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NOTES

Admiralty Law/Workmen's Compensation—On the Waterfront: The Fourth Circuit Draws the Line at the Point of Rest in a Narrow Interpretation of the LHWCA Amendments of 1972

The primary objectives of workmen's compensation systems are to provide certainty of employee benefits and to limit employer liability;[1] however, past attempts to provide such a system for shore-based maritime employees have entirely failed. A leading cause of confusion has been the inability of both Congress and the courts to solve the jurisdictional problems of an industry in which the employees must engage in repeated crossings of the shoreline between land and navigable waters, the traditional boundary between federal and state workmen's compensation acts. The 1927 Longshoremen's and Harbor Workers' Compensation Act (LHWCA) contained a bright line test of coverage based on the admiralty law concept that federal jurisdiction stops at the shoreline.[2] Subsequent attempts to provide federal remedies according to the site of claimant's injury, rather than by the nature of his duties, have often led to harsh and incongruous results.[3]

Despite the apparent rigidity of this shoreline coverage test, courts have proved ingenious in blurring the lines among three possible avenues of recovery for injured harborworkers: the LHWCA, state workmen's compensation statutes and the admiralty tort law cause of action for unseaworthiness. Uncertainty of coverage and competing remedies that offer significantly different levels of relief have resulted in an endless stream of litigation together with unacceptably high insurance costs for the industry.

In response to the inadequacies of the Longshoremen's and Harbor Workers' Compensation Act of 1927, Congress enacted extensive

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1. *See* Griffith v. Wheeling Pittsburgh Steel Corp. 521 F.2d 31, 42 (3d Cir. 1975).

2. Act of Mar. 4, 1927, ch. 509, § 3(a), 44 Stat. 1426 (codified at 33 U.S.C. § 903(a)(1970)).

3. *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). In this case, benefits were denied three longshoremen who were injured or killed when cargo hoisted by the ship's crane swung back and knocked them to the pier or crushed them against the side of a railroad car, while the widow of a fourth longshoreman whose decedent had a similar accident, but was knocked into the water, was able to recover.

amendments in 1972[4] in an effort to resurrect a viable compensation scheme for the industry.[5] In *I.T.O. Corp. v. Benefits Review Board*[6] the Fourth Circuit became the first appellate court to determine the extent to which the 1972 amendments extend benefits under the Act to persons engaged in necessary steps in the overall process of loading and unloading a vessel, but who under prior law could only claim benefits for accidental injury or death under state law. The court concluded that coverage was limited to "those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship."[7]

I.T.O. and its two companion cases arose on appeal from three Benefits Review Board decisions which awarded relief under the Act to shore-based workers involved in various tasks in the overall process of loading and unloading ships.[8] Plaintiffs Adkins, Brown and Harris were forklift operators who were injured while transporting cargo, each working at a different stage of the loading process. The Benefits Review Board concluded that each of these workers was a maritime employee covered by the 1972 amendments.

Coverage under the 1927 Act was based solely on the place of injury; recovery was granted if the injury occurred over navigable waters.[9] The present Act, as a result of the 1972 amendments, establishes a dual test for coverage. The situs test, the requirement that the injury occur over navigable waters, remains, but the definition of navigable waters has been expanded by amendment to include adjoining land areas that are customarily used in loading, unloading, repairing or

4. 33 U.S.C.A. §§ 901-50 (Supp. 1976), *amending* 33 U.S.C. §§ 901-50 (1970).

5. *See generally* 1A BENEDICT, ADMIRALTY § 15-30 (7th ed. 1973, Supp. 1975); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-48 to -61 (1975) [hereinafter cited as GILMORE & BLACK]; Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. MARITIME L. & COM. 1 (1974); Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683 (1973); Comment, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End of Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94 (1972); Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 WASH. U.L.Q. 649.

6. 529 F.2d 1080 (4th Cir. 1975), *petition for rehearing en banc granted*, (4th Cir., March 12, 1976). Judge Winter wrote the majority opinion with Judge Haynsworth concurring. Judge Craven dissented.

7. 529 F.2d at 1081.

8. Harris v. Maritime Terminals, Inc., 1 BRBS 301 (1975); Brown v. Maritime Terminals, Inc., 1 BRBS 212 (1974); Adkins v. I.T.O. Corp., 1 BRBS 199 (1974).

9. "Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock). . . ." Act of Mar. 4, 1927, ch. 509, § 3(a), 44 Stat. 1426 (codified at 33 U.S.C. § 903(a) (1970)).

building a vessel.[10] The second part of the coverage test under the amendments is the requirement that the injured employee be engaged in maritime employment.[11]

In light of the new definition of navigable waters, the Benefits Review Board held in *I.T.O.* and its companion cases that each of these employees, having been injured over navigable waters, satisfied the situs test.[12] As to whether these employees were engaged in maritime employment (the status test), the Board held that any task that is an integral part of the total process of loading or unloading cargo satisfies the status requirements that the employee be engaged in maritime employment.[13] According to the Board, the fact that the cargo does not move directly between the ship and the storage area is of no consequence in determining whether claimants qualify as employees under the Act.[14]

The Fourth Circuit concurred in the Board's resolution of the situs issue,[15] but rejected the administrative board's facile resolution of the status question.[16] The court noted that Congress did not define what constituted maritime employment[17] although it did include "any longshoreman or other person engaged in longshoring operations."[18] Since none of these terms have fixed meanings, the court refused to accept them as reliable guides in ascertaining which tasks or functions are of a sufficiently maritime nature to be covered by the Act.[19] The case law dealing with these terms is, according to the court, not particularly helpful since the former test of coverage contained no requirement that injured employees be engaged in maritime employment.[20] The amend-

10. 33 U.S.C.A. § 903(a) (Supp. 1976) provides:

Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .

11. 33 U.S.C.A. § 902(3) (Supp. 1976) provides:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

12. 1 BRBS at 305; 1 BRBS at 214; 1 BRBS at 203.
13. 1 BRBS at 304; 1 BRBS at 214; 1 BRBS at 202.
14. 1 BRBS at 202.
15. 529 F.2d at 1083-84.
16. *Id.* at 1084.
17. *Id.*
18. 33 U.S.C.A. § 902(3) (Supp. 1976), set forth in note 11 *supra.*
19. 529 F.2d at 1084.
20. *Id.*

ments utterly change the significance of the terms "maritime employment," "longshoreman," and "longshoring operations." These terms have become determinative of coverage for the first time.

Unable meaningfully to interpret the Act on its face, the *I.T.O.* court considered the legislative history of the Act to ascertain congressional intent.[21] Prior to 1972 coverage under the Act stopped at the water's edge.[22] The congressional committees[23] felt that this coverage provision was conducive to anomalies[24] since "[t]he result is a disparity in benefits . . . for the same type of injury depending on which side of the water's edge and in which state the accident occurs."[25] The House Committee noted that this disparity in benefits was becoming a greater problem because of advances in technology that have enabled many longshoring operations traditionally performed on ship to be transferred to shore.[26] The Committee indicated that compensation for longshoremen should no longer "depend upon the fortuitous circumstance of whether the injury occurred on land or over water."[27] Although the committee expressed an intention to create a uniform compensation system,[28] its illustration of this scheme established that Congress did not intend to cover all employees engaged in any activity on the waterfront.[29] Thus, employees involved in unloading the ship and those immediately transporting the cargo to its storage area on land are covered by the Act for any injuries sustained during these tasks.[30] However, the committee emphasized that it did not intend to cover employees who are not engaged in loading or unloading vessels. Mere injury on navigable waters and adjoining land area was not sufficient in itself to come within the coverage of the Act. Thus, the reports contain the caveat that "employees whose responsibility is only to pick up stored

21. *Id.*

22. The prior Act read: "Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . ." 33 U.S.C. § 903(a) (1970).

23. The House and Senate Reports are virtually identical. *Compare* SENATE COMM. ON LABOR AND PUBLIC WELFARE, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, S. REP. NO. 1125, 92d Cong., 2d Sess. (1972), *with* HOUSE COMM. ON EDUCATION AND LABOR, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, H.R. REP. NO. 92-1441, 92d Cong., 2d Sess. (1972) [hereinafter cited as House Report].

24. *See, e.g.*, note 3 *supra.*

25. House Report, *supra* note 23, at 10.

26. *Id.*

27. *Id.*

28. *Id.* at 10-11.

29. *Id.* at 11.

30. *Id.*

cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."[31]

The court considered the committee reports to be explicit in delineating which portions of the overall loading and unloading process were covered by the Act.[32] Those employees who transport cargo immediately from the ship are covered, according to the committee reports; however, those employees engaged in transshipment activities are explicitly excluded. The court interpreted transshipment to mean any intermediate movement of cargo after it reaches its initial storage point.[33] Checkers directly involved in the loading and unloading functions would be eligible for benefits but clerical employees not intimately involved with these functions would be excluded under the court's interpretation.[34] The court concluded that Congress intended to cover only those employees involved in unloading cargo to the first "point of rest" as the term is generally understood in the industry.[35] The court inferred that this limitation would apply when workers are loading vessels, so that employees moving cargo from the last point of rest to the vessel are provided protection by the Act.[36] Applying this interpretation of the coverage provisions, the court found that at the time of injury all three claimants were performing duties landward of the last point of rest.[37] The court's resolution of what constitutes maritime employment has

31. *Id.*
32. 529 F.2d at 1087.
33. *Id.* at 1087-88.
34. *Id.*
35. *Id.* The "point of rest" is defined by the Federal Maritime Commission in its regulations governing terminal operators: " '[P]oint of rest' shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading." 46 C.F.R. § 533.6(c) (1975). *See* American President Lines, Ltd. v. Federal Maritime Bd., 317 F.2d 887, 888 (D.C. Cir. 1962); DiPaola v. International Terminal Operating Co., 311 F. Supp. 685, 687 (S.D.N.Y. 1970). *But see* the proposed guidelines for coverage under the LHWCA which the Department of Labor has issued:

> Based on procedures normally utilized in the maritime industry, the loading process may include certain terminal activities which are incidental to the placement of cargo on the vessel. Conversely, the unloading process may also include certain terminal activities. Terminal activities to be included in coverage under the amended Act are employees engaged in loading or unloading breakbulk, containerized or Lash ships and lighters, or passenger ships. Activities which may be covered include employees engaged in stuffing and stripping of containers, employees working in and about marine railways, and other employees engaged in processing water-borne cargo.

20 C.F.R. § 710.4(b) (1975).
36. 529 F.2d at 1087.
37. *Id.* at 1087-88.

been termed the "point of rest" doctrine.[38] It is based on the presumption that waterborne cargo leaves the chain of maritime commerce when it is taken off the ship and brought to its first point of rest. Likewise, maritime employment commences when cargo is picked up from its last "point of rest" and loaded onto the ship.[39]

The dissent in *I.T.O.* disagreed with fundamental aspects of the majority's holding and with the analysis employed by the court in reaching its decision. Judge Craven objected to the ready use of the committee reports in the face of statutory language amenable to interpretation.[40] He argued that the key terms "maritime employment" and "longshoremen" have established meanings which preclude reliance on the legislative history to achieve a contrary interpretation.[41] According to the dissent, both "maritime employment" and "harbor workers" are generic terms that include, but are not limited to, longshoremen,[42] while "loading and unloading" is an extremely narrow term and indisputably maritime. Thus, a demonstration that these claimants were engaged in loading or unloading operations, as these terms were understood at the time the amendments were enacted, constituted sufficient proof to the dissent that the status prerequisite had been met.[43]

Prior to the 1972 amendments, "loading and unloading" was often a necessary element in a cause of action in admiralty against a shipown-

38. *Id.* at 1096 (dissenting opinion).
39. *Id.* at 1095.
40. *Id.* at 1090.
41. *Id.* at 1094.
42. Judge Craven points out that the greatly expanded definition of "navigable waters" can be used to ascertain the meaning of "maritime employment." *Id.* at 1090 (dissenting opinion). As one commentator states: "[T]here can be nothing more maritime than the sea, every employment on the sea or other *navigable waters* should be considered as maritime employment . . . . [I]t would be well to adopt a criterion which takes into account the undoubted jurisdiction of admiralty in matters of all injuries on *navigable waters.*" 1A BENEDICT, ADMIRALTY § 17 (7th ed. 1973, Supp. 1975) (emphasis added); similarly, Judge Craven suggests that longshoremen can properly be considered a sub-category of harbor workers. 529 F.2d at 1090 n.4 (dissenting opinion). Another leading commentator has stated:

> First in the catalogue of harbor workers is the longshoreman. The longshoreman, as the name implies, is a shoreside worker whose principle activity is the loading and unloading of ship's cargo. . . .
>
> . . . .
>
> Outside of the cargo work area in the holds, longshoremen are engaged in various tasks in connection with voyage preparation or termination. The work may consist of carrying ship's stores or passenger's baggage aboard ship. *Or the work may be performed entirely on the pier in the handling of mechanical equipment, or the storing, moving, or loading of goods on the dock.*

1 M. NORRIS, THE LAW OF MARITIME INJURIES § 3 (2d ed. 1975) (emphasis added).
43. 529 F.2d at 1097 (dissenting opinion).

er for injuries sustained in ship's service.[44] Thus, the courts had numerous opportunities to explore the dimensions of the term and, Judge Craven asserts, "loading and unloading" had acquired a settled meaning at the time Congress considered the amendments. The majority of courts construed "loading and unloading" in a pragmatic, realistic sense. Rejecting mechanistic, hypertechnical approaches akin to the point of rest theory,[45] the prevailing construction used by courts included all employees engaged in the total operation of moving cargo from the waterfront to the ship or vice versa.[46] The dissent emphasized that recently the Fourth Circuit had adopted this approach.[47]

Accepting arguendo that the plain language of the statute is ambiguous, Judge Craven suggested that four considerations taken together require affirmance.[48] First, as a remedial statute,[49] the language should be interpreted liberally to achieve its avowed purpose of eliminating the disparity of benefits received, depending on the side of the water's edge on which employees sustained an injury. Given this goal of uniformity, those employees engaged in similar tasks and exposed to the same risks would be afforded the same remedy when injury occurs. Second, Judge Craven argued that all doubt should be resolved in favor of coverage.[50] The Act incorporates this presumption in section 920 by directing that in the absence of substantial evidence to the contrary, a

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44. *Id.*

45. One case adopting such a narrow approach is Drumgold v. Plova, 260 F. Supp. 983 (E.D. Va. 1966).

46. *See* Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970); Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970); Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965); Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir. 1964); Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3d Cir. 1963); McNeil v. Havtor, 326 F. Supp. 226 (E.D. Pa. 1971); Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968); Byrd v. American Export Isbrandtsen Lines, Inc., 300 F. Supp. 1207 (E.D. Pa. 1969); Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812 (E.D. Pa. 1959).

47. Garrett v. Gutzeit, 491 F.2d 228 (4th Cir. 1974). The court noted:

> The [district] court apparently concluded that "unloading" ceases when the cargo is no longer in contact with the ship, *i.e.*, when the bales were deposited on the pier and discharged from the ship's gear. . . . [W]e believe that the case law rejects such a narrow definition of "unloading."
>
> . . . In view of the obvious trend to fully develop the humanitarian purposes of the warranty of seaworthiness we find no reason to apply a hypertechnical definition to the terms loading and unloading.

Id. at 234-35.

48. 529 F.2d at 1094 (dissenting opinion).

49. *See, e.g.*, Reed v. The Yaka, 373 U.S. 410 (1963); Voris v. Eikel, 346 U.S. 328 (1953); Pillsbury v. United Eng'r Co., 342 U.S. 197 (1951); 529 F.2d at 1091 (dissenting opinion).

50. 529 F.2d at 1091 (dissenting opinion). *See, e.g.*, Friend v. Britton, 220 F.2d 820 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); Hartford Accident and Indem. Co. v. Cardillo, 112 F.2d 11 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 649 (1940).

claimant shall be considered to fall within the provisions of the Act.[51] Third, "[a] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts."[52] The Benefits Review Board has consistently held that coverage can reasonably be extended to all those employees who are engaged in integral and essential steps in the overall loading and unloading process. Moreover, the Board has considered and rejected the contention of employers and carriers that a point of rest doctrine is feasible or permissible.[53] The majority decision, in effect, overruled the Board's conception of "shoreward coverage," as set forth in thirty-two administrative decisions.[54] Finally, the dissent argued that the scope of review for these cases is a narrow and restricted one.[55] Thus, the dissent would have held that the Board's rulings are conclusive except in cases in which the record does not warrant the opinion reached or a reasonable basis in law does not exist.[56]

The dissent admitted that the majority's reliance on legislative history might have been more palatable if it contained clear and unambiguous language concerning the issue.[57] Instead, Judge Craven considered the committee reports to be inconclusive, and therefore, useless as an interpretive tool.[58]

The critical passage relied on by the majority is interpreted differently by the dissent. Transshipment, Judge Craven argued, does not

51. 33 U.S.C.A. § 920 (Supp. 1976).

52. 529 F.2d at 1091 (dissenting opinion), *quoting* NLRB v. Boeing, 412 U.S. 67, 75 (1973).

53. *E.g.*, Richardson v. Great Lakes Storage & Contracting Co., 2 BRBS 31 (1975); Ford v. P.C. Pfeiffer Co., 1 BRBS 367 (1975); Avvento v. Hellenic Lines, Ltd., 1 BRBS 174 (1974).

54. The Board had indicated subsequent to the *I.T.O.* decision that it is "well aware of the restrictive interpretation given the status requirement by the Fourth Circuit Court of Appeals. . . . However, we are of the opinion that our interpretation with regard to coverage is more in keeping with the amended statute and the legislative history, and we will continue to follow the line of reasoning developed in previous decisions . . . ." Bradshaw v. J.A. McCarthey Inc., 3 BRBS 195 (Jan. 26, 1976).

55. 529 F.2d at 1093-94 (dissenting opinion). Prior to the 1972 amendments, the review of compensation orders was assigned the federal district courts, 33 U.S.C. § 921 (b) (1970), where a very narrow scope of review was adopted. On appeal, the circuit court of appeals adhered to a similarly restricted scope of review. The amendments direct the Benefits Review Board to review the Administrative Law Judge's findings with appeal to the court of appeals for the circuit where the injury occurred. The amendments codify a narrow review for the Benefits Review Board, 33 U.S.C.A. § 921(b)(3) (Supp. 1976), and remain silent concerning the court's scope of review. Judge Craven construes this language to mean that the same narrow review exercised by the district courts prior to the amendments remains the proper standard. 529 F.2d at 1093 (dissenting opinion).

56. *See, e.g.*, O'Loughlin v. Parker, 163 F.2d 1011 (4th Cir. 1947).

57. 529 F.2d at 1095 (dissenting opinion).

58. *Id.*

refer to intermediate handling of goods once they are placed on the terminal. Rather, the term refers to teamsters who normally are not involved in the loading process at all and whose function is to transport goods away from the shoreside terminal.[59]

More importantly, the point of rest theory is found in neither the legislative history nor the statute.[60] This concept, which in effect defines which employees are to be covered, is conspicuous by its absense. Such a doctrine, unsupported by the weight of prior case law or administrative precedent, is unfairly imputed to Congress in the absence of a clear indication of such intent.[61]

Understanding the origins and interpretations of the first Longshoremen's Act is prerequisite to understanding the purpose of the amendments. One of the first questions to arise when workmen's compensation laws were promulgated in the various states was whether these laws encompassed those harbor workers who regularly boarded ships to unload cargo.[62] Since these workers were engaged in an extremely hazardous occupation[63] it seemed equitable that they at least not be left to the not-so-tender mercy of traditional negligence doctrines in case of injury.[64] This search for equity was stymied by the Supreme Court's insistence in *Southern Pacific Co. v. Jensen*[65] that all things maritime must be uniform.[66] The effect of the Court's ruling was to thrust on Congress the responsibility of providing coverage for those employees who passed over the shoreline, the Jensen line, as courts labeled it, onto navigable waters. Enacted in 1927, the Longshoremen's

59. *Id. Accord*, GILMORE & BLACK, *supra* note 5, § 6-51, at 430, where it is stated: "The line which the Committee Reports evidently sought to draw was between workers who participate directly, or physically, in the specified activities and workers whose jobs require them to be in the same area but who (like clerical workers) do not physically 'participate' or who (like truckers) can be thought of as only indirectly involved in the strictly maritime phase of the activity."

60. 529 F.2d at 1095 (dissenting opinion).

61. *Id.* at 1096.

62. *See* GILMORE & BLACK, *supra* note 5, § 6-45, at 404-05.

63. There is no doubt that the occupation was (and is) a dangerous one. *See Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 130 (1972) (union spokesman citing National Safety Council reports describing the longshore accident rate as more than ten times the national average). *See also* appendix to Justice Douglas' dissent in Victory Carriers, Inc. v. Law, 404 U.S. 202, 218-25 (1971).

64. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 531 (4th ed. 1971), in which the author refers to "[t]he three wicked sister of common law—contributory negligence, assumption of risk and the fellow servant rule."

65. 244 U.S. 205 (1917).

66. *Id.* at 215. *See also* Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

and Harbor Workers' Compensation Act[67] was designed to provide coverage to those workers who crossed the Jensen line into admiralty jurisdiction. Judicial interpretation of the Act proved a difficult task. Jurisdictional problems have plagued the courts from the begining.

Prior to the Act, courts sought to soften the harshness of the Jensen line by extending state jurisdiction to its constitutional limits. The so-called "maritime but local" exception that followed was intended to cover those harbor workers injured seaward of the *Jensen* line, but engaged in activities of such local character that the Supreme Court's insistence upon admiralty law uniformity would not be offended by permitting such workers coverage under local compensation acts.[68]

Considerable confusion arose concerning whether these cases were still viable after the Act became law. Initially, the courts proceeded on the assumption that the "maritime but local" exception was within the intention of Congress,[69] with the result that certain claimants had no idea in advance whether they were covered by the state or the federal compensation schemes. Instead of swift compensation, these claimants were faced with uncertain court battles. A wrong guess meant, at best, a loss of time and money for the injured employee, and at worst, a total preclusion due to the statute of limitations.

The practical consequences of the doctrine that state and federal jurisdictions were mutually exclusive was obviously intolerable. Finally, the court in *Davis v. Department of Labor and Industries*[70] suggested that rather than mutual exclusivity, there existed an area of overlapping jurisdiction, which Justice Black characterized as "a twilight zone in which the employees must have their rights determined case by case."[71]

The effect of *Davis* was to give those employees in the "maritime but local" category the option of proceeding under either the state's workmen's compensation statute or the federal Act.[72] This concurrent

67. 33 U.S.C. § 903(a) (1970).

68. *See, e.g.* Grand Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); Western Fuel Co. v. Garcia 257 U.S. 233 (1921).

69. "The 'may not validly be provided by state law' limitation in LHWCA § 903(a) was generally—indeed, universally—taken to have built the Garcia-Rohde 'maritime, but local' category into the Act's coverage." GILMORE & BLACK, *supra* note 5, § 6-49, at 419.

70. 317 U.S. 249 (1942).

71. *Id.* at 256.

72. *See* Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683, 688-89 (1973).

state and federal jurisdiction that existed for certain injuries allowed employee freedom to elect the preferred remedy.[73]

At the time the Act was passed it was viewed as a substitute for state workmen's compensation acts and accordingly contained the standard language of such legislation that the employer's liability was to be "exclusive and in place of all other liability."[74] Despite this language, the Supreme Court in 1946 allowed a harbor worker who was injured aboard ship to bring a suit in admiralty against the shipowner based on an unseaworthiness claim.[75] An unseaworthiness cause of action was originally devised for seamen and included elements of no fault and unlimited liability. Longshoremen were granted this cause of action against shipowners on the theory that since they performed tasks traditionally engaged in by seamen, they should be afforded the remedies that all seamen had in the event of injury.[76] Third party indemnification was allowed in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[77] whereby shipowners collected from stevedores. Thus, circular suits akin to three-party donnybrooks became a standard feature of longshoremen's unseaworthiness claims.[78]

In 1948 the Admiralty Extension Act[79] was enacted to alleviate some of the inequity created by the *Jensen* doctrine. This Act granted admiralty jurisdiction to those injuries to persons or property on land that were caused by vessels. In this fashion, the unseaworthiness doctrine as well as the Longshoremen's Act marched ashore though only in a limited fashion.[80] After some wavering, the Supreme Court took a narrow approach to the interpretation of the Admiralty Extension Act; it demanded a clearer congressional mandate before the doctrine could be liberally applied to all longshoremen injured while engaged in the

73. *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962). *See also* 529 F.2d at 1085 n.2.

74. 33 U.S.C. § 905(a) (1970).

75. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

76. *Id.* at 96.

77. 350 U.S. 124 (1956).

78. "By the late 1960's further elaborations of the *Sieracki-Ryan* sequence had led to the result that the longshoreman's employer had become, despite the exclusive liability provision of LHCA § 905 (or the corresponding provision of a state compensation act), ultimately liable for full damages in connection with injuries to his employees." GILMORE & BLACK, 6-53 *supra* note 5, § 6-53, at 437.

79. 46 U.S.C. § 740 (1970). The Act provides: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

80. *See* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

loading process.[81]

Congressional inertia in increasing benefits under the Act and liberal awards in unseaworthiness claims encouraged litigants to sue in admiralty rather than go the compensation route. The resulting spiral in costs caused employers in the industry to clamor for relief.[82] The rush to the courthouse also caused at least one federal district court to complain that unseaworthiness suits were becoming a serious problem because of their number.[83]

The short, sad history of the pre-amendment case law indicates the problems that overwhelmed the courts in applying the original Longshoremen's and Harbor Workers' Compensation Act. The amendments can be seen as a direct response to this history.[84] Thus, the most important change is a modernization in benefits and an elimination of unseaworthiness claims for injured longshoremen.[85] The other significant innovation is the extension of coverage shoreward.

The majority in *I.T.O.* professed to do neither more nor less than the committee reports would allow[86] and concluded that Congress intended to extend coverage for employees engaged in loading (or unloading) from last (or first) point of rest.[87] The dissent relied on an interpretation of the Act itself,[88] but even after examining the reports it concluded that an expansive theory of coverage was required by the statute.[89]

As the first appellate interpretation of the Act's coverage provisions as applied to shoreside employees, the decision is one of great importance. Virtually every circuit is considering appeals to Benefits Review Board decisions.[90] The *I.T.O.* decision presents two approaches to the question and differing answers to the problem.

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81. *See* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971).

82. Thus, an employer representative stated: "When insurance costs amount to 40% of a company's payroll, it is elementary that something is radically wrong and that corrective action is mandatory." *Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 86 (1972).

83. Turner v. Transportation Maritima Mexicana S.A., 44 F.R.D. 412, 417 (E.D. Pa. 1968). *See also Hearings on S. 915 and H.R. 6111 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, "Crisis in the Federal Courts—1967," 90th Cong., 1st Sess. 460 (1967).

84. *See* House Report, *supra* note 23, at 1.

85. *See* 33 U.S.C.A. §§ 905-06 (Supp. 1976).

86. 529 F.2d at 1088.

87. *Id.*

88. *Id.* at 1094 (dissenting opinion).

89. *Id.* at 1095.

90. Stockman v. John T. Clark & Son, 2 BRBS 99 (July 30, 1975), *appeal*

Those who subscribe to a risk distribution theory might applaud the majority result since the nearer to the water the employees are working the more they are exposed to peculiarly "maritime" risks, which historically are protected under federal law. Conversely, further inland, the risks appear to be similar to those faced by any other warehouse employee, and accordingly should fall under typical state workmen's compensation statutes.[91] Undoubtedly, this risk analysis would offer small solace to an injured employee, for injury or death is equally tragic on either side of the point of rest.

Employers will undoubtedly be relieved to discover that under *I.T.O.* the number of employees covered by the Act will be far fewer than that reached by the Benefits Review Board's interpretation of the Act. The effect of this holding will be to lessen the amount of employee-employer contribution necessary to sustain workmen's compensation protection since state workmen's compensation statutes offer lower benefits than the Longshoremen's Act.

The Fourth Circuit's interpretation of coverage will also avoid some issues that a more liberal construction would encounter.[92] Specif-

docketed, No. 75-1360 (1st Cir., filed Sept. 24, 1975); Johns v. Sea-Land Service, Inc., 2 BRBS 65 (July 11, 1975), *appeal docketed*, No. 75-2039 (3d Cir., filed Sept. 9, 1975); Richardson v. Great Lakes Storage & Contracting Co., 2 BRBS 31 (June 26, 1975), *appeal docketed*, No. 75-1786 (7th Cir., filed Aug. 25, 1975); Skipper v. Jacksonville Shipyards, Inc., 1 BRBS 533 (June 11, 1975), *appeal docketed*, No. 75-2833 (5th Cir., filed July 11, 1975); Powell v. Cargill, Inc., 1 BRBS 503 (May 30, 1975), *appeal docketed*, No. 75-2655 (9th Cir., filed July 28, 1975); Nulty v. Halter Marine Fabricators, Inc., 1 BRBS 437 (May 2, 1975), *appeal docketed*, No. 75-2317 (5th Cir., filed May 20, 1975); Ford v. P.C. Pfeiffer Co., 1 BRBS 367 (March 21, 1975), *appeal docketed*, No. 75-289 (5th Cir., briefs filed Oct. 2, 1975); Ronan v. Maret School, Inc. 1 BRBS 348 (March 10, 1975), *appeal docketed*, No. 75-1445 (D.C. Cir., filed May 5, 1975); Kelley v. Handcor, Inc., 1 BRBS 319 (Feb. 28, 1975), *appeal docketed*, No. 75-1943 (9th Cir., filed April 28, 1975); Perdue v. Jacksonville Shipyards, Inc., 1 BRBS 297 (Jan. 31, 1975), *appeal docketed*, No. 75-1659 (5th Cir., briefs filed June 4, 1975); Herron v. Brady-Hamilton Stevedore Co., 1 BRBS 273 (Jan. 23, 1974), *appeal docketed*, No. 75-1538 (9th Cir., filed Mar. 7, 1975); Gilmore v. Weyerhaeuser Co., 1 BRBS 180 (Nov. 12, 1974), *appeal docketed*, No. 74-3384 (9th Cir., oral argument Oct. 17, 1975).

91. In Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), Justice Douglas argues in his dissent that "because loading and unloading of vessels are abnormally dangerous such risks ought to be placed . . . upon the shipowners . . . ." *Id.* at 218. He later states: "Statistical evidence suggests that the great bulk of high-risk maritime activity occurs on the ship and the adjoining pier." *Id.* at 225. *See generally* Comment, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1174 (1966).

92. The Chairperson of the Benefits Review Board has stated that "[t]he 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act had such far reaching implications in the areas of increased jurisdiction or coverage, benefits and procedure that, even today, we have not been able to assess their full effects." R. Washington, *The Benefits Review Board and Its Role in the New Appellate Process Under the Longshoremen's and Harbor Workers' Compensation Act and Its 1972 Amendments*, 5 BRBS 29, 34 (Rel. 30, March 1976).

ically, when is an employee's relationship with the overall loading and unloading process so tenuous as to preclude coverage?

On the whole, however, the point of rest doctrine used in *I.T.O.* creates more problems than it solves. Automation has dramatically changed the workplace at the waterfront:[93] "[w]ith the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore."[94] The Court's point of rest doctrine will have the effect of excluding from coverage under the Longshoremen's Act large numbers of employees who perform necessary and integral tasks in the overall loading and unloading process. Thus, the following employees will be precluded from obtaining relief under the Act: "some checkers, some hustler drivers, some tractor drivers, all members of container stuffing and stripping gangs, and other terminal labor all of whom are longshoremen and all of whom are hired through the union hiring hall to participate together in the integrated process of the movement of cargo across the water-front terminal."[95] This result appears to clash with the stated congressional policy that compensation should "not depend on the fortuitous circumstance of whether the injury occurred on land or over the water."[96]

One of the most difficult problems with the majority's point of rest theory is that there is no particular place where cargo is immediately put at rest. Wherever it touches the ground it "rests" though only for an instant. The point of rest will vary from day to day and from port to port, depending on the type of cargo, the sophistication of available cargo-handling facilities and even the whim of the employer.[97] Employees have cause for suspicion when the limits of their federal coverage, determined by the point of rest, are a matter of managerial discretion. Ever shifting and amorphous in character, the exact point of rest is bound to be a serious source of dispute. Rather than a guide for administration of the Act it will be a starting point for litigation since no

93. "[C]ontainerization saw the historical locus of longshore work moved further inland on the waterfront in order to provide for huge equipment and parking areas to accommodate containers. . . . It is through the use of containers that the complete turnaround time for a ship in port has been reduced from 8 days to 36-48 hours." Brief for International Longshoremen's Association as Amicus Curiae at 11, I.T.O. Corp. v. Adkins, 529 F.2d 1080 (4th Cir. 1975).

94. House Report, *supra* note 23, at 10.

95. Brief for Director, Office of Workers' Compensation Programs at 60-61, I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975).

96. House Report, *supra* note 23, at 10.

97. 529 F.2d at 1096 (dissenting opinion).

one can be certain of the dividing line between coverage and noncoverage. The Jensen line was undoubtedly too rigid and mechanical, but the point of rest doctrine suffers from being so flexible, uncertain and elusive that it borders on fiction.[98]

Additionally, the point of rest theory is inadequate in that it has the effect of erecting another "situs" requirement for coverage.[99] The status of maritime employment is ascertained by determining the *location* of the employee's work, not the *nature* of his duties. The point of rest doctrine "means that workers performing the *same* function, handling the *same* cargo, will be treated differently depending on *where* they work, even though they are all working on the premises of a terminal conceded to be within the Act's definition of 'navigable waters' "[100] Under this anomalous result there will be times when employees moving the same cargo will be treated differently, though both were injured in the same manner and in similar stages of the loading and unloading process.[101]

Courts faced with the task of interpreting the 1972 amendments would do well to keep in mind the jurisdictional problems that bedeviled the Act in earlier years. A modern compensation system loses its efficacy to the extent that coverage is uncertain and conducive to costly and time-consuming litigation. The court's resolution of the status issue creates in effect a second situs requirement for coverage. The point of rest theory advanced by the court draws an arbitrary line around some longshoremen while excluding others on the basis that the cargo movement past this line is not sufficiently maritime in nature. This is a fiction that can not be fairly found in either the statute or the committee reports. The report so heavily relied on by the majority is singularly

98. Judge Craven argues that "[t]he legislative history standing alone cannot support the majority position. At best, the House Report matches its own ambiguity against that of the statute. The majority opinion makes sense only when the legislative history is paired with the 'point of rest' theory, a concept which appears *nowhere* in the legislative history *or* the statute, and one which, I predict, will confound and perplex this court for years to come." 529 F.2d at 1095 (dissenting opinion).

99. *Id.* at 1096.

100. *Id.* at 1097.

101. To illustrate this anomaly, imagine a longshoreman operating a forklift transporting cargo from one point on the terminal to make room for recently arriving cargo which is being placed at its immediate point of rest after being unloaded from a ship. If he loses his brakes and collides with another forklift operator, the two employees would receive differing benefits by virtue of their being covered by different compensation schemes. Despite the fact that they were engaged in the same work (forklift operation) and exposed to similar risks (in this case, collision), they would not be treated equally because at the time of injury they were assigned to tasks on different sides of the "point of rest."

unimpressive as a guidepost to statutory meaning. The crucial language cited by the court is capable of differing interpretations. A leading commentator, in rejecting the committee reports, explains that "as essays in statutory construction, they do not commend themselves."[102] In contrast to its indulgent attitude towards the ambiguities that abound in the committee report, the court exhibited an unnecessarily rigid approach to the statutory language itself. Maritime employment includes those tasks that take place over navigable waters. The coverage provisions can be fairly read to encompass all employment-related injuries that occur within the Act's territorial limits. At the very least, maritime employment must include all employees engaged in the overall process of loading and unloading vessels. An affirmation of the Benefits Review Board in these three cases would come closer to accomplishing the congressional intention of creating a modern, fair and workable longshoremen's compensation scheme.

BRIAN A. POWERS

Civil Procedure—Cutts v. Casey Extended to Summary Judgment

[PROLOGUE

As this Note went to press, the Supreme Court of North Carolina held in *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976), that summary judgment may be granted for the party with the trial burden of proof even when he carries that burden, at least in part, with his own affidavits. *Cutts v. Casey* was expressly rejected as not controlling since it involved a directed verdict motion upon conflicting evidence on a strenuously contested issue of fact.

