accompanying text.

31. *Hartley v. North Carolina Prison Dep't*, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962).

32. *See supra* note 3 and accompanying text.

33. *Watkins v. City of Wilmington*, 290 N.C. 276, 281, 225 S.E.2d 577, 581 (1976) (quoting 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 29.00 (1972)).

34. *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972).

between the injury and the performance of some service of the employment."³⁵ Furthermore, the risk generally must be one that a reasonable person would assume to be "incidental to the service when he entered the employment."³⁶

The employee in question, however, need not have perceived the risk before the injury occurred. It is sufficient that the injury be "one which, after the event, may be seen to have had its origin in the employment."³⁷ If it originated in the employment, it need not be shown that it ought to have been foreseen or expected.³⁸

The court in *Diaz* did not explicitly address whether plaintiff's injury arose out of the employment, but implied that it did not. Diaz's duties, according to the court, did not include having to connect the wiring from the substation to the machinery, nor was Diaz directed by his superiors to enter the substation.³⁹ Furthermore, even if one of his duties was to check the voltage in the substation, Diaz had completed the duty before he reentered the substation.⁴⁰ Therefore, the court seemed to imply that the claimant was acting outside the scope of his employment by reentering the substation and attempting to remove the board.⁴¹

If the court intended to imply that Diaz's injury did not arise out of the employment, such a finding is incorrect. Whether Diaz's duties included checking the power source does not determine whether the injury arose out of the employment. An employee may perform a task beyond the scope of his assigned duties if he reasonably believes that it will further his employer's interests.⁴² The Commission believed Diaz's explanation that he was attempting to eliminate a safety hazard, and therefore properly may have found that Diaz reasonably believed that he was furthering his employer's interests. A reviewing court is bound by the Commission's finding if any competent evidence exists to support it.⁴³

35. *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964). See also *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968) ("When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard . . . common to others, it does not arise out of the employment.").

36. *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354. See also *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960) ("Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.'").

37. *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 726, 153 S.E. 266, 269 (1930).

38. *Id.* at 726, 153 S.E. at 269. See also *Taylor v. Twin City Club*, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963).

39. *Diaz*, 60 N.C. App. at 717, 299 S.E.2d at 846.

40. *Id.*

41. *Id.*

42. According to Professor Larson, "an employee who honestly attempts to serve his employer's interests by some act outside of his fixed duties should not be held to the exercise of infallible judgment on what best serves those interests." 1 LARSON, *supra* note 33, at § 27.12. Accord *Stubblefield v. Watson Elec. Co.*, 277 N.C. 444, 177 S.E.2d 882 (1970); *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1955). For application of this doctrine to the "in the course of employment" part of the test, see *infra* notes 44-47 and accompanying text.

43. See *supra* notes 20-22 and accompanying text.

The third requirement of the test, that the employee be injured "in the course of the employment," refers "to the time, place and circumstances under which an accidental injury occurs."⁴⁴ Since there was no dispute that Diaz was injured during his working hours and on his employer's premises, only the "circumstances" part of the test need be considered here. "[W]here the employee is engaged in activity which he is authorized to undertake and which is calculated to further, *directly or indirectly*, the employer's business,"⁴⁵ the circumstances are said to be within the course of employment.

The court of appeals relied in part upon Diaz's apparent lack of authority to enter the substation in holding that the injury did not occur in the course of employment.⁴⁶ Whether Diaz was authorized to enter the substation, however, is not dispositive. If he "had reasonable grounds to believe that the act . . . was incidental to his employment, or . . . would prove beneficial to his employer's interest . . ., compensation may be recovered, since then a causal connection between the employment and the accident may be established."⁴⁷ If Diaz reasonably believed that his act was either incidental to his employment or beneficial to his employer's interest, then compensation was proper.

A second reason for the court's finding that Diaz's injury did not occur in the course of employment was that, under either of the explanations Diaz gave for his behavior, he acted outside the scope of his employment. The court held that Diaz "was not doing what a man so employed may reasonably do at a time he was employed and at a place where he may have been during the time to do that thing."⁴⁸

The court's decision may have been influenced by Diaz's contradictory explanations of why he hit the board, the testimony that no board was found inside the substation after the accident, and the alleged existence of a suicide note.⁴⁹ All of these factors suggest that Diaz may have intended to injure or kill himself. If this were so, Diaz's injuries would not be the result of an accident,⁵⁰ and denial of compensation would be proper.⁵¹ The weighing of this

44. *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972).

45. *Harless v. Flynn*, 1 N.C. App. 448, 456, 162 S.E.2d 47, 53 (1968).

46. *Diaz*, 60 N.C. App. at 717, 299 S.E. 2d at 846.

47. *Harless v. Flynn*, 1 N.C. App. 448, 456, 162 S.E.2d 47, 53 (1964). The supreme court held in 1982 that:

"[C]ompensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer 'to any appreciable extent' when the accident occurred Such a determination depends largely upon the unique facts of each particular case, and, in close cases, the benefit of the doubt . . . should be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act."

Hoffman v. Ryder Truck Lines, 306 N.C. 502, 506, 293 S.E.2d 807, 810 (1982) (quoting *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955)).

48. *Diaz*, 60 N.C. App. at 717, 299 S.E.2d at 846.

49. See *supra* notes 14-19 and accompanying text.

50. Under the generally accepted definition of the term "accident," the injury must not have been "expected or designed" by the employee. See *supra* note 26 and accompanying text.

51. See N.C. GEN. STAT. § 97-12(3) (1979), which states in pertinent part: "No compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (3) His willful intention to injure or kill himself or another."

evidence is within the province of the Industrial Commission, however, and must be accepted as fact by a reviewing court if supported by *any* competent evidence.⁵² Applying the Commission's findings of fact to the law, an award of compensation was proper.

The *Diaz* decision represents an erroneous application of workers' compensation law and should be overruled expressly by the North Carolina Supreme Court. By holding that the claimant's injuries did not arise by accident because he "should have known" that injury would result from his actions, the court of appeals incorrectly interjected the concept of contributory negligence into workers' compensation law.⁵³ By rejecting the Commission's findings that Diaz reasonably believed his actions were incidental to his employment and would further his employer's interests, the court of appeals rejected findings of fact that were supported by competent evidence and were therefore binding on the court. Until *Diaz* is disapproved by a higher court it may invite the Industrial Commission and other panels of the court of appeals to deny meritorious claims under a misconception of the law.

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52. See *supra* notes 20-22 and accompanying text.

53. See *supra* notes 3, 31, and accompanying text.

North Carolina General Statutes Section 97-31: Must it Provide Exclusive Compensation for Workers who Suffer Scheduled Injuries?

The North Carolina Workers' Compensation Act¹ establishes three avenues of compensation for injured workers. First, section 97-29 provides benefits to workers who are unable to work as a result of an injury.² Second, section 97-30 makes benefits available to workers who are able to earn some wages but less than the amount that they were earning prior to their injury.³ The amount of compensation awarded to workers under these two sections is determined by the duration of a worker's disability.⁴ Finally, section 97-31 awards compensation to workers even if they suffer no diminution of earning capacity as a result of their injury.⁵ Unlike sections 97-29 and 97-30, compensation under section 97-31 is limited to a fixed duration and a list of specifically enumerated injuries.⁶ This compensation is "in lieu of all other

1. N.C. GEN. STAT. §§ 97-1 to -122 (1979 & Cum. Supp. 1983).

2. The pertinent part of *id.* § 97-29 (Cum. Supp. 1983) provides:

Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars (\$30.00) per week.

3. The pertinent part of *id.* § 97-30 provides:

Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury.

4. *Id.* §§ 97-29, -30; *see id.* § 97-2(9) (1979) (definition of "disability" under the Act).