In an excellent analysis that appears to adopt the federal construction, Chief Justice Sharp concluded that a movant with the trial burden of proof is entitled to summary judgment on the basis of his own affidavits when: (1) there are only latent doubts concerning the credibility of his affidavits; (2) the non-movant has failed to introduce any materials which support his opposition to the motion or which point to specific areas of contradiction or impeachment in the movant's materials and the non-movant has failed to utilize rule 56(f); and (3) summary judgment is otherwise appropriate—

102. GILMORE & BLACK, *supra* note 5, § 6-51, at 450.

that is, the movant must succeed on the basis of his own materials. The Chief Justice clearly articulated that to succeed on his own materials the movant must show: (1) that there are no genuine issues of material fact; (2) that there are no gaps in his proof; (3) that no inferences inconsistent with his recovery arise from his evidence; and (4) that there is no standard that must be applied to the facts by a jury. With equal clarity she noted that summary judgment must be denied if the movant's affiants are inherently incredible, if the circumstances are suspect, or if the need for cross-examination appears. Thus, she concluded that when a movant's *only* materials were his own affidavits, ordinarily he will not be able to meet the above standards. However, interest in the outcome of the case on the part of an affiant, by itself, was said to raise only latent doubts as to his credibility which do not preclude summary judgment.

Despite the *Kidd* opinion we feel that this Note warrants publication for several reasons. First, it provides a vehicle by which the *North Carolina Law Review* can timely disseminate information concerning the important *Kidd* decision. Second, this note presents arguments that the pronouncement in *Cutts* is obiter dictum. There is some language in the *Kidd* decision that supports these arguments. In light of the *Kidd* decision, these arguments may prove particularly useful. Additionally the court in *Kidd* expressly rejected the argument that the constitutional right to jury trial compelled the preclusion of summary judgment for the movant with the trial burden of proof. A similar argument was the basis of the *Cutts* rationale. Thus the court in *Kidd* rejected the argument it thought persuasive in *Cutts*. This express rejection certainly weakens *Cutts* even as it applies to directed verdict cases and supports the conclusion of this note that the *Cutts* rule may be only dictum. Third, the policy arguments for not applying the *Cutts* decision to summary judgment cases presented in this note are quite similar to those expressed by the court in *Kidd*. Finally, we think this Note, though somewhat pre-empted, will provide a useful research tool when read in conjunction with the *Kidd* decision.

THE BOARD OF EDITORS]

When the North Carolina Supreme Court decided *Cutts v. Casey*,[1] the decision was met with a less than favorable reaction.[2] *Cutts* denies the availability of a motion for directed verdict to the party with the burden of proof when his right to recover depends upon the credibility of his witnesses.[3] Some critics of this opinion, like Jeremiah predicting

1. 278 N.C. 390, 180 S.E.2d 297 (1971).

2. *See, e.g.*, Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. REV. 729, 746-54 (1972); Comment, *Directing the Verdict in Favor of the Party with the Burden of Proof*, 50 N.C.L. REV. 843, 847-52 (1972).

3. 278 N.C. at 417, 180 S.E.2d at 311. The rationale for this decision was that to direct a verdict based on testimonial evidence for the party with the burden of proof would violate the non-movant's constitutional right to jury trial. *Id.* at 417-18, 180

doom to the peoples of Judah, prophesied that the decision not only forced an unintended and restrictive interpretation on the use of the directed verdict, but also that its application to summary judgment motions would be compelled by force of logic.[4] It appears that such things have come to pass. In *Shearin v. National Indemnity Co.*[5] the North Carolina Court of Appeals reluctantly concluded that the Su-

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S.E.2d at 311. The constitutional provision relied upon provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. CONST. art. I, § 25. From this statement of constitutional policy, it was concluded by the *Cutts* majority that the presentation of testimonial evidence raises an issue of credibility that must be submitted to the jury. 278 N.C. at 417, 180 S.E.2d at 311. This conclusion is clearly at odds with federal and most state precedent. *See* cases cited by Huskins, J., concurring, *id.* at 427, 180 S.E.2d at 319. *See also* Comment, 50 N.C.L. REV., *supra* note 2, at 848 & n.29. Generally, the federal courts will allow a directed verdict based upon testimonial evidence for the party with the burden of proof if that evidence is uncontradicted, unimpeached, and if no conflicting inferences may be drawn therefrom. 5A J. MOORE, FEDERAL PRACTICE ¶ 50.02[1], at 2318-19 (2d ed. 1975) [hereinafter cited as MOORE]. Under this approach, when a judge directs a verdict based upon such evidence, he has not deprived the non-movant of his right to jury trial because the *preliminary* question—"Is there a genuine issue of fact for the jury?"—is a question of law for the judge that may be decided against the non-movant. *See* 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488.20 (Phillips Supp. 1970) [hereinafter cited as Phillips]. The majority in *Cutts* distinguished this precedent by relying upon N.C.R. CIV. P. 51(a), North Carolina's "no comment" statute, which forbids a judge from commenting on the sufficiency of the evidence during his charge to the jury. It has been pervasively argued that this reliance was neither appropriate nor compelled. *See* 278 N.C. at 427, 180 S.E.2d at 319 (Huskins, J., concurring); Phillips § 1488.20; authoritites cited note 2 *supra*.

This note proceeds upon the preliminary conclusion that the *Cutts* decision was unfortunate for two reasons. First, under *Cutts*, an entire class of potential movants (those with the burden of proof who must rely upon testimonial evidence) are denied access to the directed verdict procedure. Thus, even if the non-movant has presented no evidence and regardless of the strength of the movant's case, the issues created by denials in the pleadings must be submitted to a jury if the movant's right to recover depends upon the credibility of his witnesses. Second, to the extent that the *Cutts* holding is extended to summary judgment, the primary purpose of that procedure—to preview the evidence so that a trial may be avoided if there is no genuine issue of material fact —is frustrated. If the movant bears his burden of proof with testimonial evidence (affidavits), there is no compulsion on the non-movant to come forward with materials of his own since, under *Cutts*, summary judgment cannot be entered against him on the basis of the movant's testimonial evidence. If he does not come forward, it is impossible for a judge to predetermine if the non-movant can present triable issues of fact. This is clearly at odds with the language of rule 56(e). *See* note 38 *infra*.

During these days of crowded dockets it seems inappropriate to deny the availability of two procedures and to frustrate their clear purpose of promoting judicial economy for less than compelling reasons. Since the constitutional infirmity propounded in *Cutts* has been rejected by the vast majority of jurisdictions using virtually identical procedural rules, and since the factor used by the *Cutts* majority to distinguish this precedent is less than persuasive, until overruled, *Cutts* should be limited. This note proceeds upon that premise.

4. *E.g.*, Cutts v. Casey, 278 N.C. 390, 426-27, 180 S.E.2d 297, 321 (1971) (Huskins, J., concurring); Louis, *supra* note 2, at 749 & nn.132-33.

5. 27 N.C App. 88, 218 S.E.2d 207 (1975).

preme Court's reasoning in *Cutts* applied to summary judgment motions.[6]

In *Shearin* plaintiff-insured sought to recover from defendant-insurer for accidental damage to his airplane. The insurer denied liability on two grounds. First, it alleged that at the time of the accident the airplane was not being used for a "use" covered in the policy.[7] Second, it alleged that the aircraft was not being operated by a "qualified" pilot as that term was defined in the policy.[8] Plaintiff's answers to interrogatories issued by defendant tended to show that at the time the airplane was damaged, it was being used by a friend of plaintiff who was receiving flight instruction from a certified instructor.[9] On the basis of the pleadings and plaintiff's answers to the interrogatories, defendant moved for summary judgment.[10]

Plaintiff responded with an affidavit by his friend, an affidavit by the flight instructor and two affidavits of his own. These materials tended to show that plaintiff had made his airplane available at no charge so that his friend could get flight instruction; that the instructor was certified and was a "qualified" pilot under the policy definitions; and that although his friend was operating the plane from the pilot's chair, the instructor had "continuous ready access to a set of controls during the entire flight . . . ."[11] On the basis of these affidavits plaintiff made a cross-motion for summary judgment to which defendant did not respond.

The trial judge determined that there was no genuine issue of material fact and concluded as a matter of law that the "use" in question was covered by the policy and that the airplane was being operated by a

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6. *Id.* at 91-92, 218 S.E.2d at 210.

7. Insurer admitted in its answer that it had issued an accident policy to plaintiff and that the policy was in effect at the time of the mishap. Its defenses were definitional in nature. *Id.* at 88, 218 S.E.2d at 208.

8. *Id.* Item six of the Policy Declarations provided that the airplane would be used for "[p]leasure and [b]usiness." This was defined as "[p]ersonal and [p]leasure use and use in direct connection with the [i]nsured's business, excluding any operation for which a charge is made." "Qualified [p]ilot" as defined in the policy referred to Federal Aviation Administration certifications and ratings. *Id.* In addition, the policy provided that it did not apply to any loss occurring while the airplane was being operated by a student-pilot unless the student was under the direct supervision of a certified instructor. *Id.* at 89, 218 S.E.2d at 208.

9. *Id.* at 89, 218 S.E.2d at 208.

10. Summary judgment is authorized for either "claimant" or "defending party" under N.C.R. Civ. P. 56(a) & (b). All references in this Note to specific rules of civil procedure will be, unless otherwise indicated, to the North Carolina rules.

11. 27 N.C. App. at 90, 218 S.E.2d at 209.

"qualified" pilot.[12] Plaintiff's summary judgment motion was granted on the issue of liability and a trial on the issue of damages was ordered.[13] The defendant appealed.

The Court of Appeals clearly articulated the narrow issue: "[W]hether . . . a summary judgment may be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses." The holding is equally clear: "On authority of *Cutts v. Casey*, we conclude that the answer is NO."[14] Judge Parker, writing for the majority,[15] was unable "to see why the principle announced in *Cutts v. Casey* [did] not apply with at least equal force when the question is presented by a motion for summary judgment under Rule 56."[16] Judge Vaughn, in dissent, acknowledged that *Cutts* was controlling precedent in directed verdict cases, but concluded that since a summary judgment motion comes at a different "stage" of a proceeding, different responsibilities could be placed on the parties.[17] Therefore, failure to meet the responsibilities imposed at one stage could result in a party losing "the shield that would otherwise be available for the next [stage]."[18]

Before considering the import of the *Shearin* decision, it is necessary to examine briefly the development and application of summary judgment, a procedure new to North Carolina.[19] Summary judgment represents the most drastic change in our procedural system wrought by the new rules.[20] The procedure outlined in rule 56 is clearly available to any party and is not limited in its application to any particular type of action.[21] Its purpose is to pierce the allegations of the pleadings and to

12. *Id.* at 91, 218 S.E.2d at 209. Although the court of appeals reversed the trial judge on the basis of *Cutts*, both the majority opinion and the dissent concluded that, but for *Cutts*, the trial judge's conclusions of law were correct. *Id.* at 91-93, 218 S.E.2d at 210-11.

13. Rule 56(c) specifically allows summary judgment on the issue of liability even though a genuine issue exists as to the amount of damages. *See* note 29 *infra*.

14. 27 N.C. App. at 91, 218 S.E.2d at 209, 210 (citation omitted).

15. Britt, J., concurred without opinion. Vaughn, J., dissented. *Id.* at 92, 218 S.E.2d at 210.

16. *Id.*

17. *Id.* at 93, 218 S.E.2d at 210-11.

18. *Id.*

19. W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 56-2 (1975) [hereinafter cited as SHUFORD]. Prior procedure did allow certain issues of fact raised by the pleadings to be stricken if they were irrelevant or redundant, if a "sham" defense was raised, or if an answer, reply or demurrer was "frivolous." Where these procedures did not apply, any issue raised by the pleadings required a trial. *Id.*

20. SHUFORD, *supra* note 19, § 56-3, at 467.

21. *E.g.*, McNair v. Boyette, 282 N.C. 230, 234, 192 S.E.2d 457, 460 (1972); Kessing v. National Mortgage Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971); Pridgen v. Hughes, 9 N.C. App. 635, 638, 177 S.E.2d 425, 426 (1970).

determine if there are any issues of material fact for trial.[22] If no such issue exists, the court can dispose of a case on the merits by applying the appropriate law without incurring the cost or delay of further proceedings.

While North Carolina practitioners have utilized summary judgment extensively,[23] the state courts have considered it a drastic remedy that should be granted sparingly.[24] Great pains have been taken by the appellate courts to describe the situations in which summary judgment is *not* appropriate. It is absolutely clear that the trial judge hearing the motion is not to decide issues of fact.[25] It is equally clear that although a judge may have before him many materials,[26] and may even hear oral testimony,[27] he is not to let the hearing develop into a "trial."[28]

Rule 56 contains a statement of the standard that must be met before summary judgment can be granted. Only when the allowable materials "show that there is no genuine issue as to any material fact and

22. *E.g.*, Singleton v. Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972); *cf.* cases cited note 21 *supra.*

23. It has been suggested that more summary judgment motions have been the subject of appeal than any other procedure available under the new rule. SHUFORD, *supra* note 19, § 56-3, at 467.

24. *E.g.*, First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972); Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

25. *E.g.*, Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); Houck v. Overcash, 282 N.C. 623, 627, 193 S.E.2d 905, 908 (1973); Singleton v. Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Some North Carolina judges persist in listing "findings of fact" in their summary judgment orders. Although this practice is not appropriate, it does not constitute reversible error if the judge did not decide issues of material fact and only listed stipulated or admitted facts and conclusions of law. *See* Wall v. Wall, 24 N.C. App. 725, 729, 212 S.E.2d 238, 241 (1975).

26. Rule 56(c) specifically names pleadings, depositions, answers to interrogatories, affidavits, and admissions on file as appropriate materials. *See* note 29 *infra.* However, the scope of available materials is broader. In addition to the materials listed in rule 56(c), the court can consider admissions in the pleadings and admissions on file, whether obtained under rule 36 or otherwise, and any other material which would be admissible in evidence or of which judicial notice may be taken. *E.g.*, Kessing v. National Mortgage Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). Oral testimony is also available. *See* note 27 *infra.* In addition, stipulations of fact are considered as admissions and any presumptions that would be available at trial can be considered. Page v. Sloan, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (stipulations of fact); Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972) (presumptions).

27. Oral testimony, by virtue of rule 43(e), can be heard at a summary judgment hearing. However, such testimony should be used sparingly to prevent the hearing from developing into a "trial" to determine if a trial is necessary. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 461, 211 S.E.2d 484, 489 (1975); Walton v. Meir, 14 N.C. App. 183, 188-89, 188 S.E.2d 56, 60 (1972).

28. *See* note 27 *supra.*

that any party is entitled to a judgment as a matter of law . . ."[29] is summary judgment appropriate. Interpreting this statutory standard, North Carolina courts have stated that an issue is "material" if the facts alleged constitute a legal defense, or are of such a nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved cannot prevail.[30] Similarly, a "genuine issue" has been defined as one that can be supported by substantial evidence.[31] Thus neither a material issue that cannot be supported by substantial evidence nor an issue of immaterial fact will preclude summary judgment.[32] In applying these standards, directed verdict has developed into somewhat of a touchstone. It has been repeatedly stated that summary judgment is appropriate when only legal issues are involved and when a party would be entitled to a directed verdict at trial.[33]

These interpretations of rule 56 have not caused substantial controversy. The difficult task for any court is application of the evidentiary standards that each party must meet either to be entitled to or to defeat a motion for summary judgment. Consistent with the present interpretation of the equivalent federal rule,[34] the burden in North Carolina is on the movant to establish the lack of a triable issue of material fact, regardless of which party bears the burden of proof at trial.[35] General-

29. Rule 56(c) states in full:

Motion and proceedings thereon.—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

30. *E.g.*, Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

31. *E.g.*, cases cited note 30 *supra.*

32. *E.g.*, Kessing v. National Mortgage Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

33. Long v. Long, 15 N.C. App. 525, 526-27, 190 S.E.2d 415, 416-17 (1972); Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 698-99, 179 S.E.2d 865, 867 (1971).

34. There are four minor differences between the North Carolina rule and the federal rule. SHUFORD, *supra* note 19, § 56-1, at 466-67. For discussion of the present federal interpretation see Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748 & n.13.

35. *E.g.*, First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972); Whitley v. Cubberly, 24 N.C. App. 204, 206, 210 S.E.2d 289, 291 (1974).

ly, this burden will be met by proving the non-existence of an essential element of the opposing party's claim or by showing through discovery that the opposing party cannot produce evidence to support one of the essential elements of his claim.[36] To determine whether this burden has been met, the court views the record in the light most favorable to the non-movant, accepts his evidence as true and regards his papers indulgently.[37] If the movant meets this initial burden, rule 56(e) specifically provides that unless the non-movant produces specific facts showing the existence of a triable issue, the movant is entitled to summary judgment.[38]

Applying these standards to the *Shearin* facts, both the trial court and the court of appeals believed that plaintiff had met his burden.[39] They were equally in agreement that defendant had failed to set forth specific facts showing the existence of a triable issue. The court of appeals concluded: *but for Cutts v. Casey*, summary judgment was appropriate for the plaintiff.[40] Given this conclusion, it is unfortunate that the court of appeals did not take the opportunity in *Shearin* to distinguish *Cutts*.

There were several options available to the court of appeals. The majority opinion indicates that the court felt compelled to apply the

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36. Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974).

37. *E.g.*, Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); Hall v. Funderburk, 23 N.C. App. 214, 216, 208 S.E.2d 402, 403 (1974). In addition, it is often said that the movant's papers will be closely scrutinized. *Id.*

38. Rule 56(e) provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

North Carolina courts have interpreted this provision to mean that if the movant's materials are not sufficient, summary judgment in his favor is not "appropriate" and must be denied even if the non-movant does not respond at all. Thus it has been held that the non-movant does not incur the burden of coming forward with evidence of a triable issue until the movant produces evidence of the necessary certitude which negates the non-movant's claim in its entirety. Whitley v. Cubberly, 24 N.C. App. 204, 206, 210 S.E.2d 289, 291 (1974); *see* Tolbert v. Great Atlantic & Pacific Tea Co., 22 N.C. App. 491, 494, 206 S.E.2d 816, 817 (1974).

39. 27 N.C. App. at 91-92, 218 S.E.2d at 210.

40. *Id.* The court's reliance on *Cutts* appears justified. There, as in *Shearin*, the movant with the burden of proof met that burden with testimonial evidence. Credibility conceivably could be questioned at trial. Thus the *Cutts* conclusion that credibility of witnesses is for the jury, combined with the substantial precedent equating the tests for the two motions, provides some justification for the extension of the *Cutts* reasoning to summary judgment proceedings.

Cutts reasoning to the *Shearin* facts even though it was unanimous in its opinion that summary judgment was proper.[41] If stare decisis was the force behind that compulsion, the court of appeals need not have yielded so readily. Though the doctrine of stare decisis is "fully established" in North Carolina,[42] it was not necessarily applicable in *Shearin* for two reasons. First, while the North Carolina Supreme Court has spoken to the credibility question in relation to directed verdict motions, there has been no decision in that court applying the *Cutts* rationale to summary judgment cases. By refusing to apply the *Cutts* doctrine to the *Shearin* facts, the court of appeals would not be committing the *verboten* act of overruling a supreme court decision since there is little factual similarity between the two cases.[43] In addition, it must be remembered that *Shearin* and *Cutts*, cases of statutory interpretation, deal with different statutes. Though the similarity of the motions authorized by the two statutes is undeniable,[44] there are technical differences upon which a court could reasonably rely in distinguishing them.[45] Second, at least theoretically, the pronouncement in *Cutts* that credibility is always for the jury can be considered obiter dicta.[46] Justice Sharp, in the *Cutts*

41. *Id.*

42. Williamson v. Rabon, 177 N.C. 302, 305, 98 S.E. 830, 831 (1919); *cf.* Bulova Watch Co. v. Brand Distributors, 285 N.C. 467, 472-73, 206 S.E.2d 141, 145 (1974).

43. Stare decisis is a doctrine based on similarity of fact patterns. *Cf.* Dennis v. City of Albemarle, 243 N.C. 221, 223, 90 S.E.2d 532, 533 (1955). *Cutts*, an action to try title to land, has little in common with *Shearin*, an action to recover under an insurance contract.

44. *See* text accompanying note 33 *supra*. The similarity is such that it has led one commentator to suggest that, analytically, the motions are identical. Louis, *supra* note 2, at 749 & nn.132-33.

45. Distinction at this level of analysis is not difficult since stare decisis is a doctrine based on recurring fact patterns. *See* note 43 *supra*. Several differences between the two motions are apparent. First, they appear at different stages of a proceeding. As a result, the materials a judge considers when ruling on a summary judgment motion are not "evidence" as they are in a directed verdict setting, but are "evidence of evidence." In addition, granting a summary judgment can avoid a needless trial while granting a directed verdict cannot. Second, there are differences in the language of the two rules upon which a distinction could be forced. Although rule 50 is less than ambiguous in its references to who may move for directed verdict, rule 56(a) specifically provides for a summary judgment for a "party seeking to recover upon a claim, counterclaim, or crossclaim . . . ." In the normal situation such a party will bear the burden of proof at trial. For a comparison of the language of the two rules see Cutts v. Casey, 278 N.C. 390, 425-26, 180 S.E.2d 287, 320-21 (1971) (Huskins, J., concurring). These "technical differences," while perhaps unacceptable as distinctions upon which to allow a summary judgment for the party hearing the burden of proof with testimonial evidence, certainly are substantial enough to reject *Cutts* as controlling in summary judgment cases. *See generally* Louis, *supra* note 2, at 749 & nn.132-33.

46. Statements in the text of a judicial opinion unnecessary to the determination of the case have to be regarded as obiter dicta. *Cf.* Washburn v. Washburn, 234 N.C. 370, 373, 67 S.E.2d 264, 266 (1951).

majority opinion, noted that granting summary judgment was doubly error since the movant's evidence was contradicted.[47] It can be argued that this factor was dispositive of the case.[48] If it was dispositive, then the statement in *Cutts* concerning the movant with the burden of proof and credibility must be dictum. The credence of this argument is enhanced by an important qualification in the *Cutts* opinion; despite the pronouncement that credibility is always for the jury, Chief Justice Sharp conceded that there may be a few situations in which credibility as a matter of law seems compelled.[49] In light of this equivocation, it would not be unreasonable to confine *Cutts* to its own facts for stare decisis purposes. Certainly it should not be extended to control a different statute. And certainly any decision to extend it at all should not be made by an intermediate court that finds the extension contrary to the clear language of the statute.[50]

If the court of appeals was not compelled to apply the *Cutts* rationale to summary judgment by the doctrine of stare decisis, what was the basis for its decision to do so? It is submitted that the court was

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47. 278 N.C. at 422, 180 S.E.2d at 314. Even under the more liberal federal interpretation of directed verdict for the party with the burden of proof, the motion must be denied if the movant's testimonial evidence is contradicted or impeached. 5A MOORE, *supra* note 3, ¶ 50.02[1], at 2318-19 (2d ed. 1975). North Carolina case law is consistent with this interpretation. *See* cases cited notes 55-56 *infra*.

48. *See* note 47 *supra*. An additional dispositive factor, not recognized by the court, was that the plaintiff in *Cutts* apparently did not move at the close of all the evidence for a directed verdict on his own claim. Such a motion is an absolute prerequisite to a motion for judgment notwithstanding the verdict under rule 50(b), the motion the trial court erroneously granted. *See* Louis, *supra* note 2, at 747 & nn.116 & 117.

49. 278 N.C. at 421, 180 S.E.2d at 314. The *Cutts* opinion did not elaborate upon the situations in which credibility as a matter of law would be compelled. The federal courts accept credibility as a matter of law when the movant's evidence is uncontradicted, unimpeached, and no conflicting inferences may be drawn therefrom. *See* note 3 *supra*. Dean Phillips, cited by Chief Justice Sharp in *Cutts*, suggests that credibility could be accepted where the movant's evidence is entirely documentary or where it is uncontradicted and the facts to contradict it, if they exist at all, are within the non-movant's peculiar knowledge. Phillips, *supra* note 3, § 1488.20, at 26. Other jurisdictions accept credibility when the non-movant "admits" facts that establish the movant's case, when the controlling evidence is documentary and its construction is a matter of law for the court, or when the movant's oral evidence is unimpeached and uncontradicted. *See* Comment, 50 N.C.L. REV., *supra* note 2, at 844-48. In addition most courts will deny directed verdict if the movant's evidence is inherently suspect by reason of interest, internal inconsistencies, equivocation, or scientific impossibility. *Id.* at 849. The negative implication from North Carolina case law is that the movant's evidence must be from a disinterested witness whose testimony is not contradicted or impeached. *See* text accompanying notes 51-54 *infra*.

50. The *Shearin* majority noted, "Therefore, were we at liberty to give full scope to Rule 56, we would agree with the trial court in the present case that, upon the basis of plaintiff's uncontradicted affidavits, there is here no genuine issue as to any material fact." 27 N.C. App. at 91, 218 S.E.2d at 210.

misled concerning the scope of *Cutts* and missed the opportunity to free summary judgment from its shadow.

One possible ground for distinction is suggested by Judge Vaughn in his dissent. In considering the fact that rule 56 clearly contemplates the availability of a summary judgment for any party,[51] regardless of burdens of proof, he seemed to be raising a question as to what policy is contravened when the movant has the burden of proof and carries that burden with testimonial evidence. The *Cutts* opinion suggests that the policy violated in directed verdict cases is the right to have a jury observe the demeanor of the movant's witnesses and pass upon their credibility. Even if this policy is effectuated in *Cutts*,[52] it is still possible to distinguish the two motions by considering the stages at which they are available. To preserve the right to have a jury pass upon the credibility of an adversary's witnesses, a party must file the necessary pleadings in accordance with the statutory requirements. The procedural system thus imposes a condition precedent to this "constitutional" right[53] at the pleading stage. If preservation of the right can be conditioned upon requiring a certain response at the pleading stage, it follows that preservation of that right can be similarly conditioned when an adversary moves for summary judgment.

Another possible ground for distinction lies in North Carolina case law concerning summary judgment. Some early decisions did deal directly with the credibility question when summary judgment was the procedural posture of the case. Before the *Cutts* decision came down, the North Carolina Court of Appeals purported to follow federal precedent in reversing the grant of summary judgment when the movant's affidavits were made by interested parties.[54] Similar North Carolina decisions have held that the motion is not available to a party who bears his burden of proof with testimonial evidence when that evidence is contradicted[55] or when the knowledge of the facts is largely within the

51. *See* note 45 *supra.*

52. It is submitted that this policy does not compel or justify the *Cutts* result. *See* note 3 *supra.*

53. This right is articulated in N.C. CONST. art. I, § 25. *See* note 3 *supra.*

54. Lee v. Shor, 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970). The court in *Shor* also suggested that a trial court should never resolve an issue of credibility. *Id. Cf.* Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 98-99, 209 S.E.2d 734, 739 (1974); Shook Builders Supply Co. v. Eastern Assoc., Inc., 24 N.C. App. 533, 537, 211 S.E.2d 472, 475 (1975).

55. *Cf.* Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974); Reavis v. Campbell, 27 N.C. App. 231, 236, 218 S.E.2d 873, 876 (1975).

movant's control.[56] These holdings are consistent with federal precedent.[57] It is contended that in *Shearin*, the court of appeals bolted from this established line of cases which follows federal precedent when it applied the *Cutts* reasoning to a summary judgment case.[58]

The *Shearin* departure from North Carolina and federal summary judgment precedent even stands in marked contrast with other post-*Cutts* decisions by the court of appeals. In *Brooks v. Smith*[59] the defendant successfully supported his summary judgment motion with the affidavit of an eyewitness. The court found that the "deposition clearly establishe[d] contributory negligence on the part of the plaintiff which was the proximate cause of his injuries."[60] This unimpeached and uncontradicted affidavit of a disinterested witness carried the defendant's burden as movant upon an issue for which he would have the burden of proof at trial. Since the plaintiff did not respond to defendant's motion, the court of appeals held that summary judgment was proper.[61] Similarly, in *Bogle v. Duke Power Co.*[62] the same result was reached in a wrongful death action. In that case the defendant carried his burden as movant for summary judgment with the affidavit of a disinterested witness. The affidavit clearly showed that plaintiff's deceased was contributorily negligent.[63] Since plaintiff did not respond to these materials, the court of appeals held that summary judgment properly was granted against her.

From these two cases it can be concluded that the court of appeals does not feel compelled to apply the *Cutts* reasoning to all summary judgment cases in which the movant carries his trial burden with testimonial evidence. It is submitted that in *Shearin* the court was not

56. *Cf.* Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 88, 98-99, 209 S.E.2d 734, 739 (1974); Lee v. Shor, 10 N.C. App. 231, 235-36, 178 S.E.2d 101, 104 (1970).

57. *See* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2726, at 521-24 (1913); notes 3 & 49 *supra*.

58. It is difficult to imagine why these limitations on the availability of summary judgment to the party who bears his burden of proof with testimonial evidence were ever articulated if *Cutts* were controlling.

59. 27 N.C. App. 223, 218 S.E.2d 489 (1975).

60. *Id.* at 226, 218 S.E.2d at 491.

61. *Id.* at 227, 218 S.E.2d at 491-92.

62. 27 N.C. App. 318, 219 S.E.2d 308 (1975).

63. *Id.* at 322, 219 S.E.2d at 311. It should be noted that in *Bogle*, an alternative ground for the grant of defendant's motion was "no negligence," an issue upon which defendant did not bear the trial burden of proof. *Id.* This was pointed out by Parker, J., who concurred in the result since defendant had shown that plaintiff could not prove negligence. However, he rejected contributory negligence as an alternative ground for granting defendant's summary judgment since "[t]he credibility of defendant's witness is involved." *Id.* at 323, 219 S.E.2d at 311.

compelled to do so by the doctrine of stare decisis. It also appears that the court missed the opportunity to limit the *Cutts* opinion to its own facts as obiter dictum. Also present and missed was the opportunity to narrow its scope by assigning credibility as a matter of law in *Shearin* or at least recognizing the availability of that action on other facts.[64] Finally, available to and never mentioned by the majority were several possible distinctions between the two motions.[65]

In light of *Brooks* and *Bogle*, it is difficult to evaluate the significance of the *Shearin* holding. The danger in the court's blind application of *Cutts* is that *Shearin* will become the same rigid touchstone in summary judgment cases that *Cutts* has become in directed verdict cases. Unfortunately, it appears that this process has already begun.[66]

CARL N. PATTERSON, JR.

Construction Lending—General Contractor v. Lender

Any number of complex legal relationships may be generated by a building construction project.[1] Even within the framework of an ordinary situation with standard contracts, small factual variations can produce very different legal consequences. The relationship between

64. Since *Shearin* was basically a case of contract interpretation, granting summary judgment for plaintiff seems appropriate. *See* note 49 *supra*. However, in *Shearin* the option was certainly available to deny plaintiff's summary judgment motion since two of his affiants (the plaintiff and his friend) were interested parties. *See* text accompanying note 11 *supra*.

65. *See* text accompanying notes 44-58 *supra*. One final distinction is particularly troublesome. The impact of the *Cutts* opinion is somewhat ameliorated by the availability of a peremptory instruction to the movant. In this procedure the jury is instructed to find for the movant if it believes the movant's evidence. No such procedure is available in summary judgment proceedings.

66. *Shearin* was decided on October 1, 1975. Twice before the end of that year it was referred to in conjunction with *Cutts* concerning the propriety of summary judgment for the party having the burden of proof when the credibility of his witnesses is at issue. *See* Equitable Leasing Corp. v. Kingsmen Prod., 27 N.C. App. 661, 663, 220 S.E.2d 95, 97 (1975); Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 405, 219 S.E.2d 242, 243 (1975).

1. Unless otherwise indicated, the following situation is assumed: The owner of the property finances the project through a lender, for example, a savings and loan association. The owner contracts with a general contractor to build the building and agrees to pay him accordingly. The general contractor in turn employs various subcontractors and material suppliers. These subcontractors may similarly employ other subcontractors and material suppliers. The chain of subcontracts may become quite long on a major project.

the construction lender and the general contractor is one that has caused courts a great deal of difficulty. It is a relationship influenced by statutory law, common law, equity and contract. An especially difficult question, unresolved in North Carolina,[2] is what circumstances give rise to a claim for relief by a general contractor against a construction lender when the former has been unable to obtain payment from the party with whom he is in privity, namely, the owner.

The owner of property who wants to erect a building thereon normally obtains temporary financing to cover the costs of construction.[3] When the construction is complete, he obtains a long term loan secured by a new mortgage on the property and pays off the construction mortgage. The construction loan is normally disbursed in "progress payments" keyed to various stages of completion of the project.[4] The idea is that the borrower will be able to pay the general contractor and that the contractor will pay the various subcontractors and material suppliers in such a way that no one will go unpaid for completed work for very long.[5] Also, under this arrangement the various parties are supposedly motivated to complete the work soon so that they can be paid. A problem arises when the funds are somehow diverted from flowing smoothly to their proper destination. Work comes to a halt when payments are unreasonably delayed, and the scramble to get paid begins. If the lender forecloses and then seeks to complete the project without satisfying the unpaid parties, he may have difficulty getting people to do the work for various reasons.[6] Meanwhile, the partially completed building is exposed to weather and vandalism.

Statutory remedies are available to the unpaid parties to the project, but those remedies are often of no practical value. Generally speaking, the mechanics lien law in North Carolina[7] grants the claimants the right to assert liens against funds payable by the owner, but not

2. Urban Systems Dev. Corp. v. NCNB Mortgage Corp., 513 F.2d 1304, 1305 (4th Cir. 1975).

3. *See* G. NELSON & D. WHITMAN, CASES AND MATERALS ON REAL ESTATE FINANCE AND DEVELOPMENT 553-58 (1976).

4. *Id.* at 555; Lefcoe & Schaffer, *Construction Lending and the Equitable Lien*, 40 S. CAL. L. REV. 439 n.1 (1967) [hereinafter cited as Lefcoe].

5. The payments may not cover all of the costs of the in-place work for various reasons, including the possibility of a retainage provision. Lefcoe, *supra* note 4, at 439 n.1.

6. "When work stops, the suppliers and laborers who had participated are in a strong bargaining position. Union rules, camaraderie, and skepticism about the likely future of the project deter others from replacing them." *Id.* at 456.

7. N.C. GEN. STAT. § 44A (Cum. Supp. 1975).

against funds in the hands of the construction lender.[8] The claimants may also, through subrogation, enforce a lien against the land.[9] However, the liens on funds payable by the owner may well be worthless, as the owner probably was diverting funds already because of insolvency. Similarly, the lien on the property may be valueless as it only relates back to the beginning of construction and is probably subordinate to the construction loan mortgage.[10]

The North Carolina statute provides no remedy against the construction lender or the funds in his hands.[11] Those funds normally cannot be attached in a proceeding against the owner since the loan agreement and the owner's right to the funds have been terminated by his diversion of funds and the discontinuance of work. Lawyers for these claimants of undisbursed loan funds have advanced various theories, mostly without success.[12] In *Urban Systems Development Corp. v.*

8. *Id.* §§ 44A-17(3),-18. First tier subcontractors have a direct right to liens on funds due to the contractor; second and third tier subcontractors may claim through subrogation to the rights of the party with whom they dealt. Although the language of section 44A-18(1) arguably reaches loan funds wherever they are if they are "owed to the contractor," *id.* § 44A-19, which deals with notice to the "obligor," a term which by definition (*id.* § 44A-17(3)) cannot mean the lender, when coupled with section 44A-18(6) requiring such notice, makes it clear that such a result was not intended. *See* text accompanying note 64 *infra.*

9. N.C. GEN. STAT. §§ 44A-8,-23 (Cum. Supp. 1975). The general contractor may enforce such a lien directly.

10. *Id.* § 44A-10; Lefcoe, *supra* note 4, at 440-41. The land may be subject to other prior encumbrances as well, for example, a purchase money mortgage. Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 658, 48 Cal. Rptr. 278, 288 (1st Dist. 1965). For a discussion of priorities under the California statutes, see Comment, *California Mechanics' Liens,* 51 CALIF. L. REV. 331, 341-44 (1963). *See also* Kratovil & Werner, *Mortgages for Construction and the Lien Priorities Problem—The "Unobligatory" Advance,* 41 TENN. L. REV. 311 (1974).

11. N.C. GEN. STAT. § 44A-17(3) (Cum. Supp. 1975). The lender is not an "obligor." *See* note 8 *supra.*

12. The opinions reflect overlapping and ill-defined theories. One suspects that only a small fraction of the cases of this type have been appealed. The following are some of the theories advanced in cases relating to the instant fact situation: (1) Equitable assignment theory, Pratt Lumber Co. v. T.H. Gill, 278 F. 783, 789-90 (E.D.N.C. 1922); (2) reliance theory, G.L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967), Wahl v. Southwest Sav. & Loan Ass'n, 12 Ariz. App. 90, 102-03, 467 P.2d 930, 942-43 (1970), Lampert Yards, Inc. v. Thompson-Wetterling Constr. & Realty, Inc., — Minn. —, 223 N.W.2d 418, 422 (1974), First Nat'l State Bank v. Carlyle House, Inc., 102 N.J. Super. 300, 246 A.2d 22 (Ch. 1968), Demharter v. First Fed. Sav. & Loan Ass'n, 412 Pa. 142, 194 A.2d 214 (1963); (3) third party beneficiary claim, Avco Delta Corp. Canada v. United States, 484 F.2d 692 (7th Cir. 1973), Demharter v. First Fed. Sav. & Loan Ass'n, *supra,* Clardy v. Barco Constr. Co., 205 Pa. Super. 218, 208 A.2d 793 (Super. Ct. 1965); (4) priority for liens over lenders' mortgages sought based on various principles of equity, Ash v. Honig, 62 F.2d 793 (2d Cir. 1933), J.I. Kislak Mfg. Corp. v. William Matthews, Builder, Inc., — Del. —, 303 A.2d 648 (1973), Bedford Lake Park Corp. v. Twelve Linden Corp., 8 App. Div. 2d 962,

NCNB Mortgage Corp.,[13] which originated in North Carolina,[14] the Fourth Circuit Court of Appeals rejected the general contractor's claims against the construction lender which were based on detrimental reliance,[15] third party beneficiary status,[16] and a trust fund theory.[17] In similar cases, unpaid claimants have asserted claims based on negligence.[18] They have also sought to have the lenders estopped on equitable grounds from asserting the priority of their mortgages to the claimants' mechanics liens.[19]

If diversion of construction loan proceeds is to give rise to a claim for relief against the lender, the theory the courts select is of minor consequence since several theories could be adapted to the situation. The equitable lien theory used by the California courts, before the legislature intervened and eliminated it, is probably the most flexible and appropriate. The California equitable lien doctrine is also the only theory that has generated a substantial number of judicial opinions and reached a

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190 N.Y.S.2d 834 (1959); (5) negligence theory, Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp., 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (4th Dist. 1975), Lampert Yards, Inc. v. Thompson-Wetterling Constr. & Realty, Inc., *supra* at 422-23, First Nat'l State Bank v. Carlyle House, Inc., *supra*. (The writer has found no cases in which this last theory has been successful, seemingly because the courts have not found the duty of the lender to the plaintiffs that a negligence claim requires.) *See also* the California cases discussed in text accompanying notes 22-39 *infra*.

13. 513 F.2d 1304 (4th Cir. 1975).

14. Other North Carolina cases have been settled, avoiding appeals on similar claims. Letter from Edward C. Winslow III, an attorney in Greensboro, N.C., to Elizabeth Gibson, June 3, 1975, on file with the *North Carolina Law Review*.

15. 513 F.2d at 1306-07. Special circumstances, namely the allegation of an express promise, gave rise to this claim. Reliance on the fund is generally treated as an element of an equitable lien claim, rather than an independent ground of recovery. *See* note 17 and text accompanying notes 23-34 *infra*.

16. 513 F.2d at 1306.

17. *Id.* at 1305-06. Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp., 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (4th Dist. 1975), was apparently not yet available to Judge Haynsworth when he wrote this opinion. *See* text accompanying notes 56-62 *infra*. It is not clear what he meant by the California "trust fund" theory. *See* 513 F.2d at 1305. He cited two cases; one, Ralph C. Sutro Co. v. Paramount Plastering, Inc., 216 Cal. App. 2d 433, 31 Cal. Rptr. 174 (2d Dist. 1963), predicated its holding on certain contractual provisions and third party beneficiary principles and found that the loan funds constituted a trust for the benefit of the lender and the claimants. The project having been completed, the lender had received his benefit, and liens were granted to the claimants. The second case, Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1st Dist. 1965), insofar as it relates to this type of claim, is really an equitable lien theory case, which is discussed beginning with note 22 *infra*. If Judge Haynsworth intended to state the requirements for recovery under the equitable lien theory in *Urban Systems*, he made an overstatement. *See* text accompanying notes 22-39 *infra*.

18. *See* cases cited note 12 *supra*.

19. *Id.*

significant level of development.[20] In *Urban Systems*, Judge Haynsworth alluded to the California "trust fund theory"[21] without determining its applicability in North Carolina. Because of the degree of development of the California theory, North Carolina can benefit from an analysis of the California experience.

A basic statement of the California equitable lien theory is found in the 1965 case of *McBain v. Santa Clara Savings & Loan Association.*[22] In *McBain* an equitable lien on undisbursed construction loan funds held by the lender was granted to subcontractors who had dealt directly with the owner-borrower.[23] Relying on older California equitable lien cases,[24] the court stressed that the claimants were entitled to senior liens on the fund because they had justifiably relied on the fund for payment,[25] even though the complaining subcontractors made no showing of enrichment of the lender as was made in those older California decisions.[26] The facts that the land was heavily encumbered prior to construction and that the owner lacked personal resources made reliance on the fund obvious.[27] The court quoted from the case of *Miller v.*

20. The cases are collected in Annot., 54 A.L.R.3d 848 (1974). *See* text accompanying notes 22-39 *infra.*

21. 513 F.2d at 1305; *see* note 17 *supra.*

22. 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (1st Dist. 1966).

23. *Id.* at 832, 841, 51 Cal. Rptr. at 80, 86. The owner apparently acted as his own general contractor.

24. *Id.* at 836, 51 Cal. Reptr. at 83. The older decisions were Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898 (1928) and Pacific Ready Cut Homes v. Title Ins. & Trust Co., 216 Cal. 447, 14 P.2d 510 (1932). Another important precedent cited was Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1st Dist. 1965).

25. The rule required that the borrower or the lender have induced the reliance, 241 Cal. App. 2d at 836, 51 Cal. Rptr. at 83, but the court also said: "Basically it is the fund itself and the arrangement for progress payments therefrom, created by the mutual agreement of the borrower and the lender, that constitiutes the material inducement . . . ." *Id.* at 841, 51 Cal. Rptr. at 86.

26. *See* Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp., 44 Cal. App. 3d 460, 464, 118 Cal. Rptr. 699, 701 (4th Dist. 1975).

In the older decisions granting recovery, *supra* note 24, the projects were completed with loan funds remaining and the owner in default. Assuming the value of the completed project to be at least the amount of the loan taken out initially, the lender had been "unjustly" enriched to at least the extent of remaining loan funds. *See* McBain v. Santa Clara Sav. & Loan Ass'n, 241 Cal. App. 2d 829, 845-46, 51 Cal. Rptr. 78, 89 (1st Dist. 1966); Lefcoe, *supra* note 4, at 444 n.11. *See also* note 41 *infra.*

None of the cases discarding the requirement of a surplus after completion or even a showing of any enrichment of the lender, *see* text accompanying notes 32 & 35 *infra*, reached the California Supreme Court, where *Smith* and *Pacific Ready Cut* were decided.

27. 241 Cal. App. 2d at 844, 51 Cal. Rptr. at 88. The system of progress payments and inspections constituted further inducement to rely. *Id.* at 843-44, 51 Cal. Rptr. at 87-88. The lack of personal finances was inferred from the inability to

Mountain View Savings & Loan Association,[28] cited also in *Urban Systems*:[29]

> "Where the lender has received the benefit of the claimant's performance, and therefore a more valuable security for its note, it is not justified in withholding or appropriating to any other use money originally intended to be used to pay for such performance and relied upon by the claimant in rendering its performance."[30]

The *McBain* court assumed that lenders are capable of preventing loan misappropriations: "Respondent was therefore in a commanding position to employ well known and commonly accepted . . . methods to prevent the diversion . . . of the progress payments by the owners . . . ."[31] The court did not require the claimants to prove that the lender had been unjustly enriched; indeed, there was no indication that the incomplete project was worth more than the amounts already disbursed from the fund.[32] Thus *McBain* gave an equitable lien on remaining funds to any unpaid contributor to the project able to show reliance on the loan fund.

Two subsequent cases sharpened three significant aspects of the equitable lien theory. First, in *Doud Lumber Co. v. Guaranty Savings & Loan Association*[33] the court pointed out that reliance on the fund may be circumstantially proved with ease.[34] Second, *Doud* specifically rejected completion of the project as a prerequisite to recovery.[35] Third, in *Swinerton & Walberg Co. v. Union Bank*[36] California granted recovery under the equitable lien theory to a general contractor for the first

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purchase the land or build the building without extensive credit. *See* text accompanying note 34 *infra*.

28. 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1st Dist. 1965).

29. 513 F.2d at 1305 n.1.

30. 241 Cal. App. 2d at 836, 51 Cal. Rptr. at 83, *quoting* 238 Cal. App. 2d at 661, 48 Cal. Rptr. at 290.

31. 241 Cal. App. 2d at 842, 51 Cal. Rptr. at 86-87. *See* Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 659, 48 Cal. Rptr. 278, 288 (1st Dist. 1965).

32. Lefcoe, *supra* note 4, at 444 n.11.

33. 254 Cal. App. 2d 585, 60 Cal. Rptr. 94 (1st Dist. 1967).

34. *Id.* at 589, 60 Cal. Rptr. at 96. "Both Smith and Ready Cut indicated that the necessary elements of inducement and reliance could be inferred from the circumstances of the transaction without great difficulty and suggested that an improver's knowledge that a construction loan had been negotiated would be sufficient." *Id.*

35. *Id.* at 592, 60 Cal. Rptr. at 98, *quoting* Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 664, 48 Cal. Rptr. 278, 292 (1st Dist. 1965). " 'The reasoning behind Smith and Pacific Ready Cut Homes is as applicable to the claimant putting in the foundation, or the rough plumbing, as it is to the carpenter driving the last spike. All other factors being equal the rights of one contributing to the construction should not depend on the stage thereof at which his contribution was made.' " *Id.*

36. 25 Cal. App. 3d 259, 101 Cal. Rptr. 665 (2d Dist. 1972).

time.[37] The *Swinerton* court held that, in the equitable lien context,[38] general contractors who were independent from the borrower were indistinguishable from subcontractors in relation to the lender and to the policies behind the equitable lien.[39]

An article analyzing the California equitable lien in construction lending cases was published after *McBain*.[40] The authors, Lefcoe and Schaffer, point out that although the lenders in cases in which the owners divert loan funds have gotten a more valuable security because of the claimants' work, they have already disbursed funds once. Therefore they have not been unjustly enriched,[41] and there must be some reason to force them to pay twice instead of applying any remaining funds against the borrowers' loan liabilities.[42] Lefcoe and Schaffer discredit fault and the prevention of loan diversions as supportable rationales for granting equitable liens.[43] These commentators dismiss the court's assumption in *McBain* that lenders are more able to prevent borrowers from diverting the loan funds than are contractors and sub-

37. The appellant bank claimed that such a recovery had not been allowed before, and the court did not disagree. *Id.* at 264, 101 Cal. Rptr. at 668.

38. *Swinerton* distinguished Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Ass'n, 247 Cal. App. 2d 1, 55 Cal. Rptr. 884 (2d Dist. 1966). 25 Cal. App. 3d at 263-64, 101 Cal. Rptr. at 667-68. *Gordon* denied the general contractor an "equitable lien" based on a third party beneficiary claim, a contract theory, not an equitable lien theory as discussed herein. In addition, there was no proof of reliance in *Gordon*. *Swinerton* held that, "Since recovery in the present case is not grounded on contract but rather on equitable considerations arising out of estoppel and unjust enrichment, its disposition is not controlled by . . . *Gordon*." *Id.* at 264, 101 Cal. Rptr. at 668. *But see* text accompanying notes 26 & 32 *supra*, note 41 *infra*. The loan agreement in *Swinerton* contained a provision denying the creation of an interest in the fund in the contractor. 25 Cal. App. 3d at 266, 101 Cal. Rptr. at 670.

39. 25 Cal. App. 3d at 264, 101 Cal. Rptr. at 668. The only possible basis of distinction is that there are simply more parties between the lender and the subcontractors, and, hence, more possibilities for diversion of funds and a greater need for protection of the subcontractors' rights. On the other hand, it is arguable that simply because of the number of intervening parties, a general contractor may be more justified in relying on a construction loan fund. Certainly it should not matter that the general contractor's contribution may be largely of entrepreneurial and managerial effort rather than of materials or physical labor.

40. Lefcoe, *supra* note 4.

41. "Unjustly enriched" is used in the traditional sense. Disbursing to the owner according to contract can hardly be regarded as tortious behavior. RESTATEMENT OF RESTITUTION § 128 (1937). The lender may not have been enriched in any sense. The term "unjust enrichment" is used liberally in the equitable lien context to indicate the situation in which one party, the lender, has realized a gain, but another, the lien claimant, has suffered a loss.

42. *See* Lefcoe, *supra* note 4, at 444.

43. Lefcoe, *supra* note 4, at 442-43. Actually, prevention is only one objective of what Lefcoe and Schaffer termed an "allocation of resources" rationale. However, if this was the courts' rationale, prevention was certainly the ultimate objective.

contractors.[44] They also point out a number of problems with lenders' use of bonding or the voucher system as preventive measures.[45] In fact, a survey of California lenders taken after *McBain* showed insignificant movement to more sophisticated methods of supervising loans.[46] The mere threat of equitable lien liability was apparently insufficient to induce the drastic alterations in lending practices necessary to avoid liability under *McBain*.[47]

Lefcoe and Schaffer suggest a different basis for decision: the desire to mitigate losses due to delay in resuming contruction after work has stopped.[48] Neither the allowance nor disallowance of equitable liens in all cases is likely to affect lenders' decisions to take over and complete disrupted projects.[49] The remedy should be limited so as not to put the various claimants in a position to be unreasonable about completing the work because of their possession of a claim against the lender.[50] As *McBain* imposes no such limitations, its rule is too broad.[51] Lefcoe and Schaffer assert that, under this rationale, equitable liens are justified in two situations:

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44. *Id.* at 447-48. *See* text accompanying note 31 *supra.* The *Miller v. Mountain View Sav. & Loan Ass'n* court mentions this proposition. 238 Cal. App. 2d 644, 658-59, 48 Cal. Rptr. 278, 288 (1st Dist. 1965).

45. Lefcoe, *supra* note 4, at 449-52. "Performance bonds" guarantee performance of the contract; "payment bonds" guarantee payment of the subcontractors and materialmen. *See* G. NELSON & D. WHITMAN, *supra* note 3, at 664-65. "[Bonding companies] do not seek to prevent losses by supervising the distribution of construction loan funds; rather, they rely on the credit of the borrower as a source of indemnity. This much lenders could do themselves. Bonding is efficient only for a lender less capable than a bonding company of checking borrower credit." Lefcoe, *supra* note 4, at 449. Mandatory bonding would inhibit certain small scale construction contrary to the public interest. *Id.* at 450.

The voucher system calls for disbursements only upon receipt of bills for completed work. The bookkeeping expense of paying each subcontractor is generally prohibitive, and paying the borrower directly facilitates the presentation of forged bills. *Id.* at 451.

46. Lefcoe, *supra* note 4, at 454. Greater selectivity of borrowers was attributed to the then tight money situation. *Id.* n.48.

47. "As a determinant of lending policy, the threat of equitable liens seems insignificant in relation to trends in the money market and demand for construction loans." *Id.* at 455. One reason for the scarcity of appellate opinions may be that the cost of litigation and appeal is simply too high compared to the amounts involved, which tend to be small. Large projects with large costs are usually bonded, eliminating the need for recourse to equitable liens for subcontractors and materialmen. *Id.* at 458 n.62. But see notes 69-70 *infra* concerning general contractors.

48. Lefcoe, *supra* note 4, at 456-58.

49. *Id.* at 456.

50. That is, if the remedy is allowed in all cases, the claimants are likely to get the same compensation for what they have already done regardless of whether they resume work. *Id.*

51. *See* text accompanying notes 23-32 *supra.*

> First, when the lender forecloses and sells the incomplete project to a purchaser who finishes and resells for a substantial profit, this provides some evidence that the lender failed to act reasonably to mitigate loss. In such a case the tender [*sic*] without a coherent defense of its conduct (*e.g.*, that materialmen and laborers capriciously refused to stay with the job) might properly be held accountable to unpaid materialmen on an equitable lien theory. Second, an equitable lien might be imposed in order to avoid unjust enrichment. Suppose the lender finishes after foreclosing mechanics' liens and realizes a profit above normal entrepreneurial gains. This surplus profit may be attributable to the earlier, uncompensated contribution of materialmen.[52]

Having identified two situations in which it is clearly unfair to deny the remedy to the claimants, the commentators also suggest that a reasonable profit should be preserved for the lender.[53]

The liberal allowance of recovery against lenders under the rule of *McBain* produced sufficient backlash to have the remedy legislated out of existence, possibly completely. In 1967 the California legislature enacted the following statute:

> [N]o person may assert any legal or equitable right with respect to such [construction] fund, other than a right created by direct written contract between such person and the person holding the fund, except pursuant to the provisions of [the California stop notice[54]] chapters.[55]

In *Boyd & Lovesee Lumber Co. v. Western Pacific Financial Corp.*[56] the California Court of Appeals rejected the argument that the statute was intended only to abrogate the extension of the equitable lien theory that occurred in *McBain* and similar cases.[57] Instead, the court construed the new statute to abolish the equitable lien altogether[58] and expressed the

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52. Lefcoe, *supra* note 4, at 457.

53. *Id.*

54. The stop notice is a device whereby the unpaid materialmen may enjoin the lender from making further disbursements. CAL. CIV. CODE § 3162 (West 1974). *See* Ilyin, *Stop Notice!—Construction Loan Officer's Nightmare*, 16 HASTINGS L.J. 187 (1964); Comment, *California's Private Stop Notice Law: Due Process Requirements*, 25 HASTINGS L.J. 1043 (1974). In Connolly Dev., Inc. v. Superior Court, 41 Cal. App. 3d 543, 116 Cal. Rptr. 191, 200 (5th Dist. 1974), the court held the bonded stop notice statute to violate procedural due process.

55. CAL. CIV. CODE § 3264 (West 1974). In *Swinerton*, a 1974 decision, the statute was held to be prospective only and, therefore, inapplicable to the events of 1965. *See* text accompanying notes 36-39 *supra.*

56. 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (4th Dist. 1975).

57. *Id.* at 464-65, 118 Cal. Rptr. at 701. *See* text accompanying notes 24-26 *supra.*

58. *Id.* at 465, 118 Cal. Rptr. at 701-02.

opinion that the mechanics liens and stop-notice statutes adequately provided for contractors, subcontractors and materialmen.[59] Concerning lenders, the court said, "[Lenders] are relieved of the expense and risk of policing the ultimate distribution of construction funds and can concentrate on their primary duty of providing construction loans at lesser expense to the borrower and ultimately to the consuming public."[60] The facts of the case did not compel the court to decide expressly whether a claim for relief would be stated if there were an allegation of unconscionable enrichment of the lender.[61] Thus the possibility of stating a claim under the circumstances that Lefcoe and Schaffer suggest as justifying the equitable lien remedy has not been properly foreclosed by *stare decisis*.[62]

North Carolina's courts have the opportunity to discard the worst of the California judicial theory and to retain and improve on the best. Development of this area of the law in North Carolina should not be impeded by her statutory scheme because it does not treat the construction lender's relationships with other parties,[63] and because there was no legislative intent to foreclose such development.[64] It is noteworthy that at the time California legislated the equitable lien out of existence,[65] that state still provided a statutory remedy against the lender.[66] North Carolina's statute is different.[67] Her courts should apply the equitable lien theory as Lefcoe and Schaffer recommend: (1) to prevent lenders from taking unfair advantage of an unpaid contractor's, subcontractor's, or materialman's contribution by granting recovery in such cases and (2) to assist in minimizing economic waste by not granting the remedy in all cases in which mere reliance is shown.[68]

Beyond that application, however, the North Carolina courts should consider applying the theory to another situation based on a prevention rationale, but should avoid the shortcomings of a *McBain*

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59. *Id.*

60. *Id.* at 465, 118 Cal. Rptr. at 702.

61. *Id.* at 466, 118 Cal. Rptr. at 702.

62. *See generally* Lefcoe, *supra* note 4, at 459, in which the authors described in their Postscript how the statute can be read to allow still the equitable lien in those cases in which they recommended its use. *See* text accompanying note 52 *supra.*

63. *See* N.C. GEN. STAT. § 44A (Cum. Supp. 1975), especially *id.* § 44A-17.

64. At least, such was the opinion of Professor Smith, a member of the committee that drafted section 44A. Interview with Richard M. Smith, Professor of Law at the University of North Carolina, February 11, 1976.

65. *See* text accompanying notes 54-62 *supra.*

66. The stop notice remedy was still available. *See* note 54 *supra.*

67. *See* text accompanying note 63 *supra.*

68. *See* text accompanying notes 48-52 *supra.*

type of rule. That situation occurs when the claim to the fund is made by an unpaid *general* contractor (rather than by subcontracators or materialmen) who simply proves that he relied on the fund for payment. This rule would encourage the lender to see to it that the proceeds of the loan make it at least past the owner to the next party in the chain of payment.[69] It may be that general contractors are just as likely as owners to misuse funds, but if the lender does his job, at least one party would be prevented from misusing the proceeds. Furthermore, by obligating the lender to supervise the distribution of funds to the general contractor, the first tier subcontractors are better able to protect themselves. The funds would at least make it to the party with whom the first tier subcontractors are in privity, or else the general contractor would have a claim against the lender that they could attach. Lenders should not be overburdened by this type of obligation, though they would be by an obligation to all possible claimants to the fund. Hopefully, unlike the *McBain* rule,[70] this approach, limiting recovery based on mere reliance to general contractors, would make it economically advantageous for lenders to verify that the requisite progress has been made prior to a disbursement and to obtain the owner's agreement to disburse funds directly to the contractor. Although it does not inhibit diversion further down the chain of payment, this rule would provide a reasonable measure of prevention.

Construction lending cases are difficult because of their differing fact situations and the problem of resolving disputes between two innocent parties. The California lien theory in the limited form advocated by Lefcoe and Schaffer, as opposed to the liberal view of *McBain*, would

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69. Any deterrence of mitigation (*see* text accompanying note 50 *supra*) caused by liberal allowance of the equitable lien to the general contractor should be outweighed by the prevention accomplished. Besides, it is not so difficult to find a new general contractor if the old one is unreasonable about finishing the job.

As for the fear that deterrence of mitigation of economic waste will result (as under the *McBain* rule) if subcontractors are able to obtain subrogation to the general contractor's claim by contract or otherwise, once the duty of the lender to get the payments to the general contractor is clear, fault becomes the controlling consideration if the lender fails in his simple duty.

Furthermore, when there is a payment bond guaranteeing payment to all subcontractors, the general contractor is an indemnitor of the surety and is the only party who really stands to lose if he has no recourse against the lender. He has no practical means of protecting himself from diversion by the owner. When he is granted the equitable lien remedy against the lender, and when there is a payment bond every innocent party is protected. The lender protects himself by getting the payments to the general contractor.

70. *See* text accompanying note 47 *supra*. The lender's cost of compliance with this rule is lower and the threat of lien liability is larger when the general contractor is the claimant.

not deter mitigation of loss and would prevent the lender from making a supernormal profit while others go unpaid. North Carolina can go one step further and reduce the number of loan misappropriation cases without unduly burdening lenders by granting equitable liens to general contractors who relied on construction loan funds but were not paid for completed work.

WILLIAM H. HIGGINS

Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?

Shortly after the enactment of the North Carolina unfair trade practices legislation in 1969,[1] the hope was expressed that the state had taken a "unique approach" to consumer protection that might well succeed in curbing deceptive trade practices: a consumer protection statute to be enforced in large part by consumers themselves.[2] For almost six years, however, the potential of these sections had remained

1. The main provisions of the legislation are to be found in the newly created section 75-1.1 which provides as follows:

> **Methods of competition, acts and practices regulated; legislative policy.**—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.
>
> (c) Nothing in this section shall apply to acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C. GEN. STAT. § 75-1.1 (1975). In addition, the following sections were amended to make them applicable to all potential defendants in a deceptive trade practice action: *id.* §§ 75-9, -10, -11, -12, -16 (1975).

2. *See* Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 911 (1970) [hereinafter cited as Comment].

untested.[3] Finally, in *Hardy v. Toler*[4] the North Carolina Supreme Court was squarely confronted with the case that necessitated an initial judicial construction of the statute. Although in *Hardy* defendant's actions *were* held to violate section 75-1.1 of the North Carolina General Statutes,[5] the court may well have vitiated the impact of these provisions by its apparent ruling on the critical question whether it is for the judge or the jury to decide if alleged conduct constitutes an unfair or deceptive trade practice.[6] If *Hardy* is to be read as requiring a determination of liability under the statute by the court alone, the corresponding lack of significant jury involvement could effectively deprive the legislation of much of its consumer orientation.

In 1971 plaintiff Hardy purchased a used car from defendants, relying on representations that it was a low mileage, previously unwrecked, one-owner vehicle carrying a transferable manufacturer's warranty.[7] Upon learning that in fact these representations were untrue, and known by defendants to be false, plaintiff brought suit in Craven County Superior Court seeking damages for breach of warranty, punitive damages, and treble damages under section 75-16 of the General Statutes,[8] alleging that defendant's actions amounted to unfair or deceptive trade practices under section 75-1.1.[9] The trial court granted defendant's motion for a directed verdict on the question of punitive damages and refused to allow the jury to determine whether defendant's conduct was indeed unfair or deceptive within the statute.[10] After a jury verdict for plaintiff for breach of warranties, the judge refused to treble the award, holding as a matter of law that "the acts

3. In no previous case had liability been found under section 75-1.1, and in only three appellate opinions had the section even been noted: Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975); Smith v. Ford Motor Co., 26 N.C. App. 181, 215 S.E.2d 376 (1975); State v. Dare to be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

4. 288 N.C. 303, 218 S.E.2d 342 (1975).

5. *Id.* at 311, 218 S.E.2d at 347.

6. *Id.* at 310, 218 S.E.2d at 346-47.

7. *Id.* at 305-06, 218 S.E.2d at 344.

8. N.C. GEN. STAT. § 75-16 (1975) provides:

> **Civil action by person injured; treble damages.**—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 by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

9. 288 N.C. at 304-05, 218 S.E.2d at 343-44.

10. *Id.* at 305, 218 S.E.2d at 344.

of the defendants did not constitute unfair or deceptive acts or practices in the conduct of trade or commerce, which are declared unlawful by Section 75-1.1(a) . . . ."[11]

The court of appeals upheld the trial court on the issue of punitive damages, but remanded the case for a new trial on the ground that the issue of deceptive trade practices should have been presented to the jury.[12] The supreme court granted certiorari[13] to review the denial of punitive damages, and presumably to address the question of the allocation of the decision-making responsibility between judge and jury as to what constitutes an unfair trade practice.[14]

After somewhat summarily disposing of plaintiff's claim for punitive damages[15] the court turned to the critical judge/jury issue. Reviewing federal court decisions interpreting the provisions of the Federal Trade Commission Act,[16] and language from two Massachusetts opinions discussing a similar statute,[17] the North Carolina Supreme Court declared that "traditionally" and "[o]rdinarily it would be for the jury to determine the facts, and based on the jury's finding, the court

11. Record at 41, Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

12. 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813 (1975).

13. 287 N.C. 259, 214 S.E.2d 431 (1975).

14. Although in his petition for certiorari plaintiff raised only the question of punitive damages, Petitioner's Brief for Certiorari at 4-5, the Attorney General asked the court to resolve the conflict which had developed in the courts below on the judge/jury issue. Brief for Attorney General as Amicus Curiae at 2-4.

15. The entire court treated the question of punitive damages as though raised in an action alleging common law fraud. Whereas the majority insisted that punitive damages were not warranted because plaintiff had failed to demonstrate "insult, indignity, malice, oppression or bad motive other than the same false representations" upon which his claim was based, 288 N.C. at 306, 218 S.E.2d at 344-45, the concurring Justices contended that, even under the rigorous standard of the majority, defendant's conduct called for the imposition of punitive damages. *Id.* at 312, 218 S.E.2d at 348. However, because the treble damages provision was thought to supersede any other recovery of punitive damages, the concurring Justices joined with the majority in ordering that plaintiff's judgment be trebled.

If, however, proof of fraudulent intent is not a requisite element of plaintiff's case under this new statutory scheme, neither the majority nor the concurring opinion seems particularly well founded. Not only is the majority's premise for denying punitive damages severely eroded; the concurring Justices' interpretation of legislative intent in providing for treble damages also becomes suspect, since in fact "oppressive" conduct need not be shown to establish recovery under the statute. The legislature may rather have intended that treble damages finance litigation costs or represent unprovable actual damages, leaving the availability of punitive damages for "willful" conduct undisturbed. Thus, in an appropriate case both treble and punitive damages could be awarded.

16. Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (1970). See note 28 *infra* for the language of this federal statute. See note 35 *infra* for the case cited by the court.

17. MASS. GEN. LAWS ANN. ch. 93A, § 2 (1975). *See* cases cited notes 49-50 *infra.*

would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce."[18] But given the facts as stipulated by defendant in *Hardy*,[19] the court concluded that there simply was never even a questionable role for a jury to have assumed: clearly section 75-1.1 had been violated. The court held that such obviously unfair and deceptive conduct must always be found to offend concepts of fairness and good faith.[20] Therefore, the trial judge should have directed a verdict against defendant as a matter of law and awarded treble damages pursuant to section 75-16.[21] With these instructions, the case was remanded to the trial court to enter judgment for the plaintiff.[22]

Prior to the passage of section 75-1.1 of the General Statutes, the North Carolina consumer had been virtually without any meaningful protection against, or remedy for, many unfair and deceptive trade practices. This section was enacted by the legislature in part "to declare, and to provide civil legal means to maintain, ethical standards of dealings . . . between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State."[23] Perhaps recognizing that "[i]t is impossible to frame definitions which embrace all unfair practices,"[24] the legislature sought to provide for a flexible maximum of deterrence and compensation. Thus, in broadly declaring "unfair or deceptive acts or practices" unlawful,[25] the legislature chose not to attempt to enumerate specific prohibited conduct,[26] but rather to delegate to the judicial process the

18. 288 N.C. at 310, 218 S.E.2d at 346-47.

19. Defendant admitted that at the time of the sale to plaintiff Hardy the odometer showed mileage of at most 23,000 miles, well under actual mileage of almost 80,000 miles, that it, defendant, knew at that time that the car had been sold twice previously and that therefore its representations as to the transferability of warranties were false, and that it had knowingly failed to disclose to plaintiff that the automobile had been involved in a wreck. *Id.* at 310-11, 218 S.E.2d at 347.

20. *Id.* at 311, 218 S.E.2d at 347.

21. *Id.*

22. *Id.*

23. N.C. GEN. STAT. § 75-1.1(b) (1975).

24. Although the words are those of the United States Congress explaining its reluctance to enumerate specific standards in the Federal Trade Commission Act, H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914), the North Carolina legislature must have appreciated the futility of any attempt to list all proscribed activities. *See* Comment, *supra* note 2.

25. N.C. GEN. STAT. § 75-1.1(a) (1975).

26. *See* note 24 *supra*. THE UNIFORM DECEPTIVE TRADE PRACTICES ACT, §§ 2(a)(1)-(12), and the UNIFORM CONSUMER SALES PRACTICES ACT, §§ 3(b)(1)-(11), do pro-

responsibility for determining on a case by case basis whether in fact a breach of "good faith and fair dealings" had occurred.[27] Until *Hardy v. Toler*, however, the potential scope of section 75-1.1 had not been explored.

Because the language of section 75-1.1 was drawn almost verbatim from the Federal Trade Commission Act,[28] it was reasonable to suggest that the North Carolina courts turn to the federal court decisions interpreting that Act when faced with cases brought under the North Carolina legislation.[29] Indeed, several states having similar statutes have held the federal interpretations to be incorporated into their statutes, either explicitly by legislative provision,[30] or through judicial construction.[31] And the North Carolina Supreme Court indicated in *Hardy* that it too would at least look to the federal opinions for "[s]ome guidance" when construing section 75-1.1.[32] On the judge or jury question, however, the court conceded that FTC cases involving administrative rather than jury determinations on the issue of unfair trade practices are not "directly in point."[33] Policy considerations appropriate in the administrative agency context clearly differ from those important to an appreciation of the jury's role in the judicial process.[34]

Nevertheless, the North Carolina Supreme Court did rely heavily upon the United States Supreme Court and lower federal court opinions which had held that judicial construction of the meaning of the phrase "deceptive trade practices" is to be given priority over Federal Trade Commission rulings.[35] Because administrative agencies possess a special expertise, they are "often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the

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pose to forbid a list of specified practices, and several states have adopted similar lists in their consumer statutes. *See* note 88 *infra*.

27. *See generally* Comment, *supra* note 2.

28. 15 U.S.C. § 45(a)(1) (1970) provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

29. Comment, *supra* note 2, at 910.

30. *E.g.*, Commonwealth v. DeCotis, — Mass. —, 316 N.E.2d 748 (1974).

31. *E.g.*, Commonwealth v. Monumental Properties, Inc., — Pa. —, 329 A.2d 812 (1974).

32. 288 N.C. at 308, 218 S.E.2d at 345.

33. *Id.* at 309, 218 S.E.2d at 346.

34. *See* note 41 and accompanying text *infra*.

35. 288 N.C. at 308, 218 S.E.2d at 345, *citing* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); FTC v. Keppel & Bro., Inc., 291 U.S. 304 (1934); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973); *and* Wisdom v. Norton, 507 F.2d 750 (2d Cir. 1974).

[Federal Trade Commission] Act."[36] Agency judgments therefore are to be given extensive weight by reviewing courts before they are rejected.[37] But, "in the last analysis the words 'deceptive practices' set forth a legal standard . . . ."[38] Thus it is for appellate courts to correct administrative errors in statutory interpretation or application.[39] Turning from the national model, the North Carolina Supreme Court must have then reasoned that the fact-law distinction of the federal analogy should translate into a judge/jury distinction in state court litigation.[40]

It would seem that not only do the federal cases serve as poor analogies, but also that the court in *Hardy* unnecessarily enmeshed itself in the fact-law dichotomy which has so confounded numerous courts and commentators in the past.[41] It has been submitted that this classification is nothing more than shorthand for a choice by the courts of a particular standard of review.[42] Since the scope of review is thought to differ depending upon the "label" applied,[43] courts unwilling to review administrative decisions "are tempted to explain by the easy devise of calling the question one of 'fact'; and when otherwise disposed, they say it is a question of 'law.' "[44] If then freedom of review is the real goal, whether it is sought to avoid problems of delegation

36. *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922), in which the Court declared that "[t]he Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act."

37. The federal statutory scheme depends primarily upon agency expertise for effective enforcement:

> It [the FTC] was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934), *quoting* SENATE COMM. ON INTERSTATE COMMERCE, S. DOC. No. 597, 63d Cong., 2d Sess. 9-11 (1914).

38. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

39. FTC v. Curtis Publishing Co., 260 U.S. 568, 579-80 (1972); FTC v. Gratz, 253 U.S. 421, 427 (1920).

40. 288 N.C. at 309, 218 S.E.2d at 346.

41. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961); O.W. HOLMES, THE COMMON LAW (1881); Weiner, *The Civil Trial Jury and the Law—Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

42. L. GREEN, JUDGE AND JURY 279 (1930).

43. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 380 (5th ed. 1970).

44. J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (2d ed. 1955).

and separation of powers,[45] or merely to extricate appellate courts from the limitations upon judicial review imposed by the "substantial evidence" rule,[46] resolutions of the fact-law debate in the field of administrative law cast little light on an analysis of the proper functions of judge and jury in a civil case.