5. *Watts v. Brewer*, 243 N.C. 422, 424, 90 S.E.2d 764, 767 (1956); *Anderson v. Northwestern Motors*, 233 N.C. 372, 374, 64 S.E.2d 265, 266 (1951); *Loflin v. Loflin*, 13 N.C. App. 574, 577, 186 S.E.2d 660, 662, *cert. denied*, 281 N.C. 154, 187 S.E.2d 585 (1972).

6. N.C. GEN. STAT. § 97-31 (1979) provides:

In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(1) For the loss of a thumb, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 75 weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty-six and two thirds percent (66⅔%) of the average weekly wages during 45 weeks.

(3) For the loss of a second finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 40 weeks.

....

(24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars (\$10,000).

N.C. GEN. STAT. § 97-31 (1979).

compensation.”⁷ The critical language of section 97-31 provides: “In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement”⁸

The North Carolina Supreme Court has interpreted section 97-31’s “in lieu of” proviso as entitling an injured employee to compensation exclusively under the schedule, if all his injuries are included in it.⁹ The court of appeals adhered to this view¹⁰ until 1983 when it rejected the exclusive compensation theory in *West v. Bladenboro Cotton Mills, Inc.*¹¹ and *Cook v. Bladenboro Cotton Mills, Inc.*¹² Instead of viewing section 97-31 as an exclusive source of compensation for a worker with a scheduled injury, *West* and *Cook* interpreted section 97-31 as an alternative basis of compensation for a worker who also qualified under another compensatory section of the Workers’ Compensation Act.¹³ This rationale allows a worker to elect the most favorable statutory remedy; if he chooses to receive compensation under section 97-31, however, he cannot recover additional compensation under another section of the Act,¹⁴ because compensation under section 97-31 is “in lieu of all other compensation.”

The *Cook* and *West* interpretations of section 97-31 are more equitable and more consistent with the underlying policy of the workers’ compensation law than the supreme court’s construction. Although these cases depart from precedent set by a higher court, they should not be overruled. Instead, the supreme court should reevaluate its interpretation of section 97-31 and, at the earliest opportunity, approve the court of appeals’ approach.

Cook and *West* are strikingly similar. In both cases, claimants were employed for most of their adult lives at the Bladenboro Cotton Mills where they were exposed to high levels of cotton dust. When Bladenboro was purchased by Highland Mills in 1979, neither claimant obtained employment because pulmonary testing revealed that their lungs were impaired.¹⁵ Both plaintiffs had little hope of securing other employment. *Cook* had “to take her time in climbing stairs and [could] become over exerted while sweeping.”¹⁶ She unsuccessfully sought work at the local employment agency and was turned

7. *Id.*

8. *Id.*

9. *See Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E.2d 397 (1978).

10. *See Baldwin v. North Carolina Memorial Hosp.*, 32 N.C. App. 779, 233 S.E.2d 600 (1977); *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E.2d 660, *cert. denied*, 281 N.C. 154, 187 S.E.2d 585 (1972); *Dudley v. Downtowner Motor Inn*, 13 N.C. App. 474, 186 S.E.2d 188 (1972).

11. 62 N.C. App. 267, 302 S.E.2d 645 (1983).

12. 61 N.C. App. 562, 300 S.E.2d 852 (1983).

13. *West*, 62 N.C. App. at 270-71, 302 S.E.2d at 648; *Cook*, 61 N.C. App. at 565-66, 300 S.E.2d at 854-55.

14. *West*, 62 N.C. App. at 271, 302 S.E.2d at 648. *See also supra* text accompanying note 8.

15. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646; *Cook*, 61 N.C. App. at 563-65, 300 S.E.2d at 853-54.