The North Carolina Supreme Court also noted that legislation similar to section 75-1.1 had recently been interpreted by the courts of other states.[47] Unfortunately, the court chose to focus its attention on Massachusetts cases which, arising in equity, "did not specifically address . . . the division of function between judge and jury in determining whether a violation had occurred."[48] Furthermore, it seems that the cases cited are better read as announcing reasons for setting aside[49] or directing[50] verdicts, than as declaring any policy on the judge or jury allocation. And most of the decisions from other jurisdictions in which similar legislation was involved are likewise of little value on the judge/jury issue, either because they too arose in equity,[51] or because the particular statute more specifically spelled out the conduct proscribed.[52]

45. Although for many years the courts had resisted legislative attempts to delegate legislative and "executive" power to administrative agencies, when the substantive due process era came to an end, so in large measure did the courts' resistance to delegation. Consistent with principles of separation of powers, courts today will not interfere with agency determinations made within their delegated authority. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-86 (1965). By the single expedient of calling a particular conclusion a finding of fact, the court in many cases will have avoided a potential confrontation with separation of powers concepts.

46. Since ICC v. Union Pac. R.R., 222 U.S. 541 (1912), the United States Supreme Court has insisted that agency rulings are not to be displaced unless unsupported by "substantial evidence." *Id.* at 547-48. The effect of this rule is to preclude courts from an extensive review of agency findings, at least those that are classified as "of fact."

47. 288 N.C. at 308, 218 S.E.2d at 346. *See* cases cited note 88 *infra.*

48. 288 N.C. at 308, 218 S.E.2d at 346.

49. Commonwealth v. DeCotis, — Mass. —, 316 N.E.2d 748 (1974). The North Carolina Supreme Court seems to have misinterpreted this Massachusetts opinion: the quoted language (288 N.C. at 308, 218 S.E.2d at 346) simply reaffirms that plaintiff's judgment will be overturned only if as a matter of law defendant should have had a directed verdict even before the case was presented to the trier of fact. *See* text accompanying note 20 *supra.*

50. PMP Associates, Inc. v. Globe Newspaper Co., — Mass. —, 321 N.E.2d 915 (1975). Again, the North Carolina Supreme Court may have misread the Massachusetts decision, which did no more than sustain defendant's demurrer in the lower court. Clearly, courts can, as a matter of law, exempt certain practices from statutory attack if they are in no way "immoral, unethical, oppressive nor unscrupulous." *Id.* at 918.

51. *E.g.*, State *ex rel.* Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo. App. 1973).

52. *E.g.*, Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App. 1975).

Significantly, the North Carolina Supreme Court had previously held in *Carolina Aniline & Extract Co. v. Ray*[53] that " '[u]nfair competition is a question of fact. The universal test question is whether the public is likely to be deceived.' "[54] Although phrased in fact-law terminology, it is clear that the court envisioned a definite jury function. While *Carolina Aniline* was decided on a common-law unfair competition claim some years before the enactment of section 75-1.1, the juxtaposition of the terms "unfair competition" and "unfair trade practices" in that section evidences that the two concepts are of similar import.[55] The North Carolina legislation was drawn to encompass any unfair or deceptive practice, whether between a merchant and his competitors or the merchant and his customers.[56] Should not the court, therefore, have given consideration to the jury preference implicit in *Carolina Aniline* as precedent when evaluating the judge or jury issue posed by section 75-1.1? The State of Washington, as did North Carolina, patterned its consumer protection statute after the FTC Act.[57] Yet when given the opportunity to construe its legislation in the context of a jury trial, the Washington Court of Appeals was emphatic about the jury's role: "We believe that whether defendant's conduct amounted to an unfair method of competition was a factual question for the jury and instructing as a matter of law was improper."[58]

Instead of obfuscating analysis by couching its conclusions in the language of the fact-law paradox, the court in *Hardy v. Toler* might well have attempted to articulate the policies behind its decision to take from the jury meaningful involvement in the application of section 75-1.1. It has often been pronounced, for example, that statutory interpretation is a function particularly within the special province of the courts.[59]

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53. 221 N.C. 269, 20 S.E.2d 59 (1942).

54. *Id.* at 272, 20 S.E.2d at 61, *quoting* 63 C.J. *Trade-Marks, Trade-Names and Unfair Competition* § 112, at 414-15 (1933).

55. Section 75-1.1(a) reflects the parallel meanings of the two terms: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

56. Section 75-1.1 effectively overrules Rice v. Asheville Ice Co., 204 N.C. 768, 169 S.E. 707 (1933) (per curiam). On the federal level, the Wheeler-Lea Amendment of 1938 had brought otherwise prohibited conduct within FTC jurisdiction by removing the requirement of actual competition. 15 U.S.C. § 45(a) (1970).

57. WASH. REV. CODE ANN. § 19.86.020 (1974) provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

58. Ivan's Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co., 10 Wash. App. 110, —, 517 P.2d 229, 238 (1973), *aff'd*, — Wash. —, 546 P.2d 109 (1976).

59. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 135-36 (1944) (Roberts, J., dissenting); 2 H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS

Such a pronouncement certainly has validity in relation to judicial definition of the broad parameters of legislative intent[60] or constitutional review.[61] On the other hand, the United States Supreme Court has frequently stated that agency determinations will not be overturned unless clearly erroneous or unsupported by evidence.[62] And in *Byrd v. Blue Ridge Electric Cooperative, Inc.*[63] the United States Supreme Court refused to allow a contrary state rule to prevent a jury from determining if plaintiff were indeed an "employee" within the meaning of South Carolina's Workmen's Compensation Act.[64] Perhaps the fact-law distinction has again obscured "the real inquiry . . ., namely to which decision-maker *should* the task of law *application* be entrusted, and why."[65] It can be argued that Congress should allocate the job of statutory application in administrative cases between courts and agencies to reflect respective expertise, or lack of it, in specific areas.[66] When the allocation must be between judge and jury, "[a] basis for differentiation [might be] whether the issue involves a sensitive area that warrants a 'popular' or 'communal' judgment."[67] Moreover, just as administrative rulings are generally considered to be competent as long as the agency does not exceed its congressionally mandated authority,[68] legislative intent, if discernable, should dictate the proper division of function between judge and jury when the application of other statutes is at issue.

Since legislative intention on the judge/jury question is not clear from the statute itself,[69] it must be inferred indirectly. Although the court in *Hardy* must have presumed a particular legislative preference,

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IN THE MAKING AND APPLICATION OF LAW 1345-47 (tent. ed. 1958); Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 904-05 (1943); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 105-07 (1944).

60. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120, 129 (1944).

61. *See, e.g.*, Commonwealth v. Monumental Properties, Inc., 10 Pa. Commw. Ct. R. 596, 314 A.2d 333 (1973).

62. *See, e.g.*, FTC v. Standard Educ. Soc'y, 302 U.S. 112, 117-18 (1937).

63. 356 U.S. 525 (1958).

64. *Id.* at 533-40.

65. Weiner, *supra* note 41, at 1873 (second emphasis added).

66. *See* note 37 *supra*.

67. J. COUND, J. FRIEDENTHAL, & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 686 (1968).

68. W. GELLHORN & C. BYSE, *supra* note 43, at 380-81, *quoting* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 87-91 (1941).

69. Even the Attorney General conceded in his brief that section 75-16 "may be taken by some as tending to indicate that the jury should find not only the facts but also as to whether or not there has been a violation of the statute." Brief for Attorney General as Amicus Curiae at 4.

fuller consideration might well have yielded a different conclusion. In addition to electing not to attempt a listing of all forbidden practices, the North Carolina legislature also declined to establish a special agency to administer the statute.[70] Presumably the legislature also intended to create a new statutory tort that would not simply subsume the common-law action of fraud.[71] Although not independently indicative, taken together these choices would seem to support an inference of a legislative bias for jury determinations. The generality of the statutory scheme necessitates that its prohibitions find specific meaning in its application "to the facts of particular cases arising out of unprecedented situations."[72] No administrative agency was created to assume this responsibility. Juries, however, are particularly adapted to ad hoc decision making, and it has been contended that "courts should not take it upon themselves to convert a deliberately flexible standard into something more concrete by preventing juries from determining the reasonableness of human conduct."[73] Juries are permitted to find "actionable fraud and deceit,"[74] as well as negligence.[75] If then the gravamen of this new statutory tort is unethical and unfair conduct,[76] should not a jury be allowed to find a deceptive trade practice as well? For as the *Hardy* court admitted, deceptive trade practices amount in practical effect to lesser included degrees of fraud.[77] And because section

70. *See* Comment, *supra* note 2, at 899.

71. The court itself reached this conclusion. 288 N.C. at 309, 218 S.E.2d at 346, *citing* D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942) *and* Garland v. Penegar, 235 N.C. 517, 70 S.E.2d 436 (1952).

72. The quotation is from the United States Supreme Court opinion in FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

73. Weiner, *supra* note 41, at 1904-05.

74. Garland v. Penegar, 235 N.C. 517, 519, 70 S.E.2d 486, 487 (1952).

75. "Even when the historical facts are undisputed, the jury rather than the judge will normally decide whether they will be characterized as negligence." Weiner, *supra* note 41, at 1876-77. Thus, in a negligence case it is the jury that makes the ultimate determination of liability.

76. N.C. GEN. STAT. § 75-1.1(b) (1975).

77. 288 N.C. at 309, 218 S.E.2d at 346. Ironically, the court quotes with approval from *Garland v. Penegar*, a case whose facts were virtually identical to those before the court in *Hardy*:

> "Plaintiff alleged and offered evidence tending to show that the defendant, an automobile dealer, falsely and fraudulently represented that the automobile then being sold him was a 'new demonstrator,' that it had been driven only 1,000 miles as the speedometer apparently indicated, and that the automobile was in perfect condition. Plaintiff testified that instead of it being as represented the automobile was not a new one but had been previously sold to another person who drove it 8,000 miles and then turned it back to the defendant. Plaintiff also testified the automobile was not in good condition, and that he had incurred trouble and expense in repairs.
>
> . . . .
>
> It is apparent from an examination of the record that the plaintiff offered

75-1.1 was designed to accomplish more than a codification of existing case law,[78] it would not be appropriate to allow state judges to construe the statute according to common-law concepts. However, if the jury is to have no role in determining liability under the statute, it is likely that trial judges may continue to require proof of a common-law tort in consumer actions.[79] Such a practice would undoubtedly frustrate the legislative purpose of providing a potent statutory remedy for unfair or deceptive trade practices.

In addition to the difficulties of discerning legislative purpose on the issue, several other policies converge that must be reconciled before deciding the judge/jury question. Foremost among these is the extent to which "a fixed standard that applies to all members of the community impartially" is to be valued over an ad hoc determination that better takes into account the peculiar circumstances of an individual case.[80] The North Carolina Attorney General argued in *Hardy*, as amicus curiae, that a consistent interpretation of section 75-1.1 was vital both to insure uniform application on a state-wide basis, and to encourage private actions by providing "guidance . . . to both courts and attorneys for the future trial of such actions."[81] Implicit in such a position must be the fear of a free-wheeling, plaintiff-consumer oriented jury, especially when treble damages automatically accrue.[82] Yet in *Byrd* the United States Supreme Court rejected just such a contention as an insufficient justification for denying plaintiff the right to have a jury determine his status[83] in an analogous situation.

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sufficient evidence to carry the case to the jury on the issue of actionable fraud and deceit, and that defendant's motion for judgment of nonsuit was properly denied."

Id. at 309, 218 S.E.2d at 346, *quoting* Garland v. Penegar, 235 N.C. 517, 518-19, 70 S.E.2d 486, 487 (1952). The net effect of the court's ruling on the judge/jury issue in *Hardy*, therefore, is to deny that which plaintiff would have had prior to the passage of section 75-1.1: a jury judgment on defendant's conduct. Surely it was not the legislature's intent to deprive consumer plaintiffs of the considerable protection already provided by the prospect of a jury determination in the fraud cases.

78. *See* note 71 and accompanying text *supra.*

79. The lower court judge in *Hardy* must have done so himself.

80. J. COUND, J. FRIEDENTHAL, & A. MILLER, *supra* note 67, at 685-86.

81. Brief for Attorney General as Amicus Curiae at 4.

82. It has been argued that a jury can effectively impose strict liability upon any defendant brought before it, unless its function is severely controlled. *See* J. FRANK, COURTS ON TRIAL 110-11 (1949). And courts are likely to be extremely reluctant to let a jury find liability when any award it returns will be tripled. In this context it is important to note, however, that whereas the Federal Trade Commission Act makes no provision for private actions or treble damages, the North Carolina legislation provides for both, and in the context of a jury trial. N.C. GEN. STAT. § 75-16 (1975).

83. 356 U.S. at 538.

Even were an extensive role assumed for the jury, the court would in no way be displaced from an important supervisory function in the administration of the statute. Certain specific practices, proven through experience to be unfair, could still be declared deceptive by rule of law.[84] Clearly, when such conduct is before the jury, courts would be justified in directing a verdict for the plaintiff,[85] or setting aside a jury verdict clearly against the weight of common experience.[86] For these purposes North Carolina courts *should* look to federal[87] and other state[88] decisions for "some guidance." But when confronted with

84. *See* note 50 *supra.*

85. *See* Commonwealth v. DeCotis, — Mass. —, 316 N.E.2d 748 (1974).

86. *See* PMP Associates, Inc. v. Globe Newspaper Co., — Mass. —, 321 N.E.2d 915 (1975).

87. Since the enactment of the North Carolina legislation, the United States Congress passed a federal odometer statute which makes it unlawful to sell any vehicle whose actual mileage is not reflected on the vehicle's odometer. 15 U.S.C. §§ 1984, 1989 (1970). Several cases have recently been reported in which liability has been found under these sections. Coulbourne v. Rollins Auto Leasing Corp., 392 F. Supp. 1198 (D. Del. 1975); Stier v. Park Pontiac, Inc., 391 F. Supp. 397 (S.D.W. Va. 1975); Edgar v. Fred Jones Lincoln-Mercury, 383 F. Supp. 583 (W.D. Okla. 1974); Delay v. Hearn Ford, 373 F. Supp. 791 (D.S.C. 1974). In addition to suits brought under this special statute, numerous cases have been decided under section 5 of the F.T.C. Act which might reveal the potential scope of section 75-1.1. *E.g.*, FTC v. Standard Educ. Soc'y, 302 U.S. 112 (door to door selling practices); FTC v. Algoma Lumber Co., 291 U.S. 67 (1934) (product misrepresentations); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973) (unsubstantiated product claims); Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970) (bait & switch advertising); All-State Indus., Inc. v. FTC, 423 F.2d 423 (1970) (failure to disclose that a promissory note would be transferable to a holder in due course, cutting off buyer's defenses); Montgomery Ward & Co. v. FTC, 379 F.2d 666 (1967) (misrepresenting warranties); Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944) (deceptive advertising); Fresh Grown Preserve Corp. v. FTC, 125 F.2d 917 (2d Cir. 1942) (labeling).

88. The North Carolina legislature has also enacted an odometer statute since the commencement of the litigation in *Hardy*, which provides that its violation constitutes an unfair trade practice under section 75-1.1. N.C. GEN. STAT. § 20-349 (1975). The legislature has added further definition to the provisions of section 75-1.1 through the passage of *id.* § 25A-44(a) (Cum. Supp. 1975), the Retail Installment Sales Act, which declares that a violation of that section also violates section 75-1.1.

Furthermore, other conduct has been recognized to be unfair under the deceptive trade practices legislation of several states. *See, e.g.*, Scott Imports v. Orton, 27 Ariz. App. 354, 527 P.2d 513 (1974) (turning back odometer); Nash v. Hoopes, 332 A.2d 411 (Del. Super. Ct. 1975) (failure to disclose existing mortgage default and impending foreclosure); *In re* Brandywine Volkswagen, Ltd., 306 A.2d 24 (Del. Super. Ct. 1973) (misrepresenting condition of automobile); Slaney v. Westwood Auto, Inc., — Mass. —, 322 N.E.2d 768 (1975) (automobile); PMP Associates, Inc. v. Globe Newspaper Co., — Mass. —, 321 N.E.2d 915 (1975) (refusal to accept newspaper advertising not a violation); Commonwealth v. DeCotis, — Mass. —, 316 N.E.2d 748 (1974) (resale fee without furnishing services); State *ex rel.* Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo. App. 1973) (automobile); Brown v. Lyons, 43 Ohio Misc. 14, 332 N.E.2d 380 (Hamilton County C.P. 1974) (failure to honor warranties, misrepresentation of product qualities, failure to provide prior written estimates of repairs); Commonwealth v. Monumental Properties, Inc., — Pa. —, 329 A.2d 812 (1974) (terms in

new and unique circumstances, the courts should give a jury the first chance to pass on the "fairness" of the defendant's actions. Perhaps the standard for a jury instruction on the meaning of "unfair and deceptive" practices should be that proposed by the court in *Carolina Aniline*: "Whether the public is likely to be deceived."[89] Although less freely reviewable, a jury finding in such a case would be supported by the weight of a community judgment on a sensitive public issue. Furthermore, rather than hampering the instigation of private actions to enforce the statute, the prospect of a jury verdict would seem to encourage such actions. Indeed, if section 75-1.1 is to fulfill its promise, a jury drawn from the consuming public must be given a substantial involvement in the denunciation of unfair or deceptive trade practices.

The North Carolina Supreme Court need not be deterred from a thorough reconsideration of the judge/jury question by its decision in *Hardy v. Toler*. For the court in *Hardy* did no more than refer to the historical functions of judge and jury, assuming without further analysis that they were to be grafted into the statutory scheme of section 75-1.1. The ultimate disposition of the case, however, did not itself depend upon a resolution of this issue, for even had the court decreed a major role for the jury in determining liability under the statute in future cases, a directed verdict was clearly dictated by the facts of this case. In the face of defendant's stipulations, no reasonable jury could have been allowed to find otherwise than that the statute had been violated. As a consequence, the court should feel free to undertake an independent evaluation of the differing policies at issue before restricting itself to a superficial resolution of the judge/jury question. *Hardy* need not be directly overruled; it certainly should continue to serve as a declaration that the specific acts therein alleged constitute deceptive trade practices as a matter of law. But as suggested above, the better reasoned analysis on the more critical judge or jury issue must result in a significant role for the jury in deciding whether particular conduct amounts to an unfair or deceptive trade practice if the North Carolina legislation is to have any real impact.

JAMES MCGEE PHILLIPS, JR.

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an agreement); Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App. 1975) (misrepresentation of agent's authority). *See also* People v. Jack Dykstus Ford, Inc., 52 Mich. App. 337, 217 N.W.2d 99 (1974) (violation of odometer statute).

89. 221 N.C. at 272, 20 S.E.2d at 61.

Contracts to Devise Realty—Sufficiency of Will as Memo for Statute of Frauds

Upon breach of a contract to devise realty, an aggrieved party may be awarded specific performance of the contract or damages only if the contract complies with the Statute of Frauds.[1] Consequently, courts are often called upon to decide whether a certain contract to devise meets with the Statute's requirements, especially the requirement of a writing. In *Rape v. Lyerly*[2] the North Carolina Supreme Court held for the first time that a revoked will constituted a written memorandum of an oral contract to devise sufficient to comply with North Carolina's Statute of Frauds.[3] Through the legal fiction of a constructive trust, the court granted specific performance of the contract. Upon examination, the conclusions of the court appear to be sound ones.

The *Rape* case arose out of an alleged oral contract between James Lyerly and the Rapes.[4] In return for the Rapes' living with him and serving his needs, Lyerly promised to leave his property to Mrs. Rape, his daughter, by will. In 1959 Lyerly executed and delivered to the Rapes a will devising to Mrs. Rape all of his real property.[5] The Rapes fully performed their promise; yet Lyerly in 1969 executed a second will, revoking the 1959 will and devising only part of his real estate to the Rapes.[6] At Lyerly's death, Mrs. Rape's surviving children brought suit to enforce specifically the provisions of the oral contract. The other devisees under the 1969 will defended on the ground that the Statute of Frauds makes void any oral contract to convey real estate. Affirming a

1. North Carolina's Statute of Frauds is N.C. GEN. STAT. § 22-2 (1965). It provides: "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . ."

2. 287 N.C. 601, 215 S.E.2d 737 (1975).

3. *Id.* at 615, 215 S.E.2d at 746.

4. The Rapes are Mildred Lyerly Rape, deceased daughter of James Lyerly, and Basil M. Rape. *Id.* at 610, 215 S.E.2d at 743.

5. 287 N.C. at 604, 215 S.E.2d at 739. The will stated:

> "Fourth: It is my opinion that $16,000.00 is a fair market value of my real property lying in Steele Township, Rowan County, N.C. Since my daughter, Mildred Lyerly Rape and my son, Woodrow W. Lyerly have obligated themselves to care for my wife and myself during our lifetime, all of my real property, I give and bequeath to Mildred Lyerly Rape upon payment by her to the following: 1st. To my son, Woodrow W. Lyerly the sum of $6,000.00. 2nd. To my son, Gray Lyerly the sum of $1,000.00 3rd. To my daughter, Katherine Lyerly Mack the sum of $1,000.00."

6. *Id.* at 605, 215 S.E.2d at 740.

superior court judgment for the Rapes,[7] the North Carolina Court of Appeals determined that the 1959 will "provided a sufficient memorandum of the agreement to comply with the Statute of Frauds."[8] On appeal, Chief Justice Sharp, writing for the North Carolina Supreme Court, agreed with the lower courts and ordered specific performance of the contract for the plaintiffs' benefit.

Although the Statute of Frauds speaks only of contracts to "sell or convey" land, North Carolina cases clearly establish that the scope of North Carolina's Statute of Frauds[9] includes contracts to devise.[10] Thus oral contracts to devise realty not evidenced by a sufficient writing, memorandum, or note are void and unenforceable.[11] Upon breach of parol contracts to devise, only actions in *quantum meruit* or implied assumpsit will lie in favor of an aggrieved party.[12] In *quantum meruit* actions, the promisee recovers only the value of the services that he has rendered; the promisee cannot recover the benefit of his bargain or the value of the realty that had been promised him.[13] The few North Carolina cases that awarded money damages for the breach of or specifically enforced an oral contract to devise not evidenced by a writing[14] have been expressly or impliedly overruled.[15]

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7. Rape v. Lyerly, 23 N.C. App. 241, 208 S.E.2d 712 (1974).

8. *Id.* at 247, 208 S.E.2d at 716.

9. N.C. GEN. STAT. § 22-2 (1965).

10. *See, e.g.*, Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

11. *See, e.g.*, Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Humphrey v. Faison, 247 N.C. 127, 100 S.E.2d 524 (1957); Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933).

12. *See, e.g.*, Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944); Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Brown v. Williams, 196 N.C. 241, 145 S.E. 233 (1928); Edwards v. Matthews, 196 N.C. 39, 144 S.E. 300 (1928); Faircloth v. Kinlaw, 165 N.C. 228, 81 S.E. 299 (1914); Miller v. Lash, 85 N.C. 45 (1881); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

13. *See, e.g.*, Wells v. Foreman, 236 N.C. 351, 72 S.E.2d 765; Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

14. Lipe v. Citizens' Bank & Trust Co., 207 N.C. 794, 178 S.E. 665 (1935); Hager v. Whitener, 204 N.C. 747, 169 S.E. 645 (1933); Redmon v. Roberts, 198 N.C. 161, 150 S.E. 881 (1929); Lipe v. Houck, 128 N.C. 115, 38 S.E. 297 (1901).

15. Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933).

Other North Carolina cases on contracts to devise realty clearly establish that a written contract to devise is enforceable.[16] Although an aggrieved party to a written contract to devise is entitled to bring an action to recover money damages, both according to the general rule[17] and to a few North Carolina cases,[18] the more common remedy for breach is in the nature of specific performance.[19] North Carolina case law often speaks of specifically enforcing a contract by making one of the testator's devisees or heirs at law a constructive trustee of the realty for the aggrieved plaintiff.[20] Some cases purport to grant specific performance only when it would be equitable to do so,[21] but North Carolina courts have yet to deny a claimant recovery on equitable grounds.

When a promisor performs his oral contract to devise realty by executing a will and then revokes, the issue becomes whether a will can constitute a memorandum of the contract sufficient for the Statute of Frauds.[22] Prior to *Rape*, no appellate court case in North Carolina had held that a revoked will is a sufficient memorandum for this purpose.[23]

16. *See, e.g.*, Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962); Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954); Chambers v. Byers, 214 N.C. 373, 199 S.E. 398 (1938); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Stockard v. Warren, 175 N.C. 283, 95 S.E. 579 (1918); Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904); Price v. Price, 133 N.C. 494, 45 S.E. 855 (1903); East v. Dolihite, 72 N.C. 562 (1875).

17. B. SPARKS, CONTRACTS TO MAKE WILLS 136 (1956).

18. Halsey v. Snell, 214 N.C. 209, 198 S.E. 633 (1938).

19. The remedy is "in the nature of specific performance" because the effect of the contract is carried out. Truly, there could not be specific performance of an act made physically impossible by the promisor's death. Yet, as SPARKS, *supra* note 17, at 156 notes, it is pointless to say that specific performance actually is not being carried out.

20. *See, e.g.*, Chambers v. Byers, 214 N.C. 373, 377-78, 199 S.E. 398, 401 (1938); Stockard v. Warren, 175 N.C. 283, 285, 95 S.E. 579, 580 (1918), *quoting from* an annotation following Naylor v. Shelton, 102 Ark. 30, 143 S.W. 117 (1912), in 31 Am. & Eng. Ann. Cas. 1917A, 394, 399:

> "[W]hile a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will."

See also Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954).

21. *See, e.g.*, Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904), requiring that the contract be for a valuable and fair consideration, be fair and just and mutual, not be procured by undue influence or imposition, be performed fully and faithfully by the aggrieved, and not result in an oppressive or harsh or inequitable decree.

22. Where a promisor performs his oral contract to devise realty by executing a will which is subsequently declared invalid, also at issue is whether the will can constitute a memorandum of the contract sufficient for the Statute of Frauds.

23. 23 N.C. App. at 246, 208 S.E.2d at 716.

One North Carolina Supreme Court decision, *McCraw v. Llewellyn*,[24] held that a particular revoked will did not of itself constitute a sufficient memo and, in so holding, implied that a revoked will could constitute a sufficient memo for Statute of Frauds purposes. As a general rule, commentators[25] and courts[26] have agreed that a revoked will can serve as a sufficient memo of a contract to devise. Courts in a substantial number of other jurisdictions have implied, while holding that the specific will at issue was not evidence of an oral contract, that a revoked will could be a sufficient memo of a contract to devise.[27]

In deciding whether a revoked will is a memo of the oral contract sufficient to satisfy the Statute of Frauds, at issue is the content of the writing, not its form.[28] Generally required are the names of the parties, the signature of the party to be charged, the terms and conditions of the contract, a description of the property, and all essential elements of the undertaking.[29] North Carolina cases require the will to include a written expression of the intent and obligation of the parties[30]—specifically, the price for the realty,[31] a description of the realty,[32] and the

24. 256 N.C. 213, 123 S.E.2d 575 (1962).

25. *See e.g.*, Annot., 94 A.L.R.2d 921 (1964).

26. *See, e.g.*, Potter v. Bland, 136 Cal. App. 2d 125, 288 P.2d 569 (Dist. Ct. App. 1955); Maddox v. Rowe, 23 Ga. 431 (1857); Holsz v. Stephen, 362 Ill. 527, 200 N.E. 601 (1936); Falk v. Fulton, 124 Kan. 745, 262 P. 1025 (1928); Nelson v. Schoonover, 89 Kan. 388, 131 P. 147 (1913); Berg v. Moreau, 199 Mo. 147, 97 S.W. 901 (1906); Woods v. Dunn, 81 Ore. 457, 159 P. 1158 (1916); *In re* Anderson's Estate, 348 Pa. 294, 35 A.2d 301 (1944); Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903); Upson v. Fitzgerald, 129 Tex. 211, 103 S.W.2d 147 (1937); *In re* Lube's Estate, 225 Wis. 365, 274 N.W. 276 (1937).

27. Brought v. Howard, 30 Ariz. 522, 249 P. 76 (1926); Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (Dist. Ct. App. 1959); Luders v. Security Trust & Savings Bank, 121 Cal. App. 408, 9 P.2d 271 (Dist. Ct. App. 1932); Southern v. Kittredge, 85 N.H. 307, 158 A. 132 (1932); Gilbert v. Gilbert, 66 N.J. Super. 246, 168 A.2d 839 (App. Div. 1961); Hunt v. Hunt, 55 App. Div. 430, 66 N.Y.S. 957 (1900), *aff'd*, 171 N.Y. 396, 64 N.E. 159 (1902); Wilson v. Dunkle, 71 Ohio L. Abs. 483, 132 N.E.2d 483 (Licking County C.P. 1955); Eslick v. Friedman, 191 Tenn. 647, 235 S.W.2d 808 (1951); McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479 (1913); Gray v. Marino, 138 W. Va. 585, 76 S.E.2d 585 (1953); Estate of Rosenthal, 247 Wis. 555, 20 N.W.2d 643 (1945).

28. Annot., *supra* note 25, at 926.

29. *See, e.g.*, 72 AM. JUR. 2d *Statute of Frauds* § 305 (1974); RESTATEMENT (SECOND) OF CONTRACTS § 207 (Tent. Draft Nos. 1-7, 1973); Annot., *supra* note 25, at 932.

30. McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962); Chason v. Marley, 224 N.C. 844, 32 S.E.2d 652 (1945); Kluttz v. Allison, 214 N.C. 379, 199 S.E. 395 (1938); Keith v. Bailey, 185 N.C. 262, 116 S.E. 729 (1923).

31. Hall v. Misenheimer, 137 N.C. 183, 49 S.E. 104 (1904).

32. Lane v. Coe, 262 N.C. 8, 136 S.E.2d 269 (1964); Searcy v. Logan, 226 N.C. 562, 39 S.E.2d 593 (1946); Hodges v. Stewart, 218 N.C. 290, 10 S.E.2d 723 (1940).

names of both parties to the contract.[33] Those cases from other jurisdictions which have considered the issue of sufficiency look most frequently to one factor in their determination: whether the will in its dispositions makes reference to the alleged oral contract.[34]

In *Rape v. Lyerly* the North Carolina court held that a revoked will could constitute a sufficient memorandum of an oral contract to satisfy the Statute of Frauds; yet it may be argued that the will in *Rape* was not a sufficient memorandum of the contract. For example, one might argue that the actual words of disposition used by Lyerly in his will do not refer to a contract to devise. Lyerly stated that he devised his realty "since" Mildred Rape had "obligated" herself to care for him.[35] Such dispositive terms are amenable to two constructions. First, the testator could be merely coupling his devise with an explanation for his generosity to Mildred Rape.[36] Such a construction compels the finding that the will is not a memo of the contract, because a memo must show not merely the appreciation and intention of one of the parties, but rather the promises and obligation running between the parties to the contract.[37]

Under the second possible construction, the testator could be recording the promises and obligations of each party to a contract to devise. That the devise was to Mildred Rape "since" she served Lyerly does not, of itself, show the contractual nature of the devise; "since" merely shows the causal relation between the devise and the service. The use of the words, "ha[d] obligated", in Lyerly's will, on the other hand. does show the contractual nature of the devise. Obligation generally refers to duty or promise arising from legal compulsion; here the only legal obligation to which the testator could have intended to refer is that of contract. Moreover, only infrequently or inadvertently does obliga-

33. Elliot v. Owen, 244 N.C. 684, 94 S.E.2d 833 (1956).

34. Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (Dist. Ct. App. 1959); Busque v. Marcou, 147 Me. 289, 86 A.2d 873 (1952); Southern v. Kittredge, 85 N.H. 307, 158 A. 132 (1932); Gilbert v. Gilbert, 66 N.J. Super. 246, 168 A.2d 839 (App. Div. 1961); *In re* Anderson's Estate, 348 Pa. 294, 35 A.2d 301 (1944); Eslick v. Friedman, 191 Tenn. 647, 235 S.W.2d 808 (1951); Upson v. Fitzgerald, 129 Tex. 211, 103 S.W.2d 147 (1937); McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479 (1913); *cf.* Falk v. Fulton, 124 Kan. 745, 262 P. 1025 (1928); *but see* Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903).

35. *See* note 5 *supra.*

36. Explanatory clauses in wills are not uncommon and serve the useful purpose of educating family members to the reasons behind the testator's dispositive scheme.

37. *See* Brown v. Williams, 196 N.C. 247, 145 S.E. 233 (1928), finding that a will was not a memo of a contract to devise. *See also* Luders v. Security Trust & Sav. Bank, 121 Cal. App. 408, 9 P.2d 271 (Dist. Ct. App. 1932), holding that a devise for the devisee's faithful service to the testator did not serve as a memo of a contract to devise.

tion refer to an unenforceable, gratuitous promise or to a moral obligation; such a usage is not generally to be expected in a legal document. The dispositive terms of the will record the promises and obligations of the contract and, in doing so, make the reference to a contract that is required by most cases[38] deciding whether a revoked will serves as a memo of a contract.[39]

Lyerly's will identified both parties to the contract and stated the contract's terms and conditions: devise in return for services. The testator's signature at the will's excution served as the signature of the party to be charged; his reference to the location of the realty was a satisfactory description of it.[40] Arguments that the will was not a sufficient memo were properly rejected by the court.

An objection that can be made to the *Rape* case concerns that portion of Chief Justice Sharp's opinion dealing with the right to revoke a will executed pursuant to a contract.[41] A will is ambulatory and always revokable,[42] regardless of a contract to devise or not to revoke. However, the opinion in *Rape*, without stating that a will can never be irrevocable, quotes extensively from sources explaining that a will cannot be revoked to defeat contractual obligations. To say, as is sometimes said in courts of equity, that relief is granted because a will becomes irrevocable when executed in compliance with an enforceable contract[43] is incorrect.[44] The meaning of such statements is that, regardless of revocation, equity will impress a constructive trust upon the devised realty in favor of the contractual promisee.[45]

The distinction between one's right to revoke a will and one's right

38. *See* note 34 *supra.*

39. *See also* Woods v. Dunn, 81 Ore. 457, 159 P. 1158 (1916), where a devise in return for the home and care of devisee was a sufficient reference to and definition of the contract to devise.

40. For cases dealing with the sufficiency of the description of realty in a memo for Statute of Frauds purposes, see, *e.g.*, Carlton v. Anderson, 276 N.C. 564, 173 S.E.2d 783 (1970); Lane v. Coe, 262 N.C. 8, 136 S.E.2d 269 (1964); Searcy v. Logan, 226 N.C. 562, 39 S.E.2d 593 (1946); Hodges v. Stewart, 218 N.C. 290, 10 S.E.2d 723 (1940); Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903).

41. 287 N.C. at 618, 215 S.E.2d at 748.

42. *Cf.* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 218, 224 (1953); 94 C.J.S. *Wills* §§ 117, 127(2) (1956); 1 H. UNDERHILL, A TREATISE ON THE LAW OF WILLS § 289 (1900).

43. Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946); Annot., 3 A.L.R. 172 (1919); B. SPARKS, CONTRACTS TO MAKE WILLS 111 (1956); Costigan, *Constructive Trusts based upon Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 HARV. L. REV. 237, 250 (1915).

44. B. SPARKS, *supra* note 43, at 111.

45. Costigan, *supra* note 43, at 250.

to rescind a contract needs to be drawn. The correct relation between these rights is that the right to revoke does not give one the right to rescind. The opinion in *Rape* fails to state this distinction and incorrectly implies that one's inability to rescind a valid contract bars revocation of the will executed pursuant to the contract. By citing cases[46] from other jurisdictions that directly state that execution of a will pursuant to a contract bars revocation of it,[47] *Rape v. Lyerly* propounds incorrect theories and promotes confusion about the justification for specific performance of a contract to devise. The correct justification rests simply upon the breach of contract to devise.

In conclusion, the North Carolina Supreme Court improperly justified the remedy that it awarded. Nonetheless, the remedy, conclusions, and holding of the court in *Rape v. Lyerly* are proper ones. The court's holding, that a revoked will can provide a sufficient memorandum of an oral agreement for Statute of Frauds purposes, had no North Carolina precedent but is supported by the weight of authority from other jurisdictions. Notwithstanding the North Carolina courts' ability to enforce an oral contract to devise realty evidenced by a will, promisees are well advised to insist upon a separate written instrument containing the promise to devise.

EVERETT B. SASLOW, JR.

Criminal Law—A Survey and Appraisal of the Law of Entrapment in North Carolina

In attempting to apprehend persons involved in the so-called victimless crimes,[1] modern law enforcement officers have found it necessary to set traps that are often quite elaborate to obtain evidence needed for conviction. In setting a trap, it is often necessary for the law officer or his agent to actually participate in the criminal act. The

46. 287 N.C. at 615, 215 S.E.2d at 748.

47. *See, e.g.*, Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946). *See also In re* Estate of Ranthum, 249 Iowa 790, 89 N.W.2d 337 (1958); Brock v. Noecker, 66 N.D. 567, 267 N.W. 656 (1936).

1. "Victimless crimes" include crimes in which there is no "victim" or in which the "victim" is a willing participant. Crimes relating to prostitution, homosexuality, narcotics, liquor sales, and gambling are common examples. *See* Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874-75 (1963).

amount of actual participation by the officer can vary substantially depending on the nature of the crime and the surrounding circumstances, as well as the aggressiveness of the officer himself. This participation can range from a minimal role of observation to substantial overt solicitation. If the solicitation becomes so strong that the government could be manufacturing criminal acts when none would have existed otherwise, the validity of any subsequent criminal prosecution must be questioned.

Courts have created the defense of entrapment in order to prevent government law enforcement officials from creating crime when none previously existed. The defense of entrapment is recognized in the federal courts[2] and in almost all state courts[3] except Tennessee.[4] Although each jurisdiction has its own definition, entrapment is generally recognized as a defense when government officials or agents, by persuasion, trickery, or fraud, induce or incite a person to commit a crime in order to prosecute that person. In particular, courts have required that criminal intent and design originate with the government officials or agents rather than with the defendant in order for the defense to operate.[5]

The North Carolina Supreme Court has recently examined the North Carolina law of entrapment in *State v. Stanley*,[6] in which it found for the first time the presence of entrapment as a matter of law. The defendant in *Stanley* was a seventeen-year-old high school student charged with felonious possession of a controlled substance with the intent to distribute, and felonious distribution of a controlled substance.[7] At trial in superior court, Stanley, the defendant, admitted that the alleged transaction had occurred, but he relied on the defense of entrapment. Although the jury returned a verdict of guilty to the charge of felonious possession, Stanley was acquitted on the charge of distribution of a controlled substance.[8]

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2. Sorrells v. United States, 287 U.S. 435 (1932).

3. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 48, at 370 (1972); A. LOEWY, CRIMINAL LAW IN A NUTSHELL § 13.06 (1975) [hereinafter cited as LOEWY]; 22 C.J.S. *Criminal Law* § 45(1) (1961). Although the status of the defense is unclear in New York, entrapment has not been rejected as a defense there. People v. Williams, 38 Misc. 2d 80, 237 N.Y.S.2d 527 (County Ct. 1963).

4. Warden v. State, 214 Tenn. 398, 381 S.W.2d 247 (1964).

5. Sorrells v. United States, 287 U.S. 435 (1932); State v. Burnette, 242 N.C. 164, 87 S.E.2d 191 (1955). *See also* Annot., 62 A.L.R.3d 110 (1975).

6. 288 N.C. 19, 215 S.E.2d 589 (1975).

7. The parties stipulated that the controlled substance was found to be lysergic acid diethylamide (LSD). *Id.* at 20, 215 S.E.2d at 590.

8. *Id.* at 20-25, 215 S.E.2d at 590-93.

Upon appeal by defendant, the court of appeals found no trial error; however, the issue of entrapment was not raised before the court of appeals.[9] Defendant then petitioned for certiorari to the North Carolina Supreme Court, but again he did not raise the entrapment issue.[10] The supreme court granted certiorari[11] and, upon examination of the trial court record, chose to consider the entrapment defense by exercising its general supervisory powers over inferior state courts.[12] The high court held that the uncontradicted evidence showed that the undercover agent of the state, in establishing a "big brother" relationship with the defendant, had induced the defendant to commit the criminal act and that the intent to commit the crime originated with the agent of the state rather than with the defendant. Therefore, the court found that the evidence compelled a finding of entrapment as a matter of law.[13]

While *Stanley* is the first North Carolina Supreme Court decision to find entrapment as a matter of law, the defense has previously been recognized in North Carolina. The first case to consider entrapment was *State v. Smith*.[14] In that case an agent of the police illegally bought liquor from the defendant. Although the word "entrapment" was not used to describe the defense, the defendant contended that the conduct of the police agent in purchasing the liquor should be a bar to prosecution. The court rejected the defense, reasoning that this technique of trapping the defendant was a reasonable method of confirming suspicions of illegal conduct. The court stated that "[i]t is not the motive of the buyer, but the conduct of the seller which is to be considered."[15] The defendant had broken the law, and he could not complain "that the law of the jungle was violated."[16]

The court reached the same result in *State v. Hopkins*,[17] a similar case that arose one year after *Smith*. The conviction was upheld in *Hopkins*, and although the court noted that the methods used by the

9. State v. Stanley, 24 N.C. App. 323, 210 S.E.2d 496 (1974). The court of appeals, in affirming the trial court's ruling, held that possession of a controlled substance was properly found to be a lesser included offense of distribution of a controlled substance.

10. 288 N.C. at 25-26, 215 S.E.2d at 594.

11. 286 N.C. 547, 212 S.E.2d 169 (1975).

12. 288 N.C. at 25-27, 215 S.E.2d at 593-94 (1975).

13. *Id.* at 32-33, 215 S.E.2d at 597-98.

14. 152 N.C. 798, 67 S.E. 508 (1910).

15. *Id.* at 800, 67 S.E. at 509.

16. *Id.*

17. 154 N.C. 622, 70 S.E. 394 (1911).

officers of the law had been criticized, it was held that "the transaction is, so far as [the] defendant is concerned, a violation of law."[18]

Almost forty years after *Smith* and *Hopkins*, the North Carolina Supreme Court first explicitly recognized the defense of entrapment in *State v. Love*.[19] The court held that for entrapment to exist, the officer's conduct must amount to more than mere initiation, invitation, or exposure to temptation, but must constitute trickery, fraud, or persuasion. Although the improper conduct of the officer is an essential element of the defense, the crucial factor in establishing entrapment is the defendant's predisposition to commit the crime. The *Love* court found that, for entrapment to exist, the trickery, fraud, or persuasion must be "practiced upon one who entertained no prior criminal intent."[20]

The North Carolina rule on entrapment crystallized into its present form in *State v. Burnette*.[21] The court held in *Burnette* that entrapment exists when an officer or agent of the government, by persuasion, trickery, or fraud, induces or incites a person to commit a crime in order to prosecute. The court found it essential that the criminal intent and design originate in the mind of one other than the defendant, and also, that there be a finding that the defendant would not have committed the act but for the inducement.[22] In utilizing this definition, the court made clear that the major issue is the defendant's predisposition. It follows that under this test of predisposition, the government's conduct assumes importance only because the degree of inducement or incite-

18. *Id.* at 624, 70 S.E. at 394.

19. 229 N.C. 99, 47 S.E.2d 712 (1948). *See also* State v. Godwin, 227 N.C. 449, 42 S.E.2d 617 (1947) (problems related to entrapment discussed, but decision reached on other grounds).

20. 229 N.C. at 101, 47 S.E.2d at 714.

21. 242 N.C. 164, 87 S.E.2d 191 (1955).

22. In order for there to be entrapment, the officer or agent of the government must do more than merely offer the accused an opportunity to commit the criminal act. *See, e.g.*, State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967); State v. Kilgore, 246 N.C. 455, 98 S.E.2d 346 (1957) (per curiam); State v. Greenlee, 25 N.C. App. 640, 214 S.E.2d 246 (1975); State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759, *cert. denied*, 284 N.C. 258, 200 S.E.2d 658 (1973), *cert. denied*, 415 U.S. 990 (1974); State v. Hendrix, 19 N.C. App. 99, 197 S.E.2d 892 (1973); State v. Williams, 14 N.C. App. 431, 188 S.E.2d 717 (1972). In narcotics cases, such facts as inquiring to purchase, arranging a meeting for sale, ready acquiescence in sale, and admission of at least one prior illegal sale have probative value in establishing an inference that the intent originated with the defendant. State v. Salame, 24 N.C. App. 1, 210 S.E.2d 77 (1974), *cert. denied and appeal dismissed*, 286 N.C. 419, 211 S.E.2d 800 (1975). For other entrapment cases see State v. Walker, 251 N.C. 465, 112 S.E.2d 61, *cert. denied*, 364 U.S. 832 (1960); State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958); State v. Wallace, 246 N.C. 445, 98 S.E.2d 473 (1957); State v. Bradshaw, 12 N.C. App. 510, 183 S.E.2d 787 (1971).

ment helps establish the amount of active participation by the accused in the crime: governmental participation is simply used as a means of measuring the defendant's predisposition.

In order properly to analyze entrapment, it is essential first to establish the legal basis as well as the policy rationale for allowing the defense. Entrapment does not rest on constitutional grounds. The United States Supreme Court has considered the constitutional status of entrapment principally on due process grounds, but the Court has refused to reverse a conviction allegedly involving entrapment on constitutional grounds.[23] Although the due process argument has not been totally ruled out, it seems unlikely that a case of entrapment will ever be decided on constitutional grounds. Since entrapment is recognized as a valid defense in almost all jurisdictions in the United States,[24] it appears that even in extreme cases courts will acquit on the ground of entrapment before reaching the constitutional question.

Since the entrapment defense does not rest on constitutional grounds, courts have utilized a number of legal theories and policy statements to justify the defense. One such theoretical justification is that the government is estopped from prosecution because entrapment is unconscionable and contrary to public policy,[25] deriving from "a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist."[26] It should be noted, however, that general statements of public policy fail adequately to distinguish whether the ultimate purpose of the defense is to protect a right of the accused or to prohibit intolerable government activity.

In support of the position that the purpose of the entrapment defense is to protect a substantive right of the accused, certain courts, interpreting criminal statutes, have held that the defense is based on an inference that the legislature did not intend for the given statute to apply to a victim of entrapment.[27] Consequently, if this unwritten purpose of the statute is intended to protect a substantive right of the accused rather than being a deterrent to improper government activity,

23. United States v. Russell, 411 U.S. 423 (1973). *See also* Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

24. LOEWY, *supra* note 3, § 13.06; 22 C.J.S. *Criminal Law* § 45(1) (1961).

25. Sorrells v. United States, 287 U.S. 435, 445 (1932), *citing* Newman v. United States, 299 F. 128, 131 (4th Cir. 1924).

26. United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933) (Learned Hand, J.).

27. Sorrells v. United States, 287 U.S. 435, 445-49 (1932).

the defense should be available without regard to the identity of the entrapper. However, it has uniformly been held that entrapment is available as a defense only when the entrapper is an officer or agent of the government.[28]

Beyond considerations of the identity of the entrapper, courts that have attributed the entrapment defense to an unwritten legislative purpose have indulged in judicial inventiveness unless, of course, entrapment itself has been defined by statute. While some crimes require a form of specific intent, most victimless crimes only require general intent.[29] For example, in the prosecution of an illegal drug sale, it is enough for the state to show that the accused made the sale. No further proof of intent is usually necessary. Since this minimal degree of intent is present even when the accused is a victim of entrapment, the transaction clearly falls within the scope of the statute.[30] A search of the statutes fails to provide any objective evidence that the legislative intent requires the exclusion of the accused from the scope of the statute.

Although there is general agreement that a victim of entrapment should not be convicted, the reasons for such a position go beyond concern for the interests of a particular defendant. An examination of significant entrapment cases reveals the concern of the courts over the degree of government participation and encouragement in the offenses. Although drug-related crime as well as other offenses may be generally recognized as harmful to society, the practice of setting traps for potential violators "is . . . a repugnant practice, distasteful at its best and intolerable at its worst."[31] The North Carolina court first expressed its concern for such government tactics in *State v. Godwin* when it observed that the state's case relied on a "broken reed" since the

28. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955); State v. Yost, 9 N.C. App. 671, 177 S.E.2d 320 (1970), *cert. denied*, Yost v. Ross, 181 S.E.2d 600 (1971). *See also* Sherman v. United States, 356 U.S. 369 (1958); Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972).

29. *See* State v. Love, 229 N.C. 99, 102, 47 S.E.2d 712, 714 (1948).

30. In considering the offenses in which entrapment might be available as a defense, it should be noted that entrapment is not limited to liquor and narcotics cases, although problems of entrapment arise most often in such cases. *See, e.g.*, State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967) (using profane language over the telephone); State v. Caldwell, 249 N.C. 56, 105 S.E.2d 189 (1958) (conspiracy to dynamite a school building). Although North Carolina courts have not ruled on the point, the better view holds that entrapment is not available when the offense involves the infliction or threat of bodily harm. MODEL PENAL CODE § 2.13(3) (Proposed Official Draft 1962).

31. Smith v. State, 258 Ind. 415, 418, 281 N.E.2d 803, 805 (1972).

criminal act "was brought about by persistent entreaty and duplicity."[32]

North Carolina's policy supporting the entrapment defense as a deterrent to police misconduct was explained in *State v. Love*:

> Considerations of the purity and fairness of the *courts and the agencies created for the administration of justice* gravely challenge the propriety of a procedure wherein the officers of the State envisage, plan and instigate the commission of a crime and proceed to punish it on the theory that a facile compliance with the officer's invitation confirms the accuracy of the suspicion of an unproved criminal practice,—for which the defendant is in reality punished.[33]

In light of this reasoning it is clear that entrapment was created to deter government officials from manufacturing crime where none existed before. Since the main purpose of the entrapment defense in North Carolina is to regulate governmental activity in investigating crimes that often require no form of specific intent, the focus of judicial inquiry should be the conduct of the officers and their investigative methods rather than the state of mind of a particular defendant.

To implement this purpose of regulating governmental activity, courts have taken two divergent approaches; the principal difference between these approaches relates to the importance to be given the predisposition of the accused. The federal courts[34] and the majority of state courts,[35] including North Carolina,[36] have held that entrapment focuses on the intent of the accused. Under this view no amount of improper governmental activity[37] is sufficient unless it is shown that the defendant had no previous intent to commit the crime and that the criminal intent and design originated with the government officials or agents rather than with the defendant.[38]

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32. 227 N.C. 449, 452, 42 S.E.2d 617, 619 (1947).

33. 229 N.C. 99, 101, 47 S.E.2d 712, 714 (1948), *quoted in* State v. Stanley, 288 N.C. 19, 28, 215 S.E.2d 589, 595 (1975) (emphasis added).

34. Sorrells v. United States, 287 U.S. 435 (1932).

35. LOEWY, *supra* note 3, § 13.06; 22 C.J.S. *Criminal Law* § 45(1) (1961). *See, e.g.*, State v. Bagemehl, 213 Kan. 210, 515 P.2d 1104 (1973).

36. 288 N.C. at 28, 215 S.E.2d at 595.

37. In considering the problem of improper governmental conduct, it should be noted that there have been attempts at requiring government officials to obtain approval in advance of setting traps in a manner analogous to fourth amendment search requirements. These attempts, in recognizing the scope of the problem, also illustrate the need for reevaluating the role of the defendant's prior intent in the entrapment defense. *See* Smith v. State, 258 Ind. 415, 418, 281 N.E.2d 803, 805 (1972) (requiring probable cause before setting a trap); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

38. State v. Crandall, 23 N.C. App. 625, 209 S.E.2d 834 (1974), *appeal dismissed*, 286 N.C. 417, 211 S.E.2d 797 (1975). Defendant's evidence went to the conduct of the officers and their investigative methods. Since the evidence did not relate to the defendant's intent, it was held that such evidence was neither material nor relevant.

The second approach to entrapment has been adopted by a minority of state courts,[39] the Model Penal Code,[40] and dissenting United States Supreme Court justices.[41] This approach uses a form of the "reasonable man" test, a more objective means of applying entrapment to a particular case. Rather than examining the predisposition of the particular person on trial, these authorities hold that entrapment exists when the conduct of the government agent creates a substantial risk that the crime would be committed by a person who would not otherwise have committed the criminal act.

The objective test used by the minority has the advantage of conforming more closely to the policy of entrapment as a check on governmental misconduct. The crucial factor in the minority rule is the measure of participation by agents and officers of the government. Since it establishes a more clearly ascertainable standard that does not vary from case to case depending on the predisposition of various defendants, it is more likely that this method will be perceived by government officials as a viable limit upon their ability to set illegal traps. The majority approach, with its preoccupation with the predisposition of the accused and the necessity for a jury's determination of that factor, is more likely to be viewed by government officials as more of a trial tactic than as a limit on police discretion.[42]

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39. LOEWY, *supra* note 3, § 13.06, at 253-54; *see* W. LAFAVE & A. SCOTT, *supra* note 3, § 48, at 371.

40. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962). The relevant portions are as follows:

> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by . . . :
>
> . . . .
>
> (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

See also the proposed statute in State v. Campbell, 110 N.H. 238, 241, 265 A.2d 11, 14 (1970).

41. United States v. Russell, 411 U.S. 423, 436-50 (1973) (Brennan, Douglas, Stewart, and Marshall, JJ., dissenting); Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, Douglas, Harlan, and Brennan, JJ., concurring in result). Although the dissent in *Russell* reasoned that the defendant should be acquitted by reason of entrapment, it is arguable that on the facts of that case the rationale of the dissent could be applied to reach the result of the majority. It seems unlikely that an offer to supply a person with an essential ingredient of methamphetamine ("speed") would create a substantial risk that the drug would be produced by a person who would not otherwise have committed the criminal act.

42. Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 899-902 (1963).

Beyond these basic policy considerations, it is necessary to consider all the elements of entrapment, especially as they are applied in North Carolina. In considering the definition of entrapment[43] it is important to distinguish this affirmative defense from those in which the consent of the victim negates an essential element of the offense. In such offenses, if the victim consents, there is no criminal act.[44] Entrapment, on the other hand, is a defense to a completed criminal act.[45]

Generally, entrapment is a question of fact for the jury to determine.[46] In North Carolina the accused has the burden of proof and must prove entrapment "to the satisfaction of the jury."[47] The court has reasoned that entrapment is an exception to criminal liability, and that the defendant should have the burden of bringing himself within the exception; however, not all jurisdictions place the burden of proof on the accused. The federal courts[48] as well as some state courts[49] require the prosecution to convince the trier of fact beyond a reasonable doubt that the accused was not entrapped. Since entrapment is no defense unless the trap is set by an agent of the government,[50] the North Carolina courts have required the defendant to produce substantial credible evidence that the person who set the trap was an agent if the state denies that the entrapper was in fact its agent. If a

43. For North Carolina's definition of entrapment see text accompanying note 21 *supra*. *See also* 288 N.C. at 28-29, 215 S.E.2d at 595.

44. *See, e.g.*, State v. Nelson, 232 N.C. 602, 61 S.E.2d 626 (1950); State v. Hughes, 208 N.C. 542, 181 S.E. 737 (1935); State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

45. *See* State v. Burnette, 242 N.C. 164, 87 S.E.2d 191 (1955). The defendant in *Burnette* was charged with assault with intent to commit rape. The accused actually raised two defenses—consent of the victim and entrapment. The judge instructed the jury on both defenses. *Id.* at 174-75, 87 S.E.2d at 197-99. Since the victim's consent and participation were crucial elements of both defenses, it has been noted that trial courts may experience considerable difficulty in separating the two defenses. Note, *Criminal Law—Entrapment in North Carolina*, 34 N.C.L. REV. 536, 544 (1956).

46. 288 N.C. at 32, 215 S.E.2d at 597, *quoting* State v. Campbell, 110 N.H. 238, 241, 265 A.2d 11, 14 (1970). It has been suggested that the issue be tried by the court in the absence of the jury. Jurisdictions that have followed the minority rule have been amenable to this latter view. *See, e.g.*, MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962). *See also* text accompanying note 40 *supra*.

47. State v. Cook, 263 N.C. 730, 733, 140 S.E.2d 305, 308 (1965); State v. Bland, 19 N.C. App. 560, 199 S.E.2d 497 (1973). The Model Penal Code provides that the accused has the burden of proof and must prove the existence of entrapment "by a preponderance of the evidence." MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962).

48. *E.g.*, Notaro v. United States, 363 F.2d 169 (9th Cir. 1966).

49. *See, e.g.*, Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972).

50. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

defendant fails to supply such evidence, the issue of entrapment will not be submitted to the jury.[51]

It is necessary in North Carolina for the defendant to show that he "entertained no prior criminal intent."[52] This requirement is the part of the defense that has been criticized most often, both on policy grounds[53] and on the grounds that it is often unfair in its application. To convince the jury that he is a victim of entrapment, a criminal defendant must ordinarily admit while on the stand that he is indeed guilty of doing those criminal acts of which he is charged.[54] The fact that the defendant admits that he has committed the act puts an inference of guilt in the minds of the jury that would appear difficult to rebut with even the best evidence showing a lack of predisposition.[55]

The defendant with a prior criminal record is placed in an especially precarious position. Depending on local rules of evidence, once the defendant takes the stand to try to prove lack of predisposition, the prosecution may be able to introduce the defendant's prior criminal record along with other testimony that could provide the jury with rumors and suspicions of other conduct of the defendant. Besides the fact that it is often difficult or impossible to ascertain the truth or falsity of much of this evidence, the substantial prejudicial effects of such evidence create substantial danger that the jury will convict, not because of the acts in issue, but because of prior convictions.[56] These considerations mean that as a practical matter the government can go to greater lengths in trapping a person with a criminal record of related crimes than they can go in trapping a person with no criminal record.[57] Although convictions may come easier when the accused has a prior criminal record, the police conduct that entrapment seeks to prevent is as reprehensible when directed to a multiple offender as it is when

51. State v. Yost, 9 N.C. App. 671, 177 S.E.2d 320 (1970), *cert. denied*, Yost v. Ross, 181 S.E.2d 600 (1971).

52. 288 N.C. at 28, 215 S.E.2d at 595 (emphasis omitted); *see* text accompanying notes 36-38 *supra*.

53. *See* text accompanying notes 33-42 *supra*.

54. The North Carolina courts have held that the accused must admit to the criminal act in order to raise the entrapment issue, thus rejecting the possibility of inconsistent defenses. State v. Boles, 246 N.C. 83, 97 S.E.2d 476 (1957).

55. *See* United States v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting).

56. *See* Sherman v. United States, 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring).

57. Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 898 (1963).

directed toward an ordinary law-abiding citizen.[58]

Although it is unlikely that *Stanley* reflects any substantial changes in the North Carolina law of entrapment, there are some significant points in the case that deserve noting. *Stanley* is the first case in which the North Carolina appellate courts have found entrapment as a matter of law. Additionally, entrapment was not an issue in the petition for certiorari; however, the supreme court raised the entrapment issue on its own volition.[59] These facts suggest the possibility that the North Carolina court is developing a more receptive attitude toward entrapment.

Though the North Carolina Supreme Court may be increasingly open to a broader view of entrapment, the extreme facts of *Stanley* make it difficult to perceive any real change in the North Carolina law. The court's reasoning focused on the total lack of evidence of any predisposition to commit the crime. The state's undercover officer established a "big brother" relationship with the defendant, and as the officer testified, the defendant had been unable to tell if certain substances he purchased were real drugs.[60] Beyond these facts, the court described the defendant as an "agent" of the law enforcement officer; therefore, the court ruled that the defendant should receive some sort of indirect benefit from the statute granting immunity to officers enforcing the drug laws.[61]

One of the most noteworthy aspects of the holding in *Stanley* relates to the value of prior convictions. The court held that "a conviction of possession of marijuana would not indicate a predisposition to commit the crime of [possession of LSD with intent to distribute]."[62] Within this context, the holding seems to go beyond an assessment of the probative weight of the marijuana conviction. The implication is that the marijuana conviction is irrelevant to the LSD conviction.[63] Therefore, the North Carolina court is apparently attempting to miti-

58. Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring). "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." *Id.* at 382-83.

59. 288 N.C. at 25-27, 215 S.E.2d at 593-94.

60. *Id.* at 22, 215 S.E.2d at 591.

61. *Id.* at 33, 215 S.E.2d at 598. *See* N.C. GEN. STAT. § 90-113.1(c) (1975).

62. 288 N.C. at 33, 215 S.E.2d at 598.

63. *Cf.* Sherman v. United States, 356 U.S. 369, 375-76 (1958), in which it was held that a nine year old conviction for sale of narcotics and a five year old conviction for possession of narcotics were "insufficient" to prove a present intent to sell narcotics.

gate the prejudicial effects of introducing evidence of a prior criminal record by strictly limiting such evidence to those crimes that bear the highest degree of relevance to the present charges.

With the exception of the points discussed above, *Stanley* is essentially a reaffirmation of prior North Carolina law with greater reliance on the federal definition of entrapment.[64] Except for extreme cases, the issue remains one for the jury to resolve. The court also announced in *Stanley* that it will continue to focus on the particular defendant's predisposition to participate in the criminal act. However, the North Carolina court has recognized that abuses inevitably occur when overzealous law enforcement officers set traps, particularly in search of violations of drug laws. In correcting these abuses, it is hoped that the court, recognizing the need for judicial intervention, will continue to search for the appropriate responses.

JOSEPH D. JOHNSON

Criminal Law—Diminished Responsibility, Long Ignored in North Carolina, Is Given a Hearing But Not Yet Adopted

North Carolina has never recognized the doctrine of "diminished responsibility," by which a mentally disordered defendant may be deemed incapable of the degree of mens rea required for conviction of the crime for which he is charged, even though his mental illness does not reach the level of insanity.[1] In three recent cases[2] the North Carolina Supreme Court has indicated that it remains unwilling to adopt

64. *See* 288 N.C. at 29-32, 215 S.E.2d at 595-97.

1. The doctrine herein referred to as "diminished responsibility" goes by several different names, including "diminished capacity," "partial insanity" and "partial responsibility." F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 355 (1961); People v. Anderson, 63 Cal. 2d 351, 364, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965). In addition, the term "diminished reponsibility" is used to describe a quite different doctrine derived from civil and Scottish law whereby the defendant's punishment is reduced if he could not resist the criminal impulse. *Id.* Despite this confusion and the fact that the doctrine "contemplates full responsibility, not partial, but only for the crime actually committed," State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959), "diminished responsibility" is probably the most common term and is the one used by the North Carolina Supreme Court. *E.g.*, State v. Baldwin, 276 N.C. 690, 699, 174 S.E.2d 526, 532 (1970).

2. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51 (1975); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

the theory, at least under the label "diminished responsibility." Nevertheless, the court's statement in *State v. Cooper* that one who lacks the mental capacity to premeditate and deliberate cannot lawfully be convicted of first degree murder[3] appears to acknowledge the basic theory underlying diminished responsibility, perhaps opening the way for that doctrine in North Carolina.

In *Cooper* the defendant was charged with the murder of his wife and four of his children.[4] The trial court properly instructed the jury on insanity as a complete defense[5] and on the elements of first and second degree murder.[6] The jury was not instructed to consider the evidence of the defendant's mental disorder as it affected the elements of premeditation and deliberation, but the defendant did not request such an instruction.[7] The jury found the defendant guilty of first degree murder despite considerable evidence that he was a paranoid schizophrenic.[8]

The supreme court, over a strong dissent by Chief Justice Sharp, held that the failure of the trial court to instruct the jury to consider the evidence of defendant's mental disorder on the question of premeditation and deliberation did not amount to reversible error.[9] The court said that "a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind . . . or some other cause."[10] However, since the jury's verdict established that the defendant had the mental capacity to know right from wrong at the time of the killings, the court reasoned that it "necessarily follows that he had the lesser, included capacity" to intend to kill.[11] The court also noted that the jury, after "proper instructions as to what constitutes premeditation and deliberation," determined that the defendant "did, in fact, premeditate and deliberate upon the intended killings."[12] Accordingly, the court found no error of omission in the trial court's charge.[13]

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3. 286 N.C. at 572, 213 S.E.2d at 320.
4. *Id.* at 552, 213 S.E.2d at 308.
5. *See* text accompanying note 23 *infra.*
6. 286 N.C. at 570-71, 213 S.E.2d at 319-20.
7. *Id.* at 595, 213 S.E.2d at 334 (dissenting opinion).
8. *Id.* at 552-64, 213 S.E.2d at 308-15.
9. *Id.* at 572, 213 S.E.2d at 320.
10. *Id.*
11. *Id.* at 573, 213 S.E.2d at 321.
12. *Id.*
13. *Id.* at 572, 213 S.E.2d at 320.

Chief Justice Sharp agreed with the majority that a person with a mental disorder that prevents his acting with premeditation and deliberation cannot be guilty of murder in the first degree. However, she said the defendant was entitled to the instruction the majority found unnecessary.[14] She would require such an instruction in many such homicide cases even when defense counsel failed to request it:

> [An instruction would be required in any case] in which proof beyond a reasonable doubt of a specific intent to kill, formed after premeditation and deliberation, is prerequisite to a conviction for murder in the *first* degree, and . . . in which there is substantial evidence that at the time of the homicide defendant had been and was suffering from a recognized serious mental disease and engaged in abnormal behavior characteristic of such disease.[15]

Accordingly, a first degree murder defendant who could not be convicted by use of the felony-murder rule would be entitled to a diminished responsibility instruction if his acts were characteristic of a serious mental disorder.

In *State v. Wetmore*[16] the North Carolina Supreme Court noted that several states had adopted the theory of diminished responsibility, but the court did not consider the matter further because the defendant admitted in his brief that North Carolina had not adopted the doctrine.[17] Despite the lack of discussion in *Wetmore* the court said in *State v. Shepherd*,[18] "In *Wetmore* our Court discussed, but clearly did not adopt . . . the theory of diminished responsibility."[19]

Prior to 1975 the court specifically referred to diminished responsibility only once.[20] Although a number of jurisdictions have adopted the theory,[21] the only test of criminal responsibility utilized by North Carolina courts to measure a state of mind has been the *M'Naghten* insanity

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14. *Id.* at 595, 213 S.E.2d at 334-35.

15. *Id.* at 592, 213 S.E.2d at 332.

16. 287 N.C. 344, 215 S.E.2d 51 (1975).

17. *Id.* at 356, 215 S.E.2d at 58. The court also cited *Cooper*, both for its restatement of the *M'Naghten* rule and for its discussion of diminished responsibility, but it only implied that *Cooper* rejected the doctrine. *Id.* at 357, 215 S.E.2d at 58. In *Wetmore* the defendant took the stand and in effect admitted premeditation. Thus, despite her dissent in *Cooper*, Chief Justice Sharp agreed that the defendant was not entitled to a diminished responsibility instruction. *Id.* at 358-59, 215 S.E.2d at 59-60.

18. 288 N.C. 346, 218 S.E.2d 176 (1975).

19. *Id.* at 349, 218 S.E.2d at 176.

20. In State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970), the court noted in dictum that several states had adopted a diminished responsibility theory. *Id.* at 699, 174 S.E.2d at 532.

21. *See* notes 33-35 and accompanying text *infra*.

rule.[22] Under the *M'Naghten* rule a mentally disordered defendant is exempt from criminal responsibility "only if, at the time he commits the act which would otherwise be illegal, he was incapable of knowing the nature and quality of his act or of distinguishing between right and wrong with relation thereto."[23] A defendant who does not meet the insanity test is considered wholly sane and fully responsible for the consequences of his acts, for "there is no halfway house on the road to insanity."[24]

It is a common law principle "that the state of mind with which a person commits a criminal act is material in determining not only whether he should be punished therefor, but also, if he is to be punished, how severely."[25] From this principle, which is manifest in any classification of offenses according to degree of mens rea, some jurisdictions have derived the doctrine of diminished responsibility.[26] These jurisdictions have said, in effect, that a defendant who was incapable of entertaining the state of mind required for the commission of a crime cannot logically be found guilty of that crime.[27] If this reasoning were carried to its logical conclusion, a defendant totally incapable of even a general intent should be absolved of all guilt. In practice, however, diminished responsibility is used only to negate specific intent, "allowing conviction for any lesser-included offense which does not have the requirement of a particular mental element."[28]

Many states, including North Carolina, have allowed intoxication to negate the elements of premeditation and deliberation necessary for conviction of first degree murder.[29] Those jurisdictions that have adopted diminished responsibility have often been persuaded to do so because of the anomalous result of allowing the alcohol or drug user more lenient treatment than is afforded a defendant with a mental

22. *See* State v. Helms, 284 N.C. 508, 513-14, 201 S.E.2d 850, 854 (1974). In 1915 the supreme court suggested that lack of capacity to form a criminal intent would be a complete defense to crime. State v. Cooper, 170 N.C. 719, 723, 87 S.E. 50, 52 (1915). Nevertheless, the *M'Naghten* rule was set out immediately following this suggestion, so it is doubtful that the court intended to propose an alternate or supplemental test for criminal capacity.

23. State v. Benton, 276 N.C. 641, 652, 174 S.E.2d 793, 800 (1970).

24. State v. Helms, 284 N.C. 508, 514, 201 S.E.2d 850, 854 (1974).

25. H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 177 (1954).

26. *See id.*

27. Comment, *Mental Disorders and Criminal Responsibility: The Recommendations of the Royal Commission on Capital Punishment*, 33 TEXAS L. REV. 482, 492 (1955).

28. Brady, *Abolish the Insanity Defense?—No!*, 8 HOUSTON L. REV. 629, 634 (1971).

29. *E.g.*, State v. Propst, 274 N.C. 62, 71-72, 161 S.E.2d 560, 567 (1968).

disorder he cannot control.[30] The statement in *Cooper* that a defendant cannot be convicted of first degree murder if he lacked the requisite capacity "due to a disease of the mind, intoxication . . . or some other cause"[31] indicates that the North Carolina Supreme Court was aware of this anomaly.

Diminished responsibility has been used most commonly in murder cases, to reduce the defendant's crime from first to second degree murder.[32] Thus, under California's "rule of diminished responsibility" a defendant who was "suffering from a mental illness that prevented his acting with malice aforethought or with premeditation and deliberation" cannot be convicted of first degree murder.[33] A similar rule has been adopted in the District of Columbia[34] and in about one third of the states.[35]

The North Carolina Supreme Court specifically stated in *Cooper*: "[A] defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind . . . or some other cause."[36] Although the court did not use the term "diminished responsibility," this language in *Cooper* is similar to that used by courts in California and other states.[37] Consequently, it appears that North Carolina may be on its way toward adopting diminished responsibility, notwithstanding the admission in defendant's brief in *Wetmore* and the reliance thereon in *Shepherd*.

The defining language in *Cooper* is only dictum, because the evidentiary question was not before the court, and a diminished responsibility instruction was found unnecessary. Nevertheless, the statement that a defendant who is unable to premeditate "cannot be lawfully convicted" of first degree murder apparently means, at a minimum, that evidence of mental disorder is relevant to the premeditation issue in first degree murder cases. If this is true, a defendant whose mental disorder

30. *E.g.*, State v. Padilla, 66 N.M. 289, 294, 347 P.2d 312, 315 (1959).
31. 286 N.C. at 572, 213 S.E.2d at 320.
32. F. LINDMAN & D. MCINTYRE, *supra* note 1, at 355.
33. People v. Goedecke, 65 Cal. 2d 850, 855, 423 P.2d 777, 781, 56 Cal. Rptr. 625, 629 (1967).
34. United States v. Brawner, 471 F.2d 969, 1000-02 (D.C. Cir. 1972) (en banc).
35. *E.g.*, State v. Santiago, 55 Hawaii 152, 516 P.2d 1256, 1258-59 (1973); *see* Annot., 22 A.L.R.3d 1228, 1246-52 (1968).
36. 286 N.C. at 572, 213 S.E.2d at 320.
37. *See* text accompanying notes 33-35 *supra*.

does not reach the level of insanity should be free to introduce evidence to prove his lack of capacity to premeditate.