16. *Cook*, 61 N.C. App. at 563, 300 S.E.2d at 853.

down for a job at a retail store.¹⁷ Similarly, West had "a fifth grade education and no significant training outside the cotton textile industry."¹⁸ Both claimants sought lifetime compensation under section 97-29 for total and permanent disability. The Industrial Commission, however, made a lump sum award to both claimants. The Commission awarded Cook 3000 dollars under section 97-31(24), which provides compensation not to exceed 10,000 dollars for permanent injury to any important internal organ for which no scheduled compensation is otherwise payable.¹⁹ West received a 6000 dollar lump sum award. Although the Commission did not specify the statutory basis for the judgment, the court of appeals assumed that the award was pursuant to the same section.²⁰

The court of appeals remanded both cases to the Industrial Commission with instructions to reconsider claimants' arguments that they were disabled²¹ within the meaning of section 97-29.²² The court interpreted section 97-29 as an alternative basis for compensation for workers who suffered an injury also compensable under section 97-31. The *West* court, citing the North Carolina Supreme Court decision in *Perry v. Hibriten Furniture Co.*,²³ concluded that the "in lieu of other compensation" clause of section 97-31 would permit a recovery under either section 97-31 or section 97-29, but not both.²⁴

Although the *West* decision cited the supreme court as authority, the *Perry* court actually adopted a broader view of the "in lieu of" clause than that attributed to it. In *Perry*, decided unanimously in 1978, the supreme court had held that the "in lieu of" clause did not merely prohibit double recovery under section 97-31 and another section, but that it compelled recovery under only section 97-31.²⁵ The claimant in *Perry* had suffered a work-related injury while employed by the Hibriten Furniture Company. Medical experts agreed that he lost between twenty-five and seventy-five percent of the use of his back.

17. *Id.* at 565, 300 S.E.2d at 854.

18. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646.

19. *Cook*, 61 N.C. App. at 563-65, 300 S.E.2d at 853-55.

20. *West*, 62 N.C. App. at 269-70, 302 S.E.2d at 645-66.

21. "Disability" is a term of art. It does not refer to physical injury as such, but rather to loss of earning ability. N.C. GEN. STAT. § 97-2(9) (1979). Total disability is a prerequisite to compensation under section 97-29. *Id.* § 97-29 (Cum. Supp. 1983).

22. The court's language in *West* illustrates the policy considerations that caused it to depart from the supreme court's decision in *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E.2d 397 (1978). In *West* the court stated:

Upon remand, if the Commission finds plaintiff has a disability because of the occupational disease, then the statutory basis for compensation should be specified. An award for damage to the lungs may be made under G.S. 97-31(24). . . . But such an award, by the express terms of the statute, would be in lieu of all other compensation. *Perry v. [Hibriten] Furniture Co.*, 296 N.C. 88, 249 S.E.2d 397 (1978). Such an award may also be based on G.S. 97-29. . . . In many instances, an award under G.S. 97-29 better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31 because it is a more favorable remedy and is more directly related to compensating inability to work.

West, 62 N.C. App. at 270-71, 302 S.E.2d at 648.

23. 296 N.C. 88, 249 S.E.2d 397 (1978).

24. *West*, 62 N.C. App. at 271, 302 S.E.2d at 648.

25. *Perry*, 296 N.C. at 93-94, 249 S.E.2d at 401.

Their testimony indicated that Perry was "probably unable to carry out gainful employment" and "probably disabled from any useful occupation."²⁶ Perry testified that he continued to suffer pain in his back and legs and could no longer lift or bend without hurting.²⁷ The Industrial Commission concluded that Perry sustained a fifty percent loss of the use of his back and awarded him 150 weeks' compensation under section 97-31(23). Perry alleged that he was totally disabled and should have been awarded compensation under section 97-29.²⁸ The supreme court quoted section 97-31, emphasizing the phrase "in lieu of all other compensation."²⁹ It then held that section 97-31 was claimant's exclusive remedy:

The language of G.S. 97-31 . . . compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn *any* wages he is totally disabled, G.S. 97-2(9), and entitled to compensation for permanent total disability under G.S. 97-29 *unless all his injuries are included in the schedule set out in G.S. 97-31*. In that event the injured employee is entitled to compensation exclusively under G.S. 97-31 regardless of his ability or inability to earn wages in the same or any other employment.³⁰

The court of appeals' decisions in *Cook* and *West* circumvented the *Perry* holding. If the court of appeals had followed the *Perry* rule, it would not have allowed *West* and *Cook* the opportunity to recover compensation under section 97-29, the disability section of the Workers' Compensation Act, because under *Perry*, an "injured employee is entitled to compensation exclusively under section 97-31 regardless of his ability or inability" to work.³¹

Because more than one reasonable interpretation of the "in lieu of" clause exists, the legislature's intent in ratifying this clause is important. Unfortunately, the clause's legislative history is inconclusive. The circumstances surrounding the adoption of the clause may be viewed as supporting either the *Perry* or the *Cook-West* rule.