Of the states that have adopted diminished responsibility only California[38] requires a diminished responsibility instruction on the trial court's motion whenever it appears the defendant is relying on the doctrine.[39] Although it acknowledged in *Cooper* the relevance of mental illness to the premeditation issue, the court indicated that North Carolina is not ready to join California in requiring a diminished responsibility instruction. New York has refused to require such an instruction on the ground that it is self-evident to a jury "that a defendant who cannot deliberate does not deliberate."[40] The majority in *Cooper* arrived at the same result as the New York court by taking "judicial notice of the well known fact that a dog . . . may have the mental capacity to intend to kill." Accordingly, the *Cooper* court observed that "[i]t requires less mental ability to form a purpose to do an act than to determine its moral quality."[41] Employing these postulates the court determined that the jury's verdict of guilty established that the defendant had the lesser capacity to intend to kill.[42]

Although the court may be correct in finding that diminished responsibility instructions are not required, the manner in which the result was reached presents two problems. The first is that the court's reference to a dog's intent to kill obviously refers only to the general intent found in all criminal acts, since a dog surely does not have the capacity to premeditate and deliberate or to possess malice aforethought. The reference to a dog's general intent has no place in a discussion of diminished responsibility, for that doctrine has been applied to specific intent crimes only. The second problem is that the court, in its statement that less mental ability is required to form a purpose to do an act than to determine its moral quality, seems to be recognizing a theory that should not be judicially noticed, since it is not well

38. People v. Henderson, 60 Cal. 2d 482, 492, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963) (en banc).

39. New Mexico says that such an instruction is required, but it is not clear that the trial court must act on its own motion. State v. Padilla, 66 N.M. 289, 293-96, 347 P.2d 312, 315-16 (1959). Several other states seem to be close to the position that a diminished responsibility instruction is required. *See, e.g.*, State v. Donahue, 141 Conn. 656, 663-65, 109 A.2d 364, 367-68 (1954); State v. Gramenz, 256 Iowa 134, 138-40, 126 N.W.2d 285, 291 (1964); State v. Vigliano, 43 N.J. 44, 62-66, 202 A.2d 657, 666-68 (1964).

40. People v. Moran, 249 N.Y. 179, 163 N.E.553 (1928) (per curiam).

41. 286 N.C. at 573, 213 S.E.2d at 321.

42. *Id.*

established or authoritatively settled.[43]

As Chief Justice Sharp's dissent makes clear, *Cooper* was a first degree murder case in which the defendant had a history of mental disorder and engaged in abnormal behavior characteristic of that disorder at the time of the killing.[44] Unfortunately the majority did not discuss diminished responsibility in this context. Instead, by its reference to general intent crimes, the court indicated that it was unaware that diminished responsibility has ordinarily been applied to specific intent crimes only.

Under the North Carolina homicide statute a murder without deliberation is a lesser crime than murder with deliberation.[45] The state of the criminal law under this statute provides the prime opportunity to ameliorate the all-or-nothing nature of North Carolina's insanity defense without disrupting the purposes of the criminal law. At a first degree murder trial, when evidence of mental disorder is introduced to show insanity, a jury that finds that a defendant was sane will then determine whether he premeditated and deliberated upon the act. In such a case (of which *Cooper* is an example) it is arguable that, even in the absence of a diminished responsibility instruction, the jury will consider the defendant's mental disorder on the issue of deliberation. A finding that a defendant *did* deliberate presupposes a finding that he *could* deliberate.

On the other hand, if there is no doubt that at the time of his act a

43. "A matter is the proper subject of judicial notice only if is 'known,' well established, and authoritatively settled." Hughes v. Vestal, 264 N.C. 500, 506, 142 S.E.2d 361, 366 (1965). The court in *Hughes* recognized, however, that when the information is not "the controlling or even a significant basis for decision" but is merely "rhetorical and illustrative," appellate courts are not bound by the restrictive judicial notice rule that governs adjudicative facts. *See id.* at 507, 142 S.E.2d at 366. Nevertheless, it appears that if the court in *Cooper* had not beleived that it requires less mental ability to form a purpose than to tell right from wrong, it would have required a diminished responsibility instruction. Because the court's statement controlled its decision, the court should have been surer of its factual basis before invoking judicial notice.

If we define morality to include "the idea of predicting the consequences of our actions and being responsible for them," a certain mental level is, of course, necessary for moral behavior. N. WILLIAMS & S. WILLIAMS, THE MORAL DEVELOPMENT OF CHILDREN 106 (1970). If this is what the court meant to say, judicial notice might have been appropriate. However, if determining the moral quality of one's acts implies that one will stop those acts if they injure someone else, it is not "established" that determining moral quality requires less mental ability than forming a purpose. Certain scientific experiments have demonstrated that rats and monkeys will forego pleasure to themselves if their actions cause discomfort to other animals. S. DIMOND, THE SOCIAL BEHAVIOR OF ANIMALS 119-23 (1970).

44. 286 N.C. at 595-96, 213 S.E.2d at 334-35.

45. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

defendant knew right from wrong with respect to it, he cannot claim insanity. Accordingly, in a jurisdiction in which the only means of testing criminal capacity is the *M'Naughten* insanity test, such a defendant has no opportunity to introduce evidence of mental disorder. If a defendant who is insane nevertheless lacks the capacity to premeditate and deliberate, he ought to be allowed to introduce evidence to show his lack of capacity. If he is not allowed to introduce such evidence, he could be convicted of first degree murder though he lacked the capacity to premeditate at the time of the act. A refusal to admit evidence of lack of capacity is justifiable only if it is true that one who is sane necessarily possesses the mental capacity to premeditate; however, it is questionable that knowledge of right and wrong presupposes that capacity. Since the insanity test is inapplicable to those defendants who are not insane but who do not possess the requisite capacity, North Carolina would do well to supplement its insanity test with diminished responsibility, at least in first degree murder cases.[46]

The only diminished responsibility issue in *Cooper* was whether the trial court must on its own motion instruct the jury to consider evidence of the defendant's mental disorder on the question of premeditation and deliberation. The answer given in *Cooper* was that the trial court need not give this instruction on its own motion.[47]

Cooper also indicates that North Carolina acknowledges the underlying premise of diminished responsibility: a defendant so mentally disordered that he does not have the capacity to premeditate cannot be lawfully convicted of first degree murder. Conversely, *Cooper*, *Wetmore* and *Shepherd* show that North Carolina is willing to dismiss diminished responsibility without fully considering it. To date the North Carolina Supreme Court has had occasion to discuss the doctrine

46. One argument against diminished responsibility is that the defendant who is convicted of a lesser degree of crime because of mental disorder will be released from prison sooner than the supposedly less dangerous criminal who is mentally normal. The statute that provides for the involuntary commitment of dangerous defendants *acquitted* on grounds of mental illness could not be used against one found *guilty*, but of a lesser crime. N.C. GEN. STAT. § 122-84.1 (Cum. Supp. 1975). However, because diminished responsibility is being considered in North Carolina only to reduce the defendant's crime from first to second degree murder, he may still receive a maximum sentence of life imprisonment. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). Of course, the benefits of diminished responsibility in murder cases would be negligible if capital punishment were abolished. See F. LINDMAN & D. MCINTYRE, *supra* note 1, at 355-57, for a survey of the arguments for and against recognizing the defense of diminished responsibility.

47. *See* text accompanying notes 9 & 13 *supra*. The court did not have to consider the case that would arise if the trial court, after counsel had tried to persuade the jury that there was evidence of insanity, exercised its right to instruct that there was no such evidence. State v. Melvin, 219 N.C. 538, 540, 14 S.E.2d 528, 529 (1941).

only with reference to instructions in cases in which the defendant, having pleaded not guilty by reason of insanity, has already introduced evidence of mental disorder. Hopefully, when the issue presented to the court is the admissibility of such evidence to show lack of capacity to premeditate, the court will give diminished responsibility more serious consideration.

JOHN H. BODDIE

Criminal Law—Sua Sponte Instructions on Defendant's Failure to Testify

Section 8-54 of the North Carolina General Statutes provides that a defendant in a criminal action is a competent witness but that the defendant's failure to testify in his own behalf "shall not create any presumption against him."[1] In several decisions,[2] the most recent of which is *State v. Caron*,[3] the North Carolina Supreme Court has dealt with the issue of whether it is error under section 8-54 for the judge, on his own initiative, to instruct the jury that the defendant has a right not to testify and that no adverse inference is to be drawn from the defendant's silence. Other state and federal courts, dealing with similar statutes, have divided[4] as to whether such an instruction, given without a defendant's request, so sensitizes the jury to the defendant's silence that an inference of guilt may arise or an existing adverse inference may be

1. N.C. GEN. STAT. § 8-54 (1969) provides:

Defendant in criminal action competent but not compellable to testify. —In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself.

2. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971); State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968); State v. Rainey, 236 N.C. 738, 74 S.E.2d 39 (1953); State v. Wood, 230 N.C. 740, 55 S.E.2d 491 (1949); State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936).

3. 288 N.C. 467, 219 S.E.2d 68 (1975).

4. *See* Annot., 18 A.L.R.3d 1335 (1968) for a compilation of these cases.

strengthened. In *State v. Caron* the court repeated its frequently stated assertion that the better practice is to "give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant,"[5] but declined to hold a sua sponte instruction to be reversible error.

Defendant Caron was tried and convicted in Wake County Superior Court for feloniously setting fire to a building that housed his body and paint shop. The defense called witnesses to testify, but the accused himself did not take the stand.[6] Although the defendant did not request an instruction on his right to have no adverse inference drawn from his failure to testify, the court charged the jury as follows:

> "I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. He has exercised a lawful right. You may not take the position during your deliberations did he have something he didn't want us to know. He has exercised the lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify."[7]

The North Carolina Supreme Court, in an opinion by Justice

5. 288 N.C. at 472-73, 219 S.E.2d at 72, *quoting* State v. Barbour, 278 N.C. 449, 457, 180 S.E.2d 115, 120 (1971), *cert. denied*, 404 U.S. 1023 (1972).

6. The evidence against defendant showed that he increased the first insurance coverage on his business several days before the fire; defendant had purchased a fifty-five gallon drum of lacquer thinner the day before the fire; lacquer thinner had apparently been poured in a trail throughout the shop and then ignited; defendant admitted being in the building shortly before the fire; and when notified of the blaze by the fire department, defendant arrived on the scene in a less-than-pristine state—that is, his hands, clothes, and face were coated with soot—a phenomenon that the defendant was unable to explain at the time. Defendant presented evidence that his accountant recommended the increased insurance coverage and that he was "habitually dirty" from his work in the body shop. 288 N.C. at 470-71, 219 S.E.2d at 70-71.

7. 288 N.C. at 471-72, 219 S.E.2d at 71.

Moore upholding the court of appeals,[8] found the instruction "unduly repetitious" but "not prejudicial."[9] Although noting that some jurisdictions hold such instructions erroneous when not requested by defendant and that the North Carolina Supreme Court itself had suggested that such a charge not be given unless requested by defendant, the majority concluded that the "spirit of G.S. 8-54 [had] been complied with."[10]

In dissent, Chief Justice Sharp, joined by Justice Exum, chided the majority for "disregard[ing] this Court's repeated admonition that 'it is better to give *no instruction* concerning failure of defendant to testify unless he requests it.' "[11] To the majority's holding that the undue repetitions in the charge were not prejudicial, the Chief Justice replied, "This conclusion ignores the fact that certain medicines taken in small doses may effect a cure while a large dose of the same medicine, or a small one indiscriminately repeated, can be fatal."[12] Finally, of the trial judge's admonition not to speculate on the reasons for defendant's absence from the stand, the dissent concluded, "[t]o prohibit this thought was to suggest it."[13]

At common law parties to legal actions were not allowed to testify. In the mid-nineteenth century, however, North Carolina and many other states enacted statutes making parties competent witnesses. The question remained whether the removal of a defendant's inability to testify should produce an inference of guilt when defendant failed to use his opportunity to attest to his innocence. In 1881 North Carolina enacted the predecessor of section 8-54,[15] which allowed criminal defendants to remain silent without a presumption of guilt being created.[16] Like its predecessor, the current statute is an attempt to give meaning to a defendant's constitutionally mandated protection from compulsory self-incrimination.[17] If silence were permitted to raise an inference of guilt, the defendant's choice of whether or not to testify would be a meaningless one, for his decision to testify would subject him to questioning that

8. State v. Caron, 26 N.C. App. 456, 215 S.E.2d 878 (1975).
9. 288 N.C. at 473, 219 S.E.2d at 72.
10. *Id.*
11. *Id.* at 474, 219 S.E.2d at 72, *quoting* State v. Bryant, 283 N.C. 227, 232, 195 S.E.2d 509, 512 (1973).
12. 288 N.C. at 474, 219 S.E.2d at 73.
13. *Id.*
14. State v. Walker, 251 N.C. 465, 479, 112 S.E.2d 61, 71 (1960); 8 J. WIGMORE, EVIDENCE § 2272, at 427 (McNaughton rev. 1961).
15. N.C. Rev. Stat. ch. 89 (1881), *as amended* N.C. GEN. STAT. § 8-54 (1969).
16. State v. Walker, 251 N.C. 465, 479, 112 S.E.2d 61, 71 (1960).
17. *See* Note, *Comments to the Jury on Defendant's Failure to Testify*, 64 DICK. L. REV. 164 (1960).

could produce evidence of his guilt, while his decision not to testify would be treated as evidence of guilt.

In *Bruno v. United States*[18] the United States Supreme Court interpreted a federal statute[19] worded almost identically to section 8-54 of the North Carolina General Statutes.[20] The Court held the statute to mean that when the defendant requests a federal judge to so charge, the judge is required to instruct the jury of defendant's right to silence and of the absence of any presumption of guilt resulting from his silence.[21] Although dealing with the problem in a different context, the Court in *Bruno* raised the same issue that underlies cases in which the defendant objects to or fails to request the instruction: how does the jury react to an instruction to ignore the defendant's silence. It was argued in *Bruno* that the defendant was not harmed by the judge's refusal to comply with the requested instruction since, had it been given, the charge would only have directed the jury's attention to the defendant's failure to testify and thus heightened the natural inference of guilt that arises when the jurors learn that the defendant will not testify. The Court found that, "[b]y legislating against the creation of any 'presumption' from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind."[22] Congress's intent, rather, was to allow the accused "to make his own choice" of whether the jury should be instructed, by balancing the risk of highlighting his failure to testify against the advantage of informing the jury of the "no presumption" principle.[23]

Some legal scholars and jurists have also doubted the efficacy of such instructions regarding defendant's failure to testify.[24] Professor Wigmore, for example, thought that a natural inference of guilt arises

18. 308 U.S. 287 (1939).

19. The statute provided that in federal criminal trials "the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." Act of March 16, 1878, ch. 37, 20 Stat. 30, *as amended*, 18 U.S.C. § 3481 (1969).

20. *Compare* statute quoted at note 19 *supra, with* statute quoted at note 1 *supra*.

21. 308 U.S. at 293.

22. *Id.* at 293.

23. *Id.* at 294.

24. An interesting study which lends support to this point of view is cited at Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 266 (1966). The University of Chicago Jury Project found that experimental juries reacted to an instruction to disregard evidence by becoming even more aware of the evidence. When defendants in negligence suits disclosed they had insurance and no objection was made, the average verdict was $33,000. When defendants disclosed that they were insured, the plaintiff objected and the judge instructed the jury to disregard the evidence, the average verdict was $46,000.

when jurors observe the defendant's failure to take the stand and that instructing a jury to ignore this inference is useless. "It is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends toward confusion and a disrespect for the law's reasonableness."[25] One judge, arguing for eliminating the required instruction, stated that doing so " 'would cure . . . a species of legal hypocrisy whereby courts and jurors are compelled to assume an appearance of disregarding and forgetting something which is practically impossible for either of them to disregard or forget.' "[26]

While a natural inference probably does arise from the accused's failure to take the stand, courts have generally rejected the arguments for entirely eliminating the instruction. Some have stressed that the law presumes the innocence of defendants and that therefore the accused should be allowed to attempt to minimize any existing adverse inference either by choosing to instruct the jury of the presumption or by choosing not to further emphasize his silence.[27]

Not all courts, however, recognize the right to a choice in cases in which the defendant does not desire the instruction. The *Bruno* Court,[28] in upholding the defendant's right to the instruction when requested, noted that knowledge of the human mind was not so certain as to "justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause 'shall not create any presumption against him.' "[29] In *United States v. Garguilo*[30] Judge Friendly for the Second Circuit Court of Appeals relied on the above quotation from *Bruno* to find that there was no error when the same instruction was given in the absence of a request by the accused. Noting the natural adverse inference that arises from defendant's failure to testify, Judge Friendly thus found it quite possible that the instruction would be helpful rather than prejudicial since it is not known that the jury could not or would not heed the instruction.[31] The Second Circuit thereby

25. J. WIGMORE, *supra* note 14, at 436.

26. Hiscock, *Criminal Law and Procedure in New York*, 26 COLUM. L. REV. 253, 259 (1926), *quoted in* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 22 (1959).

27. *See* United States v. Gainey, 380 U.S. 63, 73 (1965) (Douglas, J., dissenting); Bruno v. United States, 308 U.S. 287 (1939).

28. *See* text accompanying notes 18-23 *supra.*

29. 308 U.S. at 294.

30. 310 F.2d 249 (2d Cir. 1962).

31. *Id.* at 252.

interpreted *Bruno* in such a way as to allow removal of the very choice that the *Bruno* decision had provided.

Although the United States Supreme Court's decision in *Griffin v. California*[32] has furnished the rationale for some courts' decisions that the unrequested instruction is erroneous, it has been seen by other courts as not preventing a contrary conclusion.[33] *Griffin* held that the fifth and fourteenth amendments to the United States Constitution forbid comment by the court on the accused's silence.[34] The *Griffin* case dealt with an instruction that defendant's silence *could* be considered by the jury as evidence of his guilt. The debate about *Griffin*'s meaning has centered around whether *Griffin* forbids only those instructions that allow adverse inferences or whether *Griffin*'s sanction against "comment" extends to an unrequested charge that no adverse inference is allowed.[35]

In *State v. Bryant*[36] the North Carolina Supreme Court interpreted *Griffin* as barring only an instruction that defendant's silence was evidence of guilt.[37] While the North Carolina court has held that, in the absence of a request by the accused, section 8-54 does not create a duty for the judge to instruct that silence creates no inference of guilt,[38] the court has frequently suggested that the instruction not be given unless requested by the defendant.[39] Despite these repeated admonitions, the court has found prejudicial error in the sua sponte instruction in only two cases, and in both cases the judge informed the jury of the defendant's right not to testify but failed to mention that no adverse inference could arise from the exercise of that right.[40] These two instructions

32. 380 U.S. 609 (1965).
33. Many of these cases are collected at 18 A.L.R.3d 1335 (1968).
34. 380 U.S. at 613.
35. 18 A.L.R.3d 1335 (1968).
36. 283 N.C. 227, 195 S.E.2d 509 (1973).
37. *Id.* at 233, 195 S.E.2d at 513.
38. State v. Baxter, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974); State v. Bryant, 283 N.C. 227, 231, 195 S.E.2d 509, 512 (1973); State v. Rainey, 236 N.C. 738, 741, 74 S.E.2d 39, 41 (1953); State v. Jordan, 216 N.C. 356, 365, 5 S.E.2d 156, 161 (1939).
39. State v. Bryant, 283 N.C. 227, 233-34, 195 S.E.2d 509, 513 (1973); State v. Barbour, 278 N.C. 449, 457, 180 S.E.2d 115, 120 (1971), *cert. denied*, 404 U.S. 1023 1972); State v. Jordan, 216 N.C. 356, 366, 5 S.E.2d 156, 161 (1939).
40. State v. Baxter, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) (instruction that defendants " 'did not offer any evidence as they have a right to do' " was prejudicial error since it failed to instruct the jury "correctly and completely"). State v. Rainey, 236 N.C. 738, 740-41, 74 S.E.2d 39, 41 (1953) (error in mentioning defendant's right to silence without noting presumption of innocence, but held harmless error since presumption was mentioned three times elsewhere in the charge).

were erroneous because they were incomplete statements of the law, not because any right of the defendant would be violated if the judge gave the full instruction without a request by the defendant.[41]

Even accepting the notion that the unsolicited instruction is not error per se, the phrasing of instructions such as the one given in *Caron*,[42] which repeatedly emphasizes defendant's silence, could certainly prejudice the defendant. It is the wording of instructions rather than the fact that an instruction was given that the court has criticized most often.[43] The North Carolina courts have frequently urged that the language of the statute itself be used in giving the instruction,[44] and since 1973, a pattern instruction has been available.[45] Yet instructions such as that in *Caron* continue to be given, and only two supreme court justices have been willing to go beyong a suggestion that more "commendable" language could be used.[46]

Adoption of the view that the sua sponte charge of "no presumption of guilt" is reversible error would raise the question of the proper procedure to use at trial. The rule of *Bruno v. United States*[47] and the similar North Carolina case, *State v. Rainey*,[48] should be retained: when defendant requests the instruction that no inference arises from his failure to testify, the trial judge is required to so charge the jury. This

41. State v. Baxter, 285 N.C. 735, 738-39, 208 S.E.2d 696, 698 (1974):
While it was not error for the court, in the absence of a request by the defendant, to instruct the jury correctly and completely on this point, any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him.

42. *See* text accompanying note 7 *supra*.

43. *E.g.*, State v. Caron, 288 N.C. 467, 473, 219 S.E.2d 68, 72 (1975) ("we do not commend the instruction given . . . as it was unduly repetitious"); State v. Baxter, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) (charge was "incomplete statement"); State v. Bryant, 283 N.C. 227, 233-34, 195 S.E.2d 509, 513 (1973) ("we do not approve the language chosen"); State v. Barbour, 278 N.C. 449, 457, 180 S.E.2d 115, 120 (1971), *cert. denied*, 404 U.S. 1023 (1972) ("the instruction is meager and is not commended"); State v. Paige, 272 N.C. 417, 423, 158 S.E.2d 522, 527 (1968) ("infelicitous choice of words").

44. *E.g.*, State v. McNeill, 229 N.C. 377, 379, 49 S.E.2d 733, 734 (1948); State v. Caron, 26 N.C. App. 456, 460, 215 S.E.2d 878, 880 (1975); State v. Powell, 11 N.C. App. 465, 474, 181 S.E.2d 745, 760 (1971).

45. NORTH CAROLINA PATTERN INSTRUCTIONS—CRIM. 101.30 (1973). It reads: "The defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way."

46. *See* State v. Caron, 288 N.C. 467, 474, 219 S.E.2d 68, 72 (1975) (Sharp & Exum, JJ., dissenting).

47. 308 U.S. 287 (1939).

48. 236 N.C. 738, 74 S.E.2d 39 (1953).

rule protects the defendant who fears that the jury may attach undue significance to his silence and who yet believes that the judge's instruction has the potential of diminishing the adverse inference that naturally arises from his silence.[49]

Currently in North Carolina, attorneys are not required to request instructions on "substantive" features of a case, while they must request an instruction on a "subordinate" feature.[50] Failure to request the "subordinate" feature instruction leaves the judge with discretion whether to charge the jury on the issue.[51] The instruction about defendant's failure to testify has been classified as relating to a subordinate feature of a case,[52] and thus the question arises whether the judge's discretion to instruct in the absence of a request should be retained. Several jurisdictions allow the judge to use his discretion but subject it to the defendant's right to object.[53] If the accused offers an objection to the judge's proposed instruction, it is error for the judge to give the instruction.

In North Carolina, however, attorneys are not required to object to errors in an instruction in order to preserve the error for appeal; [54] and even if they do object, it is not necessarily erroneous for the judge to instruct over their objections. The alternatives for implementing the rule that the sua sponte charge is error are thus either to remove the judge's discretion to charge when the defendant does not request the instruction or to retain the discretion and to require the defendant to object if he thinks the instruction will call undue attention to his silence. Since a judge-made rule currently excuses the defendant from objecting in criminal actions,[55] the court itself could change the rule and require the accused to object at trial if he wishes to bar comment on his right to silence. If the judge then instructed over the defendant's objection, the charge would be erroneous. Either of these alternatives would allow "defendant's counsel [to] observe the entire proceedings and make his

49. Bruno v. United States, 308 U.S. 287 (1939). *See* Note, *Comments to the Jury on Defendant's Failure to Testify*, 64 DICK. L. REV. 164.

50. Broun, *North Carolina Jury Instruction Practice—Is It Time to Get the Judge Off the Tightrope?*, 52 N.C.L. REV. 719, 720 (1974).

51. State v. Powell, 11 N.C. App. 465, 474, 181 S.E.2d 754, 760 (1971).

52. State v. Rainey, 236 N.C. 738, 741, 74 S.E.2d 39, 41 (1953).

53. *E.g.*, United States v. Smith, 392 F.2d 302 (4th Cir. 1968) (dictum); Russell v. State, 240 Ark. 97, 398 S.W.2d 213 (1966); Gross v. State, 261 Ind. 489, 306 N.E.2d 371 (1974).

54. Broun, *supra* note 50, at 720.

55. *Id.* Professor Broun points out that N.C.R. Civ. P. 46(c) excuses attorneys from objecting to the charge in civil cases. *Id.* at 720 n.6. Broun argues for requiring objections to preserve error for appeal in civil and criminal cases, with an exception for "plain error." *Id.* at 733-34.

choice after he has determined whether an instruction is needed to protect the defendant's rights in the particular case."[56] In addition, the choice would be given "to the one whose rights are at stake; hence, if defendant [were] ultimately prejudiced by his selection, he [would] have no cause to complain."[57]

Regardless of whether the rule is changed to allow the defendant an absolute choice about giving the instruction, North Carolina's appellate courts should enforce their frequently repeated suggestion that the words of the statute or the available pattern instruction be used in charging the jury.[58] The instruction in *Caron* is a flagrant example of the ineffectiveness of these mere warnings to the trial courts. It is difficult to believe that such an instruction could not prejudice the defendant's right to remain silent, and when the means to assure that the instruction is properly given are so readily available, failure to do so is inexcusable.

The "natural inference" that a defendant who does not testify in his own behalf must be guilty runs counter to the law's presumption of innocence and to the accused's privilege of silence. Innocent defendants who decline to testify do exist; their silence may be prompted by fear of impeachment through the introduction of evidence of bad character or prior conviction, by fear that under the pressure of cross-examination their demeanor may adversely affect the jury, or by fear of exposing matters remotely related to the charges.[59] If the defendant, innocent or guilty, "is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention."[60] *State v. Caron* is the latest example of the North Carolina Supreme Court's willingness to pay lip service to this right of the defendant while refusing to enforce the right.

BARBARA C. RUBY

56. Note, 64 DICK. L. REV. *supra* note 17, at 171.
57. *Id.*
58. *See* notes 44-45 and accompanying text *supra.*
59. Wilson v. United States, 149 U.S. 60, 66 (1893); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 118 (2d ed. E. Cleary 1972); J. WIGMORE, *supra* note 14, at § 2272.
60. Russell v. State, 240 Ark. 97, 100, 398 S.W.2d 213, 215 (1966).

Criminal Law and Procedure—The Automaton Court: North Carolina Places Burden on Defendant to Prove Unconsciousness

The criminal defense of unconsciousness has been recognized in many states[1] and in England[2] as a means by which a defendant, although he has committed the act with which he is charged, can escape criminal responsibility. Unconsciousness, often referred to as automatism, occurs when one who engages in what would otherwise be criminal conduct is at that time in a state of unconsciousness or semi-consciousness.[3] This defense, however, is not a simple one, and its use presents several difficulties. The principal problems center on whether the defense is in actuality only an offshoot of an insanity defense and therefore should require no separate treatment with respect to the applicable criminal law and procedure and whether, assuming that unconsciousness is a separate and distinct defense, the burden of persuading the trier of fact that the defendant did the act while in a state of unconsciousness should be on the defendant.

In *State v. Caddell*[4] the North Carolina Supreme Court was presented both problems and in a nearly unanimous decision[5] held that the defenses of insanity and unconsciousness are not the same in nature and that the burden rests on the defendant to establish his defense of unconsciousness to the satisfaction of the jury. The court's decision is unusual in that it not only refuses to follow its own precedent, as well as strong California precedent and some English case law to the contrary, but also bases its decision on the rationale that unconsciousness, al-

1. Initially Kentucky, California and Wisconsin recognized the defense in the late 1800's and early 1900's in court decisions. *See* People v. Methever, 132 Cal. 326, 64 P. 481 (1901); Fain v. Commonwealth, 78 Ky. 183 (1879); Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910). Other states soon followed with court decisions that approved the unconsciousness defense and often the defense was incorporated into the state statutory framework. *See* note 14 *infra* and accompanying text.

2. The English acceptance of the defense received full court support in Rex v. Harrison-Owen, [1951] 2 All E.R. 726 (Crim. App.) and numerous cases thereafter. *See* text accompanying notes 38-49 *infra*.

3. For further definition and discussion of the defense see 1 J. BISHOP, BISHOP ON CRIMINAL LAW §§ 388, 395 (9th ed. 1923); 1 H. BRILL, CYCLOPEDIA OF CRIMINAL LAW §§ 124, 128 (1922); 1 W. BURDICK, THE LAW OF CRIME §§ 216, 217 (1946); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 44 (1972) [hereinafter cited as LAFAVE]; J. MILLER, MILLER ON CRIMINAL LAW § 39 (1934); H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954); 1 F. WHARTON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 50 (R. Anderson ed. 1957). *See also* 21 AM. JUR. 2d *Criminal Law* § 55 (1965); 22 C.J.S. *Criminal Law* § 55 (1961).

4. 287 N.C. 266, 215 S.E.2d 348 (1975).

though "distinct" from insanity, is "akin" to it and hence the burden of proof placed on the defendant with respect to insanity should likewise be applicable to unconsciousness.[6] This result is a confusing mixture of the true policy grounds and case law that properly justify the court's conclusion.

Willis Tony Caddell was charged with kidnapping and was tried before a jury in Guilford County. He entered pleas of not guilty and not guilty by reason of insanity. At trial the State's evidence tended to show that defendant kidnapped a fourteen-year-old girl, that he attempted intercourse with her, and that he choked and beat the victim over a period of thirty minutes. Defendant testified in his own behalf and stated that he "remembered nothing"[7] of the events of that day. He also introduced medical testimony, contrary to the advice of his counsel, that tended to show that defendant was *not* insane. Upon this evidence, the superior court judge charged the jury with respect to the issue of unconsciousness[8] and insanity, and the jury convicted defendant.

On appeal to the North Carolina Supreme Court, defendant asserted that the jury instruction that the defendant does not have the burden of proving unconsciousness and the instruction that the jury should find him not guilty if they found he was "completely unconscious" were inconsistent.[9] Although acknowledging the truth of this contention, the majority concluded that defendant *did* have the burden and that therefore the alleged error was harmless and in favor of defendant.[10] Relying upon an analogy to the insanity defense and quoting some of the

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5. Chief Justice Sharp and Justice Copeland dissented. *See* text accompanying notes 57-60 *infra*.

6. 287 N.C. at 281-90, 215 S.E.2d at 358-63.

7. *Id.* at 272, 215 S.E.2d at 352.

8. The instruction read:

> Now, members of the jury, a person cannot be held criminally responsible for acts committed while he is unconscious. Unconsciousness is *never* an affirmative defense. Where a person commits an act without being conscious thereof, such act is not criminal even though if committed by a person who was conscious it would be a crime. The defendant has *no burden* to prove that he was unconscious. If you find that the defendant was completely unconscious of what transpired . . . then he would not be guilty . . . .

Id. at 283-84, 215 S.E.2d at 359 (emphasis added).

9. The proper instruction when a defendant does not have the burden of proving unconsciousness is that the jury should find the defendant not guilty unless they find beyond a reasonable doubt that he was conscious of what transpired. In other words, when the defendant does not have the burden, he only has to show "reasonable doubt" and the state has the ultimate burden of persuading the jury that the defendant was conscious of his acts. *See generally* State v. Mercer, 275 N.C. 108, 116, 165 S.E.2d 328, 336 (1969); LAFAVE, *supra* note 3, at § 44.

10. 287 N.C. at 284, 290, 215 S.E.2d at 359-60, 363.

rationale in *Bratty v. Attorney General for Northern Ireland*,[11] the court concluded:

> "The necessity of laying [the] proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury." . . .
>
> . . . .
>
> . . . We are unable to perceive a reasonable basis for distinction . . . between insanity . . . and unconsciousness. . . . In [both] defenses the contention is the same—the defendant did the act, but should not be convicted because the requisite *mental element* was not present. The same presumption, which casts upon the defendant, claiming insanity, the burden of proving it to the satisfaction of the jury, and thus to negative the presence of *mens rea*, applies also to the defendant who asserts a temporary mental lapse due to [unconsciousness].[12]

The supreme court, therefore, placed the burden of proving unconsciousness, to the satisfaction of the jury, on the defendant.

Unlike the situation in North Carolina, where contacts with the automatism defense have been few, other American courts have dealt extensively with the situation.[13] In fact, in some states the defense of unconsciousness has been codified into state law.[14] Where the defense is recognized, various sources of automatism have been accepted by court decision. These sources include somnambulism and somnolenture,[15] hypnotism,[16] diabetic shock,[17] epileptic black-outs,[18] kleptoman-

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11. [1961] 3 All E.R. 523.

12. 287 N.C. at 288-89, 215 S.E.2d at 362-63 (emphasis added and deleted). Note the court's reference to mens rea. *See* text accompanying notes 25, 50-55 *infra*.

13. For a broad treatment of the defense see Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645 (1963). *See also* Edwards, *Automatism and Criminal Responsibility*, 21 MODERN L. REV. 375 (1958).

14. ARIZ. REV. STAT. ANN. § 13-134(2) (1973 Supp.); CAL. PENAL CODE § 26(5) (1970); IDAHO CODE ANN. § 18-201(2) (1975 Cum. Supp.); MONT. REV. CODES ANN. § 94-201(5) (1969); NEV. REV. STAT. § 194.010(6) (1967); OKLA. STAT. ANN. tit. 21, § 152(6) (1958). The typical statute reads: "All persons are capable of committing crimes except those belonging to the following classes: . . . Persons who committed the act charged without being conscious thereof. . . ." CAL. PENAL CODE § 26(5) (1970).

15. Somnambulism is commonly referred to as "sleep-walking," while somnolenture has been defined as "the lapping over of a profound sleep into the domain of apparent wakefulness." Fain v. Commonwealth, 78 Ky. 183, 187 (1879), *quoting* F. WHARTON & M. STILLE, A TREATISE ON MEDICAL JURISPRUDENCE § 151 (1855). *See also* H. BRILL, *supra* note 3, at § 127.

16. People v. Worthington, 105 Cal. 166, 38 P. 689 (1894).

17. Corder v. Commonwealth, 278 S.W.2d 77 (Ky. 1955).

18. Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960); Smith v. Commonwealth, 268 S.W.2d 937 (Ky. 1954); People v. Magnus, 155 N.Y.S. 1013 (Ct. Gen. Sess. 1915).

ia,[19] delirium from fever or drugs,[20] drunkenness,[21] and cerebral concussion.[22] However, the decisions with respect to these sources have not been uniform[23] and, compounded by the variance among the states concerning where the burden of the defense lies, the result has been inconsistent case law that provides ample support even within a single jurisdiction for different findings.[24]

The primary reason for this variance is the confusion over the constituent element of crime—actus reus or mens rea[25]—to which the automatism defense relates. If the unconsciousness defense is categorized as precluding "voluntariness," then the defense relates to the lack of an actus reus. Such is the view in California.[26] However, some statutes and courts characterize the defense as relating to the presence or absence of mens rea.[27] This divergence over whether the defense is connected with the "voluntary act" or the "guilty mind" produces two

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19. H. BRILL, *supra* note 3, at § 126.

20. *See* People v. Kelly, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (Sup. Ct. 1973); Note, *Drug Induced Insanity and Unconsciousness—A Clarification of California Law*, 1 PEPPERDINE L. REV. 442 (1974).

21. *See* Lewis v. State, 196 Ga. 755, 27 S.E.2d 659 (1943). Although drunkenness that results in a "black-out" condition may sometimes be considered a source of unconsciousness or an affirmative defense in and of itself, it has been held that "voluntary" drunkenness is an exception and provides no defense (for instance, when the defendant has formed an intent to commit a crime and drinks to give himself courage to commit it). State v. Arnold, 264 N.C. 348, 141 S.E.2d 473 (1965).