The legislature apparently adopted the "in lieu of" clause in response to the North Carolina Supreme Court's decision in the case of *Stanley v. Hyman-Michaels Co.*³² In *Stanley* the supreme court considered an earlier version of section 97-31 that did not contain the "in lieu of" clause.³³ Plaintiff had suffered two scheduled injuries, the loss of his left leg and the loss of the use of fifty percent of his right foot, in an industrial accident. The Industrial Commission noted that section 97-31 explicitly provided that the loss of both arms or hands, or vision in both eyes "shall be deemed permanent total disabil-

26. *Id.* at 90-91, 249 S.E.2d at 399-400.

27. *Id.* at 92, 249 S.E.2d at 400.

28. *Id.* at 89, 249 S.E.2d at 398-99.

29. *Id.* at 93, 249 S.E.2d at 401.

30. *Id.* at 93-94, 249 S.E.2d at 401 (emphasis in original).

31. *Id.*

32. 222 N.C. 257, 22 S.E.2d 570 (1942).

33. North Carolina Workmen's Compensation Act, ch. 120, § 31, 1929 N.C. Sess. Laws 117, 130 (current version at N.C. GEN. STAT. § 97-1 to -122 (1979 & Cum. Supp. 1983)).

ity,'³⁴ and shall be compensated under section 97-29, but did not state that the loss of a leg and the partial loss of the other foot would constitute such disability.³⁵ Thus, the Commission concluded that claimant's exclusive remedy was the scheduled payments provided by section 97-31.³⁶ The supreme court reversed the Commission, recognizing that although the combinations of injuries specified in section 97-31 were conclusively presumed to cause total and permanent disability, other injuries also were capable of causing such disability.³⁷ The court held that the Commission had "power to find that other injuries or combination of injuries occurring in the same accident may result in permanent total disability and when the Commission so finds, the injured employee should be compensated as provided in [the predecessor to section 97-29]."³⁸ Thus, *Stanley* allowed claimant to prove permanent and total disability and receive compensation under section 97-29 even though his injuries would have been compensable under section 97-31. When the legislature convened the following spring, however, it amended section 97-31 to include the "in lieu of" clause.³⁹

Although the holding discussed above may have elicited this prompt legislative response, a closer reading of *Stanley* suggests that the legislature amended section 97-31 because of the court's disposition of a different issue in that case. When *Stanley* was decided, section 97-31 included a provision authorizing the Commission "to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this Act, not to exceed twenty-five hundred (\$2,500) dollars."⁴⁰ The Commission had stated that, as a matter of law, plaintiff was not entitled to recover scheduled compensation for loss of particular bodily parts and then recover additional compensation under the disfigurement section, when the disfigurement resulted from the same loss of bodily parts for which compensation already had been awarded.⁴¹ On appeal defendants urged the supreme court to affirm the Commission's decision. The supreme court reviewed the legislative history of section 97-31, and noted that the "in lieu of" clause had appeared in the original workers' compensation bill. The clause was deleted, however, before the General Assembly adopted the Act.⁴² Relying on the fact that the legislature had deleted the "in lieu of" clause during its debate, the court stated: "We think the statute does authorize the Commission to award compensation for serious disfigurement resulting from the loss or partial loss

34. *Stanley*, 222 N.C. at 260, 22 S.E.2d at 572 (quoting the North Carolina Workmen's Compensation Act, ch. 120, § 31(t), 1929 N.C. Sess. Laws 117, 131) (current version at N.C. GEN. STAT. § 97-1 to -122 (1979 & Cum. Supp. 1983)).