22. Carter v. State, 376 P.2d 351 (Okl. Crim. App. 1962).

23. *Compare* People v. Higgins, 5 N.Y.2d 607, 159 N.E.2d 179, 186 N.Y.S.2d 623 (Ct. App. 1959) (where the court did not differentiate between epilepsy and insanity) *with* People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (Dist. Ct. App. 1943) (where the court held that insanity is not the same as epilepsy).

24. *Compare* Fain v. Commonwealth, 78 Ky. 183 (1879) *with* Tibbs v. Commonwealth, 138 Ky. 558, 128 S.W. 871 (1910) for an example of this variance within Kentucky.

25. *See, e.g.*, 1 W. BURDICK, *supra* note 3, at § 96 where the elements of crime are defined:

> Every crime necessarily requires two elements . . . one being physical the other mental. The physical element is the prohibited thing done or the commanded thing left undone, or what is called "the act" [or the actus reus or the voluntary act]. The mental element is the state or condition of the doer's mind which accompanies the act, the human will, otherwise known as "the intent" [or the mens rea or the guilty mind].

26. *See* CAL. PENAL CODE § 26(5) (1970), *quoted supra* note 14. The actus reus category is also the one chosen by the Model Penal Code:

> (1) A person is not guilty of an offense unless his liability is based on conduct which includes a *voluntary act* or the omission to perform an act of which he is physically capable.
>
> (2) The following are not voluntary acts within the meaning of this Section:
>
> (a) a reflex or convulsion;
>
> (b) a bodily movement during unconsciousness or sleep; . . . .

MODEL PENAL CODE § 2.01 (Prop. Official Draft, 1962) (emphasis added).

27. *See, e.g.*, ARK. STAT. ANN. § 41-116 (1964).

important consequences: the categorization of unconsciousness as dependent upon mens rea instead of actus reus can result in (1) a confusion with the insanity defense,[28] and (2) a different burden of proof upon the defendant (*i.e.*, if the focus is on actus reus, the burden is on the State; if on mens rea, the burden will fall on the defendant).[29]

With respect to the first consequence, the equating of automatism with insanity may in some instances seem somewhat purposeful due to the results occasioned by pleading one defense as opposed to the other. While, for example, a plea of "not guilty by reason of insanity" carries with it in most jurisdictions a commitment for some definite term to a mental hospital or institution for the criminally insane, the plea of "not guilty by reason of unconsciousness" typically results in outright acquittal of the defendant.[30] Therefore, some courts utilize the association of insanity with unconsciousness[31] to preclude use of automatism as a separate defense, instead recognizing the unconsciousness defense "as a species of insanity."[32] In this way, a focus on automatism as relating to mens rea enables the court to confuse automatism with insanity and serves as a device whereby the courts can dictate the result of pleas (and strike a plea of automatism by the defendant) due to the courts' dislike for the outright release afforded by the assertion of the unconsciousness defense.

Concerning the burden-of-proof[33] consequence in jurisdictions that

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28. *See* text accompanying notes 31-33 *infra*. In fact, several authors list the sources of unconsciousness under the general heading of "insanity" without a separate discussion of automatism. *See, e.g.*, 1 J. BISHOP, *supra* note 3, at § 388.

29. *See* text accompanying notes 34-49 *infra*.

30. LAFAVE, *supra* note 3, § 44, at 338.

31. Of course, the insanity defense always relates to the mens rea element of a crime. The general test for insanity is "that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from *disease of the mind*, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843) (emphasis added). It is the meaning of "disease of the mind" that frequently creates problems with respect to unconsciousness sources. Although, technically, unconscious acts caused by epilepsy, somnambulism, etc. are "diseases," most courts that recognize automatism consider that such sources are not the "diseases" of insanity. *See, e.g.*, State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

32. Tibbs v. Commonwealth, 138 Ky. 558, 567, 128 S.W. 871, 874 (1910). The court says in its opinion that it fails to see how evidence of somnambulism "would constitute any defense other than that embraced in a plea of insanity." *Id.*

33. It is interesting to note that the United States Supreme Court has also wrestled with the problem of the burden of proof when a mens rea type defense is asserted. *See* Davis v. United States, 160 U.S. 469 (1895). In that case the Court was torn between placing a burden of proof to the satisfaction of the jury on the defendant or maintaining the reasonable doubt burden on the prosecution. Justice Harlan decided that the prosecution should have the burden because, otherwise, a burden on the defendant "is in

recognize the distinction between insanity and unconsciousness, the cases in two such jurisdictions provide an interesting comparison. In California, where courts focus upon the actus reus, the burden of proof is on the defendant merely to go forward with the evidence to raise a reasonable doubt as to his consciousness,[34] and the ultimate burden of persuasion remains on the prosecution. Although the California courts recognize that the law creates a presumption that when a person commits an act, he is presumed conscious, it emphasizes that the "cardinal rule in criminal cases [is] that the burden rests on the prosecution to prove the offense beyond a reasonable doubt."[35] Thus, one California court has stated that " '[m]en are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem, they must impart that knowledge by affirmative proof [,] . . . [which] is merely another way of saying that defendant has the burden of going forward."[36] Thus, under this analysis, *any* evidence produced by the defendant would be sufficient to raise such a defense and to require the trial judge to instruct upon unconsciousness—even if the evidence is merely the defendant's statement that he "remembers nothing" or that "it was hazy."[37]

In contrast to California, the English courts have not been unified in their allocation of the burden of proving consciousness and of persuading the jury. In *Rex v. Harrison-Owen*[38] the defendant, who was arrested in a home that was obviously being burglarized, testified that he had "no recollection" of entering the house and that he must have done so in a state of automatism. Lord Goddard stated that the defendant was entitled to an automatism instruction because "[w]hen a prisoner sets up such defences it is as well to leave the matter to the jury."[39]

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effect to require him to establish his innocence, by proving that he is not guilty of the crime charged." *Id.* at 487. The issue of unconsciousness itself has not been specifically dealt with by the Court. The tendency of the Court, however, has been to leave the burden of proof on the prosecution and the Court may eventually extend this analysis to the unconsciousness defense. *See* Mullaney v. Wilbur, 421 U.S. 684, 701-03 (1975).

34. *See* People v. Hardy, 33 Cal. 2d 52, 64, 198 P.2d 865, 872 (1948).

35. *Id.* at 63-64, 198 P.2d at 871.

36. *Id.* at 64-65, 198 P.2d at 872, *quoting in part* People v. Nihell, 144 Cal. 200, 202, 77 P. 916, 917 (1904).

37. *See, e.g.*, People v. Wilson, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (Sup. Ct. 1967) (where the court stated that the fact that evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon). *But cf.* Thomas v. State, 201 Tenn. 645, 301 S.W.2d 358 (1957) (where the court held that a failure to remember what happened is alone not sufficient to present such an issue to the jury).

38. [1951] 2 All E.R. 726 (Crim. App.).

39. *Id.* at 727.

Accordingly, this analysis was similar to that of the California courts and focused upon the actus reus element of the crime.[40] In a later case, *Regina v. Charlson*,[41] the defendant produced medical evidence of a cerebral tumor and a history of ill health in the family; the court instructed the jury as to unconsciousness, and the jury acquitted the defendant despite the brutal nature of the crime.[42] In response to this "defect of the law" (*i.e.* the outright release for dangerous defendants),[43] the court the following year in *Regina v. Kemp*[44] muddled the distinction between the insanity and unconsciousness defenses and accordingly refused to instruct the jury on unconsciousness.

After *Kemp*, *Hill v. Baxter*[45] marked the initial policy change of the English courts toward a shifting of the burden of proving automatism to the defendant. In *Hill* no evidence of the defendant's automatous action other than his own testimony of "remembering nothing" was presented. The same Lord Goddard of *Harrison-Owen* responded to these facts: "[T]he onus of proving that [the defendant] was in a state of automation must be on him. [Automatism] is not only akin to a defence of insanity but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it."[46] Thus, the British court had clearly shifted to a mens rea analysis of the defense and had imposed some sort of burden on the defendant.

The court in *Bratty v. Attorney General for Northern Ireland*[47] attempted to answer the question whether the burden was that of going

40. *Id.* at 728 (where the court held that "[w]hether [it is] a *voluntary act* or not was a question for the jury") (emphasis added).

41. [1955] 1 All E.R. 859 (Chester Ass.).

42. The facts of the case show that the defendant-father called his ten-year-old son to a window and then brutally assaulted him with a mallet. *Id.*

43. See Edwards, *Automatism and Criminal Responsibility*, 21 MODERN L. REV. 375 (1958) for a discussion of the dissatisfaction of the courts with automatism and outright release afforded by the unconsciousness defense.

44. [1956] 3 All E.R. 249 (Bristol Ass.). In this case evidence of arteriosclerosis was introduced as a cause of defendant's unconsciousness. The trial judge broadened the "disease of the mind" focus of insanity to include these facts and thus preclude use of automatism. The court was obviously focusing on the mens rea element of the crime.

45. [1958] 1 Q.B. 277.

46. *Id.* at 282. Lord Devlin in the same case also related that a defendant cannot rely on the automatism defense without providing some evidence of it. Other language in the opinion is that the nature of the burden is one of "going forward" but that there must at least be some "prima facie" evidence before the defense can be relied on. He hedged, however, by stating that he reserved "for future consideration . . . the question of where the burden ultimately lies." *Id.* at 285.

47. [1961] 3 All E.R. 523. The facts of the case involved a murder of a young girl and the defendant stated that he had a "feeling of blackness." Medical evidence indicating a disease of the mind was also introduced.

forward or whether the burden was one of at least a degree of persuasion on the defendant. The court concluded that a "proper foundation" must be laid by the defendant before the evidence and charge of unconsciousness will be submitted to the jury. Lord Kilmuir suggested that the defense was similar to insanity and, concentrating on the mens rea element, concluded that some sort of persuasion burden should be on the defendant. However, Lords Denning and Morris spoke of the necessity of a "voluntary act" and categorized the burden as merely one of going forward; nevertheless, both still recognized the need of first laying a proper foundation.[48] Therefore, the court split in its analysis and left authority for at least two divergent viewpoints with respect to defendant's burden of proof.[49]

Although the North Carolina experience with automatism has been limited to two cases, the conclusions of the state's supreme court have been just as varied as those of the English courts. In *State v. Mercer*[50] the trial judge limited the evidence of defendant's "black-out" to the issue of intent. A unanimous supreme court, however, held that this ruling was erroneous and cited California law as authority for the proposition that "[u]nconsciousness is never an *affirmative* defense. . . ."[51] and that even though the only evidence of automatism was the defendant's own testimony, he was entitled to an instruction to the jury that he could be found not guilty because of his unconscious-

48. Therefore, the burden advocated by Denning and Morris is not that of going forward which typically requires that the defendant merely come forward and present *any* evidence but is a slightly stricter burden requiring at least a proper foundation more than the mere statements by the accused (*i.e.*, some medical testimony is needed). *Id.* at 535-36. In this light, the Denning and Kilmuir proposals are not far apart, although Denning would still leave the ultimate burden of persuasion on the state. *Id.* at 536.

49. As an example of the complications that resulted from this divergence, see Regina v. Quick, [1973] 3 All E.R. 347 (where defendant assaulted the victim while in diabetic shock and the court confessed confusion not only as to where the burden of the defense lay but also as to whether such shock was the result of an internal disorder and thus a "disease of the mind" precluding assertion of the unconsciousness defense); Beck, *Voluntary Conduct: Automatism, Insanity and Drunkenness*, 9 CRIM. L.Q. 315 (1967) (in which the author relates that three types of automatism have developed since *Bratty*: (1) Sane automatism (involving a blow to the head and the actus reus element; the burden is always on the Crown), (2) Insane automatism (resulting from internal malfunction; the defendant has the burden of persuasion on the balance of probabilities), and (3) Alcoholic automatism (raising the question of lack of intent to a specific intent crime; the burden is on the Crown)). *See also* Sullivan, *Self induced and Recurring Automatism*, 123 NEW L.J. 1093 (1973) (in which the author discusses the turmoil created by the unconsciousness defense).

50. 275 N.C. 108, 165 S.E.2d 328 (1969). The case involved a murder by the defendant who testified that he was "blank in mind." No medical evidence concerning the cause of the black-out or symptoms of somnambulism or epilepsy was introduced.

51. *Id.* at 117, 165 S.E.2d at 335.

ness. No mention was made of English precedent or the likeness of the defense to insanity. Automatism, then, in accord with California law, was held to be a defense of "no voluntary act," as to which the state and not the defendant had the ultimate burden of proof.[52]

Caddell, six years later, not only marks an overruling of *Mercer* and a refusal to follow California precedents, but also is indicative of the recognition of British law precedents on the issue and the dissatisfaction of courts in general with the automatism defense. The majority recognized that there is variance with respect to the burden of proof[53] but decided that the rationale underlying the *Hill* decision and underlying the "proper foundation" analysis of Lord Kilmuir in *Bratty* was controlling. The court deemed this rationale to be that the defense of unconsciousness is "like unto insanity" and "it does not necessarily follow that the two defenses are different in law with respect to the burden of proof"[54]—both relate to the mens rea element, both involve facts that are within the realm of knowledge of the defendant alone, and both involve conclusive presumptions (in the case of insanity, the doing of the act presumes conscious volition).[55] Although the court incorrectly stated that *Mercer* was the *only* decision in which a court had allowed a defendant's uncorroborated testimony of a "black-out" to be sufficient to present the jury with the question of unconsciousness,[56] it was correct in its interpretation of English precedent as authority for placing an affirmative burden of proof on the defendant not only to produce evidence constituting a "proper foundation" but also to persuade the jury to their satisfaction that he was unconscious at the time of the crime.

Chief Justice Sharp, joined by Justice Copeland, dissented from the majority's conclusion that automatism is an affirmative defense and that the burden of proving it is on the defendant. Her focus, in contrast to

52. *Id.* at 115, 165 S.E.2d at 334.

53. 287 N.C. at 286, 215 S.E.2d at 361.

54. *Id.* at 288, 215 S.E.2d at 362. The burden of proving insanity to the satisfaction of the jury rests on the defendant. *See* State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949); State v. Swink, 229 N.C. 123, 47 S.E.2d 852 (1948); State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943).

55. *See* Annot., 8 A.L.R.3d 1246 (1966) (". . . the general criminal intent necessary to conviction is *deduced from the doing of the criminal act.*") (emphasis added).

56. 287 N.C. at 290, 215 S.E.2d at 363. Several California cases and at least one early English case permitted automatism to be raised when the only evidence of it was defendant's own testimony. *See* People v. Wilson, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (Sup. Ct. 1967) (cited *supra* note 37); Regina v. Harrison-Owen, [1951] 2 All E.R. 726 (Crim. App.) (cited *supra* note 38).

that of the majority, was on the actus reus,[57] and, instead of analogizing to the defense of insanity, she stated that "[t]he plea of unconsciousness is analogous to a plea of accident or of alibi, neither of which is an affirmative defense. Each plea merely negates an essential element of the crime charged."[58] She concluded that if defendant has a burden, it is only that of going forward.[59] The Chief Justice's analysis then depended upon the actus reus and upon one of the "long-established principles of our criminal jurisprudence—that the defendant has no burden to prove his innocence."[60]

Although the majority was at odds with the Chief Justice and ostensibly violated "long-established" criminal jurisprudence with its holding in *Caddell*, the decision appears to be a wise one and compatible with current policy formulations. First, the decision comes on the wings of the law-and-order movement of the seventies that advocates a toughened judicial stance against crime. Such a position then is consistent with the deterrence of criminal conduct, not by depriving the innocent of his rights, but by simply forcing the defendant, when the unusual automatism circumstances are involved, to provide a proper foundation for the jury to believe that such circumstances were actually present. The fear that the defendant will be deprived of an unconsciousness plea because of lack of corroboration of his testimony is in any event no different from the fear that an insanity plea will be denied because not supported by medical evidence. Secondly, the focus on mens rea seems justified because of the nature of the defense and its close relationship with the mental element. Also, since evidence of black-out or causes thereof lies entirely within the knowledge of the

57. 287 N.C. at 291, 215 S.E.2d at 364 (defendant "*voluntarily* committed the . . . *act* charged"). *Id.* at 293, 215 S.E.2d at 366 ("possibility of a *voluntary act*"; "*voluntary act* is an absolute requirement for criminal liability"), *quoting* LAFAVE, *supra* note 3, at 181.

58. *Id.* at 296, 215 S.E.2d at 367.

59. For support of her position, *see* Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960); People v. Hardy, 33 Cal. 2d 52, 64, 198 P.2d 865, 872 (1948); Lord Morris's opinion in Bratty v. Attorney Gen. for N. Ireland, [1961] 3 All E.R. 523, 535-36. Justice Sharp has also espoused the same opinion concerning the burden of proof with respect to the insanity defense. *See* State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975) (where she argued that the evidence introduced by defendant short of the foundation necessary to take the issue of insanity to the jury should still be considered in determining whether the accused formed the necessary intent; therefore, she argued that the ultimate burden should always remain on the state).

60. 287 N.C. at 301, 215 S.E.2d at 370. *See also* N.C. CONST. art. I, § 23; N.C. GEN. STAT. § 8-54 (1970). This long-established principle is the "cardinal rule" in People v. Hardy, 33 Cal. 2d 52, 64, 198 P.2d 865, 872 (1948) (*see* note 34 *supra*) and the "golden rule" of Lord Morris in Bratty v. Attorney Gen. for N. Ireland, [1961] 3 All E.R. 523, 535-36 (*see* note 48 *supra*).

defendant, the burden should be on him to bring out those facts that tend to negate the presence of the guilty mind which is necessary to convict. The presumption of consciousness deduced from the doing of the proscribed act is controlling, and the *defendant* should show and prove that at the time the act was committed, he was not conscious and thus did not possess the intent requisite to the crime. Finally, in view of the consequences of a plea of unconsciousness—acquittal and outright release—the decision rightly embodies the judicial dislike for the defense that has been categorized as "the refuge of guilty minds." Thus, by making automatism an affirmative defense with burden of satisfaction on the defendant, the court is simply hoping to close off an avenue of outright release for the guilty defendant. In the long run, however, the problems raised by this defense cannot be solved in one case; therefore it remains the job of the General Assembly to awaken from its own automatous state and to clear the confusion surrounding the defense of unconsciousness.[61]

JAMES M. ISEMAN, JR.

Criminal Procedure—North Carolina Rejects a Retroactive Application of Mullaney

Homicide defendants in North Carolina who asserted that they had acted in self-defense or in the heat of passion upon sudden provocation were long required to "satisfy the jury" of the truth of their assertions.[1]

61. Several variances on the theme and solutions to the problems have been proposed. *See* State v. Sikora, 44 N.J. 453, 210 A.2d 193 (1965) (in which an expert witness psychiatrist proposed that the mens rea element be abolished because, in his opinion, the "conscious is always the unwitting and unsuspecting puppet of the unconscious." *Id.* at 458, 210 A.2d at 198); Beck, *supra* note 49 (in which Beck proposes that the fault lies in a criminal code giving outright acquittal and that the legislature should require some sort of compulsory treatment after the trial if an automatism defense is asserted); Fingarette, *Diminished Mental Capacity as a Criminal Law Defense,* 37 MODERN L. REV. 264 (1974) (in which the author says that the defense of automatism is not unconsciousness but is an "altered state" of conscious action where defendant has lost "rational control of his conduct" and that the confusion can be alleviated by treating the defense as such.); and Sullivan, *supra* note 49 (in which he suggests that a solution lies in making the unconscious defendant criminally negligent if he had a previous history of black-outs and the jury found that a reasonable man would have anticipated the unconscious state which occurred).

1. State v. Barnett, 132 N.C. 1005, 43 S.E. 832 (1903). *See also* State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969); State v. Miller, 112 N.C. 878, 17 S.E. 167 (1893); State v. Ellick, 60 N.C. 450 (1864).

But in *Mullaney v. Wilbur* the United States Supreme Court held that the State must prove beyond a reasonable doubt that a criminal defendant did not act in the heat of passion upon sudden provocation when that issue is presented.[2] The North Carolina Supreme Court, in *State v. Hankerson,* concluded that the *Mullaney* standard of proof also applied to homicide defendants who raised the issue of self-defense,[3] but the court declined to give retroactive effect to the new *Mullaney* rule.[4]

In *Hankerson* the court used a balancing test that the United States Supreme Court has sometimes employed in deciding the retroactivity of a new constitutional doctrine.[5] This test involves balancing three factors: the purpose to be served by the new rule, reliance by enforcement officials on previous decisions inconsistent with the new doctrine, and the potential impact of retroactive application of the new doctrine on the administration of justice. In applying the balancing formula, the North Carolina court found that the purpose of the *Mullaney* rule was to provide for a more "reliable" determination of innocence or of the degree of guilt.[6] Against this concededly important purpose the court balanced the two other factors. It found that North Carolina and other states had justifiably relied on an earlier Supreme Court pronouncement in *Leland v. Oregon* that states could constitutionally place the burden of persuasion on defendants, at least for the affirmative defense of insanity.[7] Giving *Mullaney* retroactive application also raised the specter of a tremendous burden on the administration of justice in North Carolina.[8] After balancing these interests, the court concluded that the burden on judicial administration and prior justified reliance were sufficient to outweigh the possibility that the fact-finding process had been tainted by the pre-*Mullaney* standard and, thus, that *Mullaney* should not apply retroactively.[9]

During the last two decades, the United States Supreme Court has

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The burden also rested, and may still rest, on defendants to prove such matters as intoxication, State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951), and insanity, State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949). The North Carolina Supreme Court has indicated that *Mullaney* does not affect the burden for the insanity issue. State v. Shepherd, 288 N.C. 346, 351, 218 S.E.2d 176, 179 (1975).

2. 421 U.S. 684, 704 (1975).
3. 288 N.C. 632, 220 S.E.2d 575 (1975).
4. *Id.* at 652, 220 S.E.2d at 589.
5. *See* text accompanying notes 12-14 *infra.*
6. 288 N.C. at 655, 220 S.E.2d at 591-92.
7. 343 U.S. 790 (1952) (holding that a state could require a defendant to prove himself sane *beyond a reasonable doubt*).
8. 288 N.C. at 654-55, 220 S.E.2d at 591.
9. *Id.* at 652, 220 S.E.2d at 589.

used the due process clause of the fourteenth amendment to revolutionize criminal procedure in state courts.[10] Because some of the Court's decisions during this period were unforeseeable and also because some decisions required procedures fundamentally different from those previously used, the Court has on occasion held that a new rule is to be applied prospectively only.[11] Thus, the Court has sometimes avoided unfairness to states, which had relied on previous constitutional doctrine, by refusing to require them to choose between "emptying the jails" and investing enormous amounts of time and resources in retrials.

The Court has established two lines of analysis in holding new constitutional doctrine either fully retroactive or merely prospective. One line[12] states that new rules intended primarily to insure an accurate determination of facts are automatically to be enforced retroactively:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.[13]

Conversely, if the major purpose of the new doctrine is perceived not to be to enhance the judicial truth-finding function, retroactivity is typically denied.[14]

In a second line of analysis, the Court does not consider the purpose of the new rule dispositive. Rather, a balancing test is used to examine the *probability* that past trials have resulted in inaccurate guilty verdicts.[15] Using this balancing approach "[t]he question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of

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10. *See, e.g., In re* Winship, 397 U.S. 358 (1970); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

11. *See, e.g.,* cases cited notes 16-18 *infra.* It may be that the Court would have been less willing to extend notions of due process had all of its rulings been automatically retroactive.

12. Hereinafter referred to as the "automatically retroactive" cases.

13. Williams v. United States, 401 U.S. 646, 653 (1971) (dictum) (plurality opinion) (footnote omitted). *See also* Ivan V. v. City of New York, 407 U.S. 203 (1972) (per curiam); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam).

14. *See, e.g.,* Fuller v. Alaska, 393 U.S. 80 (1968) (per curiam); Linkletter v. Walker, 381 U.S. 618 (1965).

15. *See, e.g.,* Daniel v. Louisiana, 420 U.S. 31 (1975) (per curiam); Adams v. Illinois, 405 U.S. 278 (1972); DeStefano v. Woods, 392 U.S. 631 (1968) (per curiam).

degree."[16] The Court reasons that the old rule may not have been the cause of a guilty verdict: it rejects "the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of [the Constitution]."[17] In this line of cases the Court considers the question whether the old rule infected the fact-finding process as a "question of probabilities"[18] and thus avoids the "automatically retroactive" line of analysis. Once this analysis is chosen the Court uses a "balancing approach,"[19] weighing three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[20]

The Court has been inconsistent in deciding which test to apply. For rules intended primarily and perhaps solely to insure a more just determination of facts, the Court has sometimes invoked the "matter of degree" formula rather than the ostensibly more appropriate "automatically retroactive" analysis. Such was the case in *DeStefano v. Woods*[21] in which the Court held nonretroactive the *Duncan v. Louisiana*[22] rule, which incorporated the right to a jury trial for serious criminal offenses. *DeStefano* also made *Bloom v. Illinois*,[23] which required a right to jury trial for serious criminal contempts, valid prospectively only. The rationale for holding a new rule which changes the trier of fact retroactive must be that a different fact-finder might arrive at a more just result.[24] In denying retroactivity, the Court assumed that many trials by judges were as fair as if tried by juries, and concluded that since the results might have been identical, an analysis of the other factors affecting retroactivity was in order.[25] On the other hand, the Court has ignored the "matter of degree" formula in other cases where the trier of

16. Johnson v. New Jersey, 384 U.S. 719, 728-29 (1966) (holding Miranda v. Arizona, 384 U.S. 436 (1966), non-retroactive).

17. Daniel v. Louisiana, 420 U.S. 31, 32 (1975) (per curiam) (holding Taylor v. Louisiana, 419 U.S. 522 (1975), barring the exclusion of females from petit juries, non-retroactive).

18. Johnson v. New Jersey, 384 U.S. 719, 729 (1966).

19. Lemon v. Kurtzman, 411 U.S. 192, 199 (1973).

20. Stovall v. Denno, 388 U.S. 293, 297 (1967). In this line of cases, "the purpose to be served by the new constitutional rule" will not automatically decide retroactivity, but is merely "[f]oremost among these factors." Desist v. United States, 394 U.S. 244, 249 (1969).

21. 392 U.S. 631 (1968) (per curiam).

22. 391 U.S. 145 (1968).

23. 391 U.S. 194 (1968).

24. 391 U.S. at 158.

25. 392 U.S. at 633-34.

fact might or might not have reached a different result had the new standard been in force. In *Ivan V. v. City of New York*,[26] for example, the Court noted an obvious fact-finding purpose for the substitution of the reasonable doubt standard for a preponderance of the evidence test. Consequently, the Court disposed of the matter with a recital of the "automatically retroactive" line of cases. Such inconsistencies provoked one commentator to conclude that the Court may be "basing its decisions on a pragmatic political assessment of the consequences."[27]

When the Court uses the balancing approach, it finds that the factors of reliance and burden on judicial administration work together against retroactivity. The reliance factor often seems merely a make-weight argument. In *Daniel v. Louisiana*,[28] for instance, the Court's refusal to hold its ban on sexually exclusive juries[29] retroactive was probably based almost exclusively on the potentially staggering impact on the administration of justice of retroactive application of the rule (at least in Louisiana). The Court emphasized, however, that Louisiana had been entitled to rely on a fourteen-year-old decision finding such procedure constitutional.[30] Similarly, when the potential burden on judicial administration seems minor, the Court may claim that reliance on prior inconsistent rules was unjustified because a recent case "clearly foreshadowed . . . [or] preordained" the overruling of prior law and thus the advent of the new constitutional doctrine.[31] The relative insignificance of this reliance factor is illustrated by the fact that retroactivity has never been limited by the Court to the time when the new rule was "foreshadowed."[32]

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26. 407 U.S. 203 (1972) (per curiam) (holding *In re* Winship, 397 U.S. 358 (1970), retroactive).

27. Ostrager, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations*, 19 N.Y.L.F. 289, 307 (1973).

An additional factor that the Court weighs is the availability of post-conviction remedies for unfairness if the new doctrine is made prospective only. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 299 (1967).

28. 420 U.S. 31 (1975) (per curiam).

29. Articulated in Taylor v. Louisiana, 419 U.S. 522 (1975).

30. Hoyt v. Florida, 368 U.S. 57 (1961).

31. Berger v. California, 393 U.S. 314, 315 (1969) (per curiam). The Court held the rule in Barber v. Page, 390 U.S. 719 (1968), that a state must make a good faith effort to bring in a missing witness, retroactive. The Court reasoned that Pointer v. Texas, 380 U.S. 400 (1965), which incorporated the sixth amendment's right of confrontation into the fourteenth, made the *Barber* rule follow. But *Pointer* overruled a series of cases from West v. Louisiana, 194 U.S. 258, 264 (1904), to Stein v. New York, 346 U.S. 156, 195-96 (1953), on which states were no doubt relying.

32. Berger v. California, 393 U.S. 314 (1969), made *Barber* retroactive not just to the time at which *Pointer* was decided, but for all time. *See* Ostrager, *supra* note 27, at 294-95.

The Court is also hesitant to put great burdens on any state's judicial administration. The prospect of numerous retrials in any state weighs against retroactivity, even if such retrials would be necessary in only a small minority of states.[33] Retroactivity under these circumstances would impose an enormous burden on those states, since witnesses and evidence that a state had presented at the first trial might no longer be available.[34] The Court's analysis of this potential impact of retroactivity on the judicial system has usually been non-quantitative, because in few instances will a state's records indicate in how many cases a formerly constitutional procedure was followed.[35] In rare instances, however, the Court is able to use statistics to evaluate the havoc that retroactivity might wreak. For example, in *Wolff v. McDonnell* the Court refused to require the expunction of facts in prison records that had been determined without such minimum standards of due process as the rights to see written notice of charges and to be furnished a written statement of the evidence relied on.[36] The Court in *Wolff* identified the burden on prison administration quantitatively: misconduct hearings in the federal system alone were proceeding at the rate of 19,000 per year in 1973.[37] Reasoning that it had earlier held other due process standards non-retroactive for parole revocation proceedings for which the federal government had held only 1,173 hearings in 1973,[38] the Court concluded that non-retroactivity should obtain in *Wolff "a fortiori."*[39]

In other cases the Court's quantitative analysis of the impact of retroactivity on the administration of justice has been less sophisticated. For instance, in *Halliday v. United States*, the Court refused to make retroactive the rule that a guilty plea is invalid if the judge who accepted it failed to comply with the applicable Federal Rule.[40] The Court noted that "over 85% of all convictions in the federal courts are obtained

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However, limitation of retroactivity to the point where the new rule became preordained would seem a good result where the other two factors are in close balance.

33. *See, e.g.*, Daniel v. Louisiana, 420 U.S. 31 (1975) (per curiam); Tehan v. Shott, 382 U.S. 406, 418 (1966).

34. 382 U.S. at 418-19.

35. *See, e.g.*, DIVISION OF CRIMINAL LAW AND ENFORCEMENT, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA, CRIME IN CALIFORNIA (1962); NORTH CAROLINA DEPARTMENT OF CORRECTIONS, STATE CORRECTIONS STATISTICAL ABSTRACT (1974).

36. 418 U.S. 539, 563-65, 573-74 (1974).

37. *Id.* at 574. There was no estimate of the burden on state prisons.

38. Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

39. 418 U.S. at 574. The Court used the balancing approach although it admitted that the new doctrine "related to the integrity of the fact-finding process." *Id.* at 573-74.

40. 394 U.S. 831 (1969) (per curiam). The doctrine held non-retroactive arose in McCarthy v. United States, 394 U.S. 459 (1969), and referred to FED. R. CRIM. P. 11.

pursuant to guilty pleas."[41] It failed, however, to explore how many of those convictions would have been voided by giving retroactive effect to the ruling. The percentage actually voided would have been far less than the Court's figure because the new rule was "substantially a restatement of existing law and practice."[42]

At first glance the North Carolina decision in *Hankerson*, holding *Mullaney* non-retroactive, seems to be a likely candidate for reversal in the federal courts. *Mullaney*, which held that the State must prove beyond a reasonable doubt that a defendant did not act in the heat of passion upon sudden provocation, relied heavily on *In re Winship*, which requires proof beyond a reasonable doubt in juvenile proceedings.[43] *Winship* was held retroactive in *Ivan V. v. City of New York*,[44] a fact that the Court noted in a footnote to *Mullaney*.[45] On its face, that footnote suggests that *Mullaney* might also require retroactive application.[46] The footnote's position, however, is a clue to its importance: it appears in the middle of a sentence in which the Court rejected the lower court's refusal to extend the *Winship* requirement that the State shoulder the burden of proof for all essential elements of a crime to the defense of heat of passion upon sudden provocation. Therefore, taken in context, the footnote seems designed to buttress the Court's conclusion that the lower court in *Mullaney* had misinterpreted *Winship*. Despite its decision that this footnote was not controlling on the issue of retroactivity, the North Carolina Supreme Court recognized

41. 394 U.S. at 833.

42. *Id.* at 834 (Harlan, J., concurring).

In *Wolff*, the Court may have assumed that practically none of the nation's prison disciplinary proceedings comported with its requirements of due process before its ruling. Given the affirmative nature of its requirements, such an assumption, although not articulated, should be warranted.

43. 397 U.S. 358 (1970).

44. 407 U.S. 203 (1972) (per curiam).

45. 421 U.S. at 688 n.8.

46. The per curiam decision in *Ivan V.* used the "automatically retroactive" test, finding that the "major purpose" of the *Winship* rule "was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." 407 U.S. at 205. Thus, the Court failed to examine the other two factors which would have been weighed in the balancing approach. However, its failure to invoke the balancing line of cases in *Ivan V.* is not dispositive of the *Hankerson* situation. Two earlier cases that seem to belong in one category were treated oppositely: the Court's use of the absolutist approach in 1968 to hold the right to counsel at the imposition of a deferred sentence retroactive, McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam), did not preclude use of the balancing approach in 1972 to hold the requirement of counsel at preliminary hearing non-retroactive. Adams v. Illinois, 405 U.S. 278 (1972). A shift in the make-up of the Court may explain to some extent the recent rise of the balancing approach. At any rate, the way that the Supreme Court decides to treat the purpose factor "seems sometimes to depend on analysis of the other two factors." 288 N.C. at 653; 220 S.E.2d at 590.

the importance of distinguishing *Ivan V.* from *Hankerson* throughout its analysis of retroactivity.[47]

In its analysis of whether to give retroactive effect to *Mullaney*, the North Carolina Supreme Court employed the United States Supreme Court's balancing approach. The North Carolina court was as unclear as the United States Supreme Court in articulating why it chose to use the balancing approach rather than the "automatically retroactive" line of cases, since it conceded that "the purpose of the *Mullaney* rule [is] to insure a reliable determination of the question of guilt."[48] The court invoked the balancing test by calling the possibility of an inaccurate verdict of guilty a " 'question of probabilities.' "[49] However, the court failed to examine what the probabilities of an incorrect determination were, and, incidentally, lost an opportunity to distinguish *Hankerson* from *Ivan V.*[50] Prejudice by the finder of fact was less inherent in *Hankerson* than in *Ivan V.* Presumably all of the juvenile defendants made eligibile for retrial in *Ivan V.* were tried before judges.[51] Many if not all homicide trials are before juries, as was the case in *Hankerson.*[52] The complicated pre-*Mullaney* set of instructions in North Carolina[53] might well, as Justice Lake suggested in a concurring opinion in *Hankerson*, have resulted in harmless error.[54] Unable to follow the shifting burden in the homicide instructions, the jury might well have heeded the apparently overriding instruction to convict only if convinced of guilt beyond a reasonable doubt.[55] Unwilling to convict without proof beyond a reasonable doubt, the jury might have refused to do so, thus nullifying the instruction.[56] An exhaustive study has shown that juries often

47. *See, e.g.*, 288 N.C. at 654; 220 S.E.2d at 590. The court couches its distinction of *Hankerson* from *Ivan V.* in terms of the differences between *Mullaney* and *Winship.*

48. *Id.* at 655, 220 S.E.2d at 591.

49. *Id.* at 655, 220 S.E.2d at 591-92.

50. *See* text accompanying note 47 *supra.*

51. *See* text accompanying note 64 *infra.*

52. *See* note 72 *infra.*

53. *See* 288 N.C. at 642-43, 220 S.E.2d at 583-84.