35. *Id.*

36. *Id.* at 260, 22 S.E.2d at 572.

37. *Id.* at 260-61, 22 S.E.2d at 572-73.

38. *Id.* at 260, 22 S.E.2d at 572-73.

39. Act of March 5, 1943, ch. 502, § 2, 1943 N.C. Sess. Laws 556, 556 (current version at N.C. GEN. STAT. § 97-31 (1979)).

40. North Carolina Workmen's Compensation Act, ch. 120, § 31(t), 1929 N.C. Sess. Laws 117, 131 (current version at N.C. GEN. STAT. § 97-1 to -122 (1979 & Cum. Supp. 1983)).

41. *Stanley*, 222 N.C. at 262, 22 S.E.2d at 573.

42. *Id.* at 263, 22 S.E.2d at 574.

of a member for which compensation is provided in the schedules."⁴³ Thus, *Stanley* authorized two awards under section 97-31 for one injury—one award for the injury itself, and another award for disfigurement arising out of the injury.

It is entirely possible that the General Assembly added the "in lieu of" clause to section 97-31 to make clear its intention not to allow double compensation within section 97-31. Significantly, the amended version of section 97-31 provides: "In cases included by the following schedule, the compensation in each case . . . shall be in lieu of all other compensation including disfigurement"⁴⁴ By appending the "in lieu of" clause to section 97-31, the General Assembly may not have intended to change the portion of *Stanley* permitting disabled claimants to recover under section 97-29 rather than under section 97-31. The circumstances surrounding this amendment, therefore, do not compel the interpretation of section 97-31 expressed in *Perry* and, in fact, support the interpretation that views the "in lieu of" clause as a measure to prevent double recovery. Because neither the language of section 97-31 nor its legislative history compel the *Perry* interpretation, the supreme court should consider the merits of the *Cook* and *West* interpretations of the section.

Three strong policy factors support the interpretation of section 97-31 offered by *Cook* and *West*. Those factors are: (1) the earning impairment principle of workers' compensation law, (2) the goal of achieving equitable results in individual cases, and (3) the necessity of construing section 97-31 in a manner that will not vitiate section 97-29. The earning impairment principle recognizes that workers' compensation disability benefits are predicated on the extent of earning impairment that a worker sustains as a result of injury, rather than the degree of physical impairment.⁴⁵ This principle represents a compromise between the employer's and employee's interests. The employee surrenders his right to common-law damages in return for guaranteed, fixed compensation. The employer foregoes his right to deny liability altogether, in return for liability limited to the employee's loss of earning capacity.⁴⁶ Thus,

43. *Id.* at 264, 22 S.E.2d at 575.

44. N.C. GEN. STAT. § 97-31 (1979) (emphasis added).

45. See 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.11 (1983). There are essentially two views concerning the type of disability that workers' compensation should redress. Benefits should compensate for economic loss—lost wages or the impairment of the ability to earn wages—or compensate for physical loss or the functional impairment of muscles, tendons, and bones with their attendant psychological effects. Most workers' compensation statutes reflect the earning impairment viewpoint. For example, in North Carolina's Act, "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. GEN. STAT. § 97-2(9) (1979). *Cf.* Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 574-75, 139 S.E.2d 857, 861 (1965) ("Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money."). For a thorough discussion of these viewpoints and the influence of the earning impairment principle in compensation law, see 2 A. LARSON, *supra*, § 57-14(a)-(j).

46. New York Cent. R.R. v. White, 243 U.S. 188, 203-04 (1917). *Cf.* Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 725-26, 153 S.E. 266, 268 (1930) (quoting Stertz v. Industrial Ins. Comm'n of Wash., 91 Wash. 588, 590, 158 P. 256, 258 (1916)):

[T]he act under consideration contains elements of a mutual concession between the employer and the employee "Both had suffered under the old system; the employers by heavy judgements, . . . the workmen through the old defenses or exhaustion in

the earning impairment principle eliminates the practical problems of a subjective measurement of evaluating disability.⁴⁷ By requiring the Industrial Commission to reevaluate claimants' section 97-29 claims in *Cook* and *West*, the court of appeals attempted to tie the awarding of compensation to the actual earning disability incurred. As the court observed in *West*, "[i]n many instances, an award under G.S. 97-29 better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31 because it is a more favorable remedy and is more directly related to compensating inability to work."⁴⁸ *Cook* and *West*, therefore, adhere to the earning impairment principle of compensation.

The equitable results achieved in *Cook* and *West* attest to the validity of the earning impairment principle and provide further support for the court of appeals' interpretation of section 97-31. Although *Cook* and *West* suffered only a partial loss of respiratory function as a result of their injuries,⁴⁹ they were unemployable in the industry in which they had labored for most of their adult lives. With several years remaining before they reached retirement age, their 3000 dollar⁵⁰ and 6000 dollar⁵¹ awards would not have sustained them. Thus, there was a substantial likelihood that they would become wards of the State. The court of appeals' decision to afford *Cook* and *West* an opportunity to prove total and permanent disability was in their best interests and the best interests of society.

The final factor favoring the court of appeals' interpretation of the "in lieu of" clause is that the decisions in *Cook* and *West* were necessary to ensure the continued vitality of section 97-29. The subsection of 97-31 under which the Commission awarded *Cook* and *West* compensation, section 97-31(24), provides compensation for an indefinite range of injuries including permanent injury "to any important external or internal organ or part of the body" for which no scheduled compensation is otherwise payable.⁵² Since every disa-

wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in [the] future, where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it."

47. See 2 A. LARSON, *supra* note 45, § 57-14(h). How does one meaningfully compare the loss of a hand with the loss of a foot and assign a value to each without taking into account the extent of a worker's earning impairment? The medical impairment approach, *see supra* note 45, has influenced the award of scheduled compensation for loss of members. For example, scheduled benefits must be paid even if a worker suffers no decrease in earning ability as a result of injury. *See supra* text accompanying note 5. Despite the influence of the medical impairment approach, however, the amount of scheduled compensation payable for the loss of a hand or foot is determined on the basis of former income. *See, e.g.,* N.C. GEN. STAT. § 97-31(12), (14) (1979).

48. *West*, 62 N.C. App. at 271, 302 S.E.2d at 648. In contrast to *West*, the *Perry* approach did not attempt to relate compensation to a worker's actual earning impairment. Under *Perry* if a worker suffered a scheduled injury, he received the limited compensation available there "regardless of his ability or inability to earn wages." *Perry*, 296 N.C. at 94, 249 S.E.2d at 401.

49. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646; *Cook*, 61 N.C. App. at 563, 300 S.E.2d at 853.

50. *Cook*, 61 N.C. App. at 564, 300 S.E.2d at 854.

51. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646.

52. N.C. GEN. STAT. § 97-31(24) (1979).

bling injury arguably affects some important "part" of the body, requiring disabled claimants to recover only under section 97-31 would eliminate the possibility that any claimant ever would be able to recover under section 97-29. All permanently injured claimants would receive only the limited compensation available under section 97-31's schedule. A claimant, however, should not be foreclosed from the opportunity to prove permanent and total disability, and to obtain an award under section 97-29, just because his injury may be described as an injury to an "important organ or part of the body."

In the *West* and *Cook* cases the court of appeals fashioned an interpretation of section 97-31 that departed from the *Perry* rule established by the North Carolina Supreme Court. The court of appeals' approach, however, serves the policies underlying the Workers' Compensation Act better than the *Perry* approach. The *West* and *Cook* decisions are consistent with the earning impairment principle of compensation. They set a precedent that will produce equitable results in cases of workers who suffer injuries compensable under the schedule, but who nevertheless are unable to resume working as a result of their injuries. Furthermore, the construction of section 97-31 proffered by *Cook* and *West* was necessary to prevent emasculation of section 97-29 of the Act. Given these considerations, the supreme court should reevaluate *Perry* and adopt the *West-Cook* construction of section 97-31.

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