54. *Id.* at 659-60, 220 S.E.2d at 594. However, for a constitutional error to be harmless "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

55. Even in a simple case, "the average juror usually does not understand the rules of law applicable to the case, or often is not able to apply them appropriately if he does understand them." Gordon & Temerlin, *Forensic Psychology: The Judge and the Jury*, 52 JUDICATURE 328, 332 (1969). In a sampling of over 300 jurors conducted by federal judges, "[o]ver one-third reported not having understood the judge's instructions; and an unknown number . . . did not understand but did not say so." *Id.*

56. H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 182-90 (1966) (juries have a higher standard of "beyond a reasonable doubt" than do judges and are less likely to convict).

It would be extremely interesting to compare conviction rates (when self-defense or

disregard the harshness of rules of law especially in judging self-defense claims.[57] The probability of misunderstanding or of nullification of the pre-*Mullaney* instruction by a jury seems much higher than that of a judge confusing the standards in pre-*Winship* cases. Thus, there seems to be a lower probability that a defendant was wrongfully convicted in the *Mullaney* situation than in the *Winship* situation.

Justice Exum's analysis of the reliance element of the Supreme Court's balancing test is the strongest part of the court's opinion. He distinguishes *Hankerson* from *Ivan V.* by noting that the reasonable doubt standard required in *Winship* has long been an essential part of criminal proceedings, with no exception ever made for juveniles.[58] Yet an exception to the reasonable doubt standard for affirmative defenses had been clearly carved out by the Supreme Court itself. In *Leland v. Oregon*[59] the Court held that placing the burden on defendant for an insanity defense comported with due process. Before *Mullaney*, it was "believed that there [was] no general federal constitutional barrier" to shifting the burden on "affirmative defenses."[60] Consequently, the reliance factor clearly militates in favor of non-retroactivity.

The North Carolina Supreme Court's analysis of the potential burden of holding *Mullaney* retroactive on the administration of justice in North Carolina and elsewhere is incomplete. The court failed to explain why the impact of *Winship*'s retroactivity on the administration of justice in one state (New York) "would obviously be less than the *Mullaney* rule which applies to all homicide cases."[61] But explanation

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heat of passion instructions were given) in states that formerly shifted those burdens to defendants with conviction rates of states that always retained the burden.

57. In their classic work, THE AMERICAN JURY, *supra* note 56, Kalven and Zeisel conducted a study of cases in which judges disagreed with jury verdicts when self-defense or provocation were issues. In each of the fifty-five disagreements studied, the judge thought the law and the evidence required more severity (conviction rather than acquittal or conviction of a more serious offense) than the verdict allowed. *Id.* at 239, 221-41 (Chapter 16, the Boundaries of Self-Defense). In their study of 1063 disagreements of all kinds between judge and jury, in 143 of the cases, or thirteen percent, the judge thought the law and the evidence required *less* severity than the verdict reflected. *Id.* at 110. The authors concluded that "[i]n the end the jury protest reflected in this long sequence of cases speaks for itself: an impatience with the nicety of the law's boundaries hedging the privilege of self-defense." *Id.* at 240-41. Nine years before *Mullaney*, the authors found that "[i]n many ways the jury is the law's most interesting critic." *Id.* at 219.

58. 288 N.C. at 654, 220 S.E.2d at 590-91.

59. 343 U.S. 790 (1952).

60. E. CLEARY & J. STRONG, EVIDENCE—CASES, MATERIALS, PROBLEMS 118 (2d ed. 1975).

However, *Mullaney* did not overrule *Leland* directly. *Cf.* Tehan v. Shott, 382 U.S. 406, 417-18 (1966).

61. 288 N.C. at 654; 220 S.E.2d at 591.

is possible. First, many of the juveniles who suffered from improper trials before *Winship* must have been released before *Ivan V.* was decided two years later because the typical length of stay in New York's juvenile correctional facilities in fiscal 1971 was under one year.[62] There is obviously much less turnover among those convicted of murder and manslaughter.[63] Secondly, since there is no right to jury trial in juvenile proceedings,[64] the burden on New York in *Ivan V.* was further reduced; expensive and time-consuming jury trials were not required of the state.

In considering the potential burden on the administration of justice in North Carolina, the court could have used a more complete quantitative analysis. The court identified 997 persons then incarcerated for first and second degree murder as potential beneficiaries of *Mullaney* retroactivity in North Carolina.[65] That figure is both underinclusive and overinclusive. Only those convicted murderers who did not plead guilty and who satisfied the burden of coming forward with a self-defense or a heat of passion defense should be eligibile for retrial.[66] Perhaps only fifteen percent of the 997 convicted murderers would meet this test of eligibility for retrial.[67] On the other hand, the court failed to

62. There were 3489 admissions to and 3483 discharges from juvenile facilities in New York in fiscal 1971. The total juvenile population in New York's juvenile facilities was 2682 as of June 30, 1971. M. HINDELANG, U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1974, Tables 6.4 (at 418), 6.7 (at 421), 6.10 (at 423).

63. The typical length of incarceration for assault (*see* text accompanying notes 71-72 *infra*) must also be substantial. For example, the penalty for assault in Pennsylvania can reach ten years, PA. STAT. ANN. tit. 18, §§ 1103(2), 2702 (1973), and occasionally twenty years, *id.* tit. 18, §§ 1103(1), 2502, 2704 (1973, Spec. Pamphlet 1975).

64. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

65. 288 N.C. at 654, 220 S.E.2d at 591.

66. Those who pleaded guilty should not be allowed to raise such a defense now. Tollett v. Henderson, 411 U.S. 258 (1973); Brady v. United States, 397 U.S. 742 (1970). Where evidence and witnesses have disappeared and memories have faded, the State would have no record upon which to base its case. Many convicted murderers would win their freedom by now putting the State to its proof.

If a defendant did not meet the burden of going forward with a self-defense or heat of passion defense at trial, he either did not have one to present then or was wrongfully determined not to have met the initial burden. In the former case, justice and good sense should preclude his raising the defense at a later date. In the latter case, if he has failed to use available appellate remedies for the wrongful determination, holding *Mullaney* retroactive should not change his situation.

67. With the cooperation of the North Carolina Department of Corrections, I sampled, at random, the records of 207 murderers convicted before *Mullaney*. Each file contained a "Crime Story—Inmate's Version" as well as an indication of whether the inmate pled guilty or was tried. My purpose was to determine in how many cases a self-defense or heat of passion upon sudden provocation instruction would have been required under North Carolina law. In the self-defense category are those inmates who indicated that they thought it necessary to kill in order to save themselves from death or great

note that untold numbers of the 695 prisoners convicted of manslaughter who pleaded self-defense would also be potential beneficiaries.[68] In addition, many parolees might willingly seize upon an opportunity to have their cases retried and to establish their innocence.[69]

But the burden on the North Carolina courts would be less than that on those of some other jurisdictions. Justice Exum lists fourteen jurisdictions that required homicide defendants to carry the burden of persuasion for self-defense or heat of passion.[70] Two of those fourteen, Ohio and Pennsylvania, and three others not included in the fourteen,

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bodily harm, and who claimed that they were without fault in bringing about the altercation. *See* State v. Smith, 268 N.C. 659, 151 S.E.2d 596 (1966), *cert. denied*, 386 U.S. 1032 (1967). 4 J. STRONG, N.C. INDEX *Homicide*, § 9 (1968). In the heat of passion upon sudden provocation category are defendants who claimed that they were struck or assaulted by the victims immediately prior to the killing, but who did not claim fear of death or great bodily harm. *See* State v. McLawhorn, 270 N.C. 622, 155 S.E.2d 198 (1967). Other legal provocations such as sexual act with a female relative and defense of one's habitation or place of business are recognized in North Carolina, *id.* at 628-29, 155 S.E.2d at 203, but no inmate claimed that he killed because of them. It should be noted that the "Crime Story—Inmate's Version" may not necessarily correspond to what defendant claimed at trial.

The primary explanations I found were:

	First degree murder	Second degree murder
Number of files examined	100	107
Number that pled guilty or nolo contendere	37	83
Explanations of inmates pleading not guilty		
Self-defense	9	11
Heat of passion upon sudden provocation	7	4
Did not commit crime	17	4
Intoxicated (alcohol or drugs)	12	0
Accident during felony	8	0
Don't remember	2	2
Insane	1	0
Guilty—law prevented guilty plea	4	0
Fifth Amendment	3	1
Child beating	0	2

68. These prisoners should be eligible for retrial only if they received a self-defense instruction at trial. *See* note 66 *supra*. A substantial number of those imprisoned for manslaughter (695 at the end of 1974, N.C. DEPT. OF CORRECTIONS, *supra* note 35, at 29) may well be eligible for retrial. To be convicted of voluntary manslaughter in North Carolina, one must prevail upon a heat of passion defense, or be adjudged to have used excessive force in defending one's self. 4 J. STRONG, *supra* note 67, at § 6; *see* State v. Watson, 222 N.C. 672, 24 S.E.2d 540 (1943); State v. Mosely, 213 N.C. 304, 195 S.E. 830 (1938). In the latter, the relevant situation, the burden was on defendant to show that his use of force was reasonable. State v. McDonald, 249 N.C. 419, 106 S.E.2d 477 (1959). Were *Mullaney* retroactive, those inmates who claimed reasonable force would be entitled to retrials. *See* State v. Calloway, 1 N.C. App. 150, 160 S.E.2d 501 (1968) (erroneous instruction about intensity of proof on justification not cured by manslaughter verdict, because defendant's self-defense plea could have resulted in acquittal).

69. The number of murderers and manslayers on parole is unknown.

70. 288 N.C. at 654-55; 220 S.E.2d at 591.

Illinois, Kentucky, and Missouri, put the burden on defendants for one or both issues in *assault* cases.[71] The number of persons who would benefit from retroactive application of *Mullaney* in Ohio and Pennsylvania might be significantly higher than in North Carolina, which has never shifted the burden in assault cases.[72] Furthermore, if the *Mullaney* principle is to be extended to other affirmative defenses, other states might face retrial of substantial numbers of convicted felons.[73]

If *Mullaney* were made retroactive, however, and if only prisoners who had not pleaded guilty and who had sustained their burden of producing evidence on issues of self-defense or heat of passion were permitted retrials, the position of the states affected would not be impossible. Retrials for that limited class of prisoners would not impose on the states some of the burdens normally associated with retrials.[74] The disappearance of evidence and witnesses and the fading of witnesses' memories should not unduly prejudice the State. Normally, in order to meet his burden of production in the original trial, the defendant

71. Shepherd v. Commonwealth, 306 Ky. 121, 206 S.W.2d 485 (1947); Davis v. State, 237 Md. 97, 205 A.2d 254 (1964); State v. Davis, 342 Mo. 594, 116 S.W.2d 110 (1938); State v. Powers, 98 Ohio App. 365, 129 N.E.2d 653, *appeal dismissed*, 162 Ohio St. 431, 123 N.E.2d 406 (1954); Commonwealth v. Yancer, 125 Pa. Super. 352, 189 A. 684 (1937), *cited with approval*, Commonwealth v. Noble, 371 Pa. 138, 88 A.2d 762 (1952). *See generally* 6A C.J.S. *Assault & Battery* § 115 (1975).

72. The North Carolina rule of placing the burden on defendants in homicide cases but not in assault cases was a rational one. When defense lawyers seek to "[t]ry the victim wherever possible," Katz, *Defense of a Homicide Case*, 1 NAT'L J. OF CRIM. DEFENSE, 235, 248 (1975), and when defendant is shown beyond a reasonable doubt to have eliminated any possible rebuttal by the victim, there is a reason for making defendant explain which does not exist in the assault situation. *See* note 66 *supra*.

However, fewer persons were in North Carolina prisons for non-sexual assault (728) than for homicide (1661) at the end of 1974. N.C. DEPT. OF CORRECTIONS, *supra* note 35, at 29. On the other hand, if the incorrect placement of the burden of proof had a significant effect, the ratio of convicted assaulters might well be higher in the jurisdictions using the improper standard.

Furthermore, there would be administrative difficulty in states that allow felony trials without a jury. North Carolina does not permit waiver of jury trial except for petty misdemeanors. N.C. CONST. art. I, § 24; State v. Hill, 209 N.C. 53, 182 S.E. 716 (1935); State v. Holt, 90 N.C. 749 (1884). In other states, if there were no *instruction* on heat of passion or self-defense, the courts would have to determine from perhaps sketchy records whether such a defense was properly raised from all the evidence.

73. *Mullaney* could conceivably be extended to reach numerous affirmative defenses on which some defendants have borne the burden of persuasion, including insanity, duress, intoxication, and entrapment. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 46-51 (1972). *But cf.* State v. Shepherd, 288 N.C. 346, 351, 218 S.E.2d 176, 179 (1975) (*Mullaney* does not apply to insanity).

74. There appears to be little precedent for a criminal retrial limited to only certain questions. *Cf.* Brown v. United States, 483 F.2d 116 (4th Cir. 1973) (remand to review record to determine whether invalid prior convictions affected prisoner's sentence). Arguably, however, such a procedure would seem ideal were *Mullaney* to be held retroactive. No relitigation of the fact that defendant committed the homicide or assault should be permitted. That fact has been properly proved, beyond a reasonable doubt.

himself testified about the act. That testimony, when introduced at retrial,[75] should serve practically to preclude assertion of a defense that the defendant did not commit the act. Thus, the issue will normally be only the existence of a self-defense or heat of passion defense.[76] Those are questions about the defendant's state of mind and the reasonableness of that state of mind at the time of the alleged crime. The re-creation of the circumstances by other witnesses will be secondary; the credibility of the defendant will be central to determination of the issue.[77] That practical limitation on the issues to be resolved will normally make the burden on the states one of time and expense only. Because the State is not likely to dismiss cases of convicted murderers, grossly incorrect results should be exceptional.[78]

The considerations in *Hankerson* are fairly evenly balanced. The burden on the administration of justice would be substantial, but at least in North Carolina, not catastrophic unless *Mullaney* is extended. Reliance on *Leland*, which allowed the State to shift the burden of persuasion on the affirmative defense of insanity,[79] seemed to justify the

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75. It would be admissible. 21 AM. JUR. 2d *Criminal Law* § 357 (1965); 22A C.J.S. *Criminal Law* § 733 (1961).

76. There remains the rare situation when defendant's burden was met by evidence other than his own testimony. In that situation, the State may well be harmed by retrial. But normally, the record of the State's evidence, combined with that of the evidence that defendant produced, should be sufficient to convince the jury that defendant committed the act, so that practically the only questions raised will be those on which the defendant wrongly bore the burden of persuasion.

77. In an assault retrial, the State's case is more likely to be severely prejudiced if the victim has disappeared or died than in a homicide retrial. In the typical assault trial, there is a contest of credibility between the accused and the victim. In the homicide situation, there may or may not be witnesses who actually saw the event.

78. Paradoxically, since the State will presumably fail to retry few defendants, the burden in terms of time and expense will be even more extensive.

79. This Note's analysis makes the decision in State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975), which held that *Mullaney* does not apply to the affirmative defense of insanity, seem unwise. *Hankerson* seems correct only if (1) the shift in the burden of proof mandated by *Mullaney* is merely of minor importance, and (2) the retrials of prisoners create serious problems for the State. *Shepherd*'s insistence that the burden remain with the defendant for an insanity defense seems to belie the first contention. Furthermore, the *Shepherd* result creates a serious risk of many retrials. It seems far from clear that *Shepherd* will survive Supreme Court scrutiny. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 53 (1975). If the Court reverses *Shepherd*, it will have to decide whether to make that extension of *Mullaney* retroactive. Like the *Hankerson* question, the question of the retroactivity of future extensions of *Mullaney* seems to admit of no easy answer. Therefore, prisoners who raise insanity defenses at post-*Mullaney* trials may well gain new trials because of a future Supreme Court decision.

The decision in *Shepherd* is understandable, however, given that once courts extend the concept of due process, they rarely renege on the extension. *See* text accompanying note 10 *supra*. As a stop-gap procedure, until the appeals in *Shepherd* are exhausted,

court's decision to hold *Mullaney* non-retroactive. Although the *Mullaney* rule does relate to truth-finding, the probability in most cases that facts were wrongfully found at trial may be quite low.

Although it is a close question, the decision in *Hankerson* seems correct. The benefits of the more equitable rule of *Mullaney* for future defendants should not be outweighed by the costs of its retroactive application. For the last two decades the United States Supreme Court has been seeking to refine American criminal procedure. *Mullaney* represents a technical readjustment, a proper refinement. Frequent relitigation does not serve the Supreme Court's goal. Retrials cost money and take time; they result in incorrect verdicts because evidence and witnesses are missing; they make prosecutors spread themselves too thinly. Most importantly, they tend to diminish the confidence of the public in the judicial process. The citizenry can quickly grasp the fact that a trial without a lawyer may have been unfair, but it will have more trouble finding that a person who has been fairly proved beyond a reasonable doubt to have killed another was unfairly tried because he had to show that he was provoked and angered or that his life was threatened.[80]

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North Carolina *prosecutors* might voluntarily request a misstatement of the law in jury instructions on the affirmative defense of insanity: they could request a charge making the State prove sanity beyond a reasonable doubt. If conviction resulted, that instruction would seem harmless to defendant. Then, the verdict would be unassailable in future years. This procedure, if not uniform, might be subject to equal protection challenge.

80. In other jurisdictions, the question of *Mullaney*'s retroactivity is closer than in North Carolina. Had the North Carolina court held *Mullaney* retroactive, the most important interest, life itself, would be protected, since some convicted murderers in North Carolina face the death penalty. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803, *cert. granted*, 419 U.S. 963 (1974). *Ivan V.* protected liberty only. Although the due process clause does not establish a hierarchy among the protected interests of "life, liberty, [and] property," the United States Supreme Court seems unanxious to affirm death sentences even for persons *properly* convicted. Furman v. Georgia, 408 U.S. 238 (1972). It is important to consider that some North Carolina prisoners face execution after trials that would not presently pass constitutional scrutiny. Yet the United States Supreme Court has always given special consideration to those states whose procedures most grievously offended due process in deciding retroactivity. *See* text accompanying note 33 *supra*. Although the burden on the administration of justice might vary substantially among states, a retroactivity decision would apply equally to all. Although the burden may not be great in North Carolina, other states face a more substantial burden. Therefore, the *Hankerson* result should ultimately prevail in the United States Supreme Court.

Perhaps a better procedure would be to let each state arrive at its own balance, articulating the factors, balanced, with an empirical determination of the potential burden on the administration of justice. Results that the federal courts found offensive to due process could be reversed.

Employment Discrimination — New Limitations on Appellate Review of Teacher Employment Discrimination Suits

Discrimination in the hiring and dismissal of teachers has been a perplexing aspect of school desegregation. The Fourth Circuit Court of Appeals has taken an active role in confronting this problem; however, in *Jones v. Pitt County Board of Education*[1] the court departed from this pattern of intervention. Because of the restrictions it imposed upon itself in reviewing the district court's findings, it appears that the court intends to place the teacher employment discrimination issue primarily within the discretion of the district courts.

The plaintiff in *Jones*, a black school teacher, alleged that the county board of education was racially motivated in its refusal to renew her contract. Mrs. Jones had been a seventh and eighth grade teacher in an all-black school for ten years. In the implementation of a judicially mandated school desegregation plan she was shifted to a fifth grade classroom in a previously all-white school. Pursuant to the recommendation of her principal, and requests of both the local advisory council and the county superintendent that she not be reemployed, the county board decided not to renew her contract. Mrs. Jones sued for damages and equitable relief under 42 U.S.C. section 1983[2] alleging a denial of equal protection.[3]

The district court concluded that the board of education had proved by clear and convincing evidence[4] that Mrs. Jones's professional incompetence and not racial discrimination was the reason for her nonretention. Plaintiff appealed claiming that the evidence did not support this finding of fact.[5] She argued that the principal's written

1. 528 F.2d 414 (4th Cir. 1975).

2. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1970).

3. The plaintiff also raised a due process issue in the trial but did not raise it on appeal. Though not in issue, the court indicated that hearings before the advisory council and before the board of education with counsel present at both were sufficient under the due process clause. 528 F.2d at 415-16.

4. *See* text accompanying notes 12-14 *infra*.

5. If the court had been so inclined it could have focused upon the conclusion of no racial discrimination and treated it as a finding of mixed fact and law. The finding of no racial discrimination is a conclusory finding much like a finding of no negli-

evaluations did not support his recommendation that her contract not be renewed.

In affirming, the court of appeals displayed great deference to the lower court's finding. First, the court refused to consider plaintiff's crucial evidence. Terming the principal's written evaluations and the county's hiring practices[6] "minutia of the evidence," the court reasoned that they could not be reviewed under the "clearly erroneous" standard of appellate review[7] since this test prohibits the appellate court from conducting a trial *de novo*. Next, the court stated that the "clearly erroneous" standard must be applied without considering defendant's burden of proving its case by "clear and convincing" evidence.[8] In a vigorous dissent Judge Craven contended that the whole record must be examined in applying the "clearly erroneous" rule and that the rule must always be applied in light of the standard of proof. He concluded that, in view of the whole record, the board of education had failed to sustain its burden of proving the plaintiff's incompetence by "clear and convincing" evidence.[9]

Jones resulted from the confluence of two streams of judicial decisions. One of these was the litigation over school desegregation that followed *Brown v. Board of Education*.[10] As judicially mandated school desegregation was implemented, it became apparent that black teachers might become casualties of the process.[11] Because of the frequent recurrence of this problem, the Fourth Circuit in *Chambers v.*

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gence. If the finding of no discrimination is determined to be a finding of mixed fact and law, First Nat'l Bank v. Hartford, 273 U.S. 548, 552 (1927), seems to make the finding freely reviewable without regard to the clearly erroneous rule. *See also* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.05[1] (2d ed. 1975); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2589 (1971) [hereinafter cited as WRIGHT AND MILLER]. *But cf.* St. Louis v. Rutz, 138 U.S. 226, 241-42 (1891); Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251, 253 (4th Cir. 1974) (where the court said some questions of fact and law were freely reviewable while others were not).

6. The county's new hire ratio was 6 to 1 in favor of whites. Thus, the ultimate result of the 50-50 non-renewal rate was discriminatory. 528 F.2d 416, 420 (dissenting opinion).

7. FED. R. CIV. P. 52(a) provides in part that: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." For the history of Rule 52(a), see Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937).

8. 528 F.2d at 418.

9. *Id.* at 420.

10. 347 U.S. 483 (1954).

11. *See, e.g.*, Wheeler v. Durham City Bd. of Educ., 346 F.2d 768, 773 (4th Cir. 1965).

Board of Education[12] fashioned a remedial mechanism for exposing this form of racial discrimination. Relying on Supreme Court cases[13] dealing with jury discrimination in criminal trials, *Chambers* held that when a history of segregation in the school system was ended only by judicial decree and there was a sudden disproportionate reduction in the number of black teachers, the school board had the burden of proving the absence of racial discrimination by clear and convincing evidence.[14]

This "clear and convincing" standard of proof has remained nebulous in teacher employment discrimination cases. The Fourth Circuit has defined the standard as an intermediate position between "a preponderance of the evidence" and "beyond a reasonable doubt."[15] *Chambers* indicates that the county school superintendent's assertions of personal preference are insufficient to sustain the burden.[16] On the other hand, *Williams v. Board of Education*[17] held that being late for the start of the school year, being late with reports, and having a dispute over corporal punishment was sufficient to sustain the board's burden of persuasion. Other cases indicate that the court is inclined to accept the general observations of the teacher's superiors.[18] Although school systems are supposed to prove their cases by clear and convincing evidence, the court of appeals has generally accepted much weaker proof in teacher employment discrimination cases than it has in other employment discrimination cases.[19]

The second stream of judicial decisions influencing *Jones* involves the interpretation of rule 52(a) of the Federal Rules of Civil Proce-

12. 364 F.2d 189 (4th Cir. 1966).

13. *See, e.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Norris v. Alabama, 294 U.S. 587 (1935).

14. 364 F.2d at 192. In Keyes v. School District No. 1, 413 U.S. 189, 209 (1973), the Supreme Court cited *Chambers* approvingly and held that racial discrimination must not play any part in the board's actions. To determine when to apply *Chambers*, see, *e.g.*, North Carolina Teachers Ass'n v. Asheboro City Bd. of Educ., 393 F.2d 736 (4th Cir. 1968); Wall v. Stanley County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967). One line of teacher employment discrimination cases deals with the National Teachers Examination. *See, e.g.*, Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974); United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973).

15. Hobson v. Eaton, 399 F.2d 781, 784 n.2 (6th Cir. 1968), *quoting* Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118. *Hobson* also distinguished between the "clear and convincing" standard and the "clear, unequivocal, and convincing" standard.

16. 364 F.2d at 191.

17. 490 F.2d 1231 (4th Cir. 1974).

18. *See, e.g.*, Vance v. Chester County Bd. of School Trustees, 504 F.2d 820 (4th Cir. 1974).

19. *Compare* cases cited in notes 16-18 *supra with* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* Moody v. Albemarle Paper Co., 422 U.S. 405 (1975); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

dure. The classic statement[20] of the "clearly erroneous" test of rule 52(a) is in *United States v. United States Gypsum Co.*:[21] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[22] A simple disagreement with the result or a preference for a different interpretation of the facts does not justify reversing the lower court.[23]

When reviewing cases that vary the standard of proof, such as cases that apply the *Chambers* rationale, the appellate court must determine how the standard of proof applied by the trial court will influence its review under the clearly erroneous test.[24] In *Baumgartner v. United States*[25] the Supreme Court held that in denaturalization cases, in which the government must prove its case by "clear, unequivocal, and convincing" evidence, it would review the findings in light of that standard of proof.[26] Also, in *Mortensen v. United States*[27] the Court held that in appeals of criminal convictions, in which the burden is "beyond a reasonable doubt," the appellate court must consider this standard in its review of the conviction. Since the appellate court must take into account the "beyond a reasonable doubt" standard and the "clear, unequivocal, and convincing" standard, it logically should also consider the "clear and convincing" standard in its review. Indeed, in the past the Fourth Circuit had claimed to do so.[28]

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20. Some courts have contended that if there is substantial evidence to support the judge's findings the findings cannot be "clearly erroneous," but that position has been generally abandoned. *See* WRIGHT AND MILLER, *supra* note 5, § 2585, at 735.

21. 333 U.S. 364 (1948).

22. *Id.* at 395.

23. *See* Guzman v. Pichirilo, 369 U.S. 698 (1962); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); Grace Girdler, 74 U.S. (7 Wall.) 196 (1868). *See also* Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962); Jersey Ins. Co. v. Heffron, 242 F.2d 136 (4th Cir. 1957).

24. For a general discussion of the topic see Note, *Appellate Review in the Federal Courts of Findings Requiring More Than a Preponderance of the Evidence*, 60 HARV. L. REV. 111 (1946).

25. 322 U.S. 665, 670 (1944). *Accord*, Nowak v. United States, 356 U.S. 660 (1958).

26. In *Jones* the majority used *Hobson* (*see* text accompanying note 15 *supra*) in an apparent attempt to distinguish the "clear and convincing" burden from the "clear, unequivocal, and convincing" burden.

27. 322 U.S. 369, 374 (1944). *But cf.* Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 282 (1966).

28. Darden v. Darden, 152 F.2d 208, 209 (4th Cir. 1945), and Holt v. Quaker State Oil Ref. Co., 67 F.2d 170, 171 (4th Cir. 1933), though not the only cases, provide the most straightforward statements that the "clearly erroneous" review must take into account the burden of proving by "clear and convincing" evidence.

Jones is unusual[29] in that the court of appeals expressly refused to consider the clear and convincing standard of proof when reviewing the case, even though it displayed no inclination to abandon the *Chambers* principle of increasing the standard of proof when there has been a history of segregation in the school district that persisted after *Brown*. Furthermore, the court applied *Chambers* without questioning whether there had been a rapid and disproportionate reduction in the number of black teachers.[30] It is therefore perplexing that the court in *Jones* would refuse to consider the standard of proof imposed at the trial stage when applying the clearly erroneous test while continuing to display such strong support for *Chambers*.

The majority[31] relied on *Oburn v. Shapp*,[32] which held that the court would not consider the "compelling state interest" test in reviewing a district court's denial of a preliminary injunction.[33] *Oburn*, however, provides only weak support for the majority's position. First, there is a difference between the "compelling state interest" criterion at issue in *Oburn* and the "clear and convincing" standard of proof in *Jones*. Secondly, *Oburn* was an appeal from the denial of a preliminary injunction, not an appeal from a final judgment; therefore, the question before the court was whether the trial court had abused its discretion, not whether the trial court was clearly erroneous in its findings of fact.[34]

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29. *See* notes 24, 26 & 28 *supra*.

30. One criterion for the application of *Chambers* had been a large and rapid reduction in the proportion of black teachers. *Williams* is another example, though not the only one, of the court's application of *Chambers* without any question as to the proportion of black teachers not retained. Perhaps the court has been influenced by *Keyes* which made no comparable requirement (however, *Keyes* did not deal directly with teacher employment discrimination). *Jones* clarifies the court's stance in applying *Chambers*. In Morton v. Charles County Bd. of Educ., 520 F.2d 871 (4th Cir. 1975), the court had refused to apply the *Chambers* approach where the school system, though segregated at the time of the *Brown* decision, had moved immediately to desegregate.

31. The dissent in *Jones* relied on two cases, Esso Standard Oil Co. v. Sun Oil Co., 229 F.2d 37 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 973 (1956), and Soccodato v. Dulles, 226 F.2d 243 (D.C. Cir. 1955), that held that the clear, unequivocal, and convincing standard of proof must be considered in applying the clearly erroneous test. The dissent reasoned that since the court was obliged to consider the clear, unequivocal, and convincing standard in applying the clearly erroneous test, it should also consider the clear and convincing standard in applying the same test. 528 F.2d at 419. The majority distinguished both the dissent's cases and the denaturalization cases (*see* notes 24, 25, and 27 *supra*) by differentiating the clear and convincing standard used in *Jones* from the clear, unequivocal, and convincing standard used in the other cases. *See* note 15 *supra*.

32. 521 F.2d 142 (3d Cir. 1975).

33. *Id.* at 149 n.19.

34. *Id.* at 147.

In *Chambers* the court justified its original reallocation of the burden of proof[35] by the fact that the school board had the power to produce the facts.[36] This reasoning obviously supports the court's shifting to the school board the burden of coming forward with the evidence. The logical connection between determining who has access to the facts and imposing the "clear and convincing" standard of proof is less clear. Since only one party has access to most of the relevant facts, the adversary process by itself will not insure adequate fact production. Therefore, the court can assure itself of adequate fact production by imposing the burden of producing the evidence on the party having access to the facts *and* increasing the standard of proof. While the court has not abandoned the *Chambers* approach, *Jones* implies that, in the future, district courts will have exclusive authority in applying the "clear and convincing" standard. So far as appellate review is concerned, however, the court has settled for half a loaf. By tacitly retaining oversight of the shifting of the burden of coming forward with the evidence, it can be assured of *some* fact production, but by abandoning further examination of the use of the clear and convincing standard of proof, the court can no longer assure itself of *adequate* fact production.

The second significant aspect of *Jones* is the court's refusal to examine the evidence fully. The Supreme Court has cautioned that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."[37] The Court, however, has also stated that in its review the appellate court must consider the whole of the evidence.[38] In *American Football League v. National Football League* the Fourth Circuit focused upon the latter requirement when it stated that it had been obliged to review all the evidence.[39]

The refusal of the *Jones* court to consider the "minutia of the evidence" in its review is the court's most radical departure from accepted authority. The majority based its refusal on the Supreme

35. See C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 336-41 (2d ed. 1972), for a discussion of burden of proof.

36. 364 F.2d at 192.

37. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

38. *See, e.g.*, United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Garsed v. Beall, 92 U.S. 684, 695 (1875). WRIGHT AND MILLER, *supra* note 5, § 2585, at 731, suggests that the prohibition against a trial *de novo* does not prevent examining all the evidence.

39. 323 F.2d 124, 134 (4th Cir. 1963).

Court's prohibition against conducting a *de novo* trial.[40] The dissent, on the other hand, emphasized that the Supreme Court required appellate courts to consider the record as a whole[41] even when reviewing decisions of administrative agencies, which had traditionally been shown more deference than those of trial courts. Judge Craven contended that the court must therefore consider the minutia of the evidence in order to review the record as a whole.[42] Such an examination in *Jones* reveals that the objective evaluation forms filled out by the principal tended to dispute his recommendation not to retain plaintiff. Thus, the majority's manipulation of the trial *de novo* concept not only forbids consideration of critical evidence but also violates the policy adopted by the court in *American Football League* of reviewing all the evidence.[43]

Although the court's approach has not been expressly prohibited[44] by the Supreme Court, it does seem to violate the policy for a review of the whole record. If the court can use the "minutia of the evidence" phrase to close off its consideration of proof that conflicts with the trial judge's findings of fact, then appellate review will be nothing more than a formal expression of the whims of the appellate court. The clearly erroneous rule, while it does limit appellate review of a trial court's findings of fact, should not be used to make the right to review meaningless. The Supreme Court once stated: "The right of appeal . . . is a substantial right, and not a shadow. . . . [W]e may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect."[45] The *Jones* court's refusal to review the whole record is that kind of abdication of duty.

Perhaps *Jones* is merely the court's response to a questionable lower court decision that it desired to affirm. On the other hand, the case suggests a more basic decision by the court to restrict its review under the clearly erroneous test. If *Jones* is followed, appeals by

40. 528 F.2d at 418, *quoting* Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

41. 528 F.2d at 419-20. The dissent relied on Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

42. 528 F.2d at 419-20.

43. *See* authorities cited notes 38 & 39 *supra.*

44. If the court were inclined to review these cases more closely, it could use the "constitutional fact" doctrine to free its review from the "clearly erroneous" rule. *See* Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 (1954); Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970); Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C.L. REV. 311 (1969); Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

45. The Ariadne, 80 U.S. (13 Wall.) 475, 479 (1871).

teachers from adverse district court decisions will be virtually meaningless. The teacher's primary weapon has been the "clear and convincing" standard of proof imposed on the local school boards. On review, that standard will be ignored. Furthermore, the court can manipulate the "minutia of the evidence" phrase to avoid meaningful review of the lower court's findings. The potential effect of *Jones*, however, extends beyond the teacher employment discrimination issue. In the past, appellate courts have delved into intricate evidence in other kinds of employment discrimination cases to expose underlying discrimination. The "minutia of the evidence" phrase can be easily manipulated by a busy appellate court to avoid such time-consuming analysis. If *Jones* represents the beginning of a trend in the extent of appellate review by the Fourth Circuit, the right of appellate review may become no more than a shadow of what it once was.

NIGLE B. BARROW, JR.

Evidence—A New Approach to Character Evidence in North Carolina

In 1904 Professor Wigmore stated that although the Anglo-American rules of evidence had "taken some curious twistings in the course of their development," none was more curious than the rule limiting the admissibility of character evidence only to that of the general community-reputation of the person in question.[1] This rule has generated continuous debate by legal theoreticians and scholars, but the case law has remained unchanged for almost seventy-five years. *State v. Stegmann*[2] is another curious twist in this area of the law; the North Carolina Supreme Court departed from precedent and the traditional rule and held admissible testimony about the character and reputation of the

1. III J. WIGMORE, EVIDENCE § 1986 (1st ed. 1904). An analysis of this issue must first differentiate between the terms "character" and "reputation." "Character" refers to the actual qualities and characteristics of an individual, while "reputation" is the esteem in which a person is held by others. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 102 (Brandis rev. 1973). As the court stated in State v. Ussery, 118 N.C. 1177, 1180, 24 S.E. 414, 415 (1896), "Some critic has said that character lives in a man—reputation outside of him." Unfortunately, judicial decisions have tended to use the terms interchangeably and thus obscure the distinction. V J. WIGMORE, EVIDENCE § 1608 (3d ed. 1940).

2. 286 N.C. 638, 213 S.E.2d 262 (1975).

prosecutrix in a rape case based upon personal opinion and observation, as well as upon her reputation within the community.[3] This decision thus represents a major change in the permissible forms of proving an individual's character in North Carolina.

John Richard Stegmann was charged with the abduction and rape of Ruth O'Leta Kendall on September 4, 1973[4] and was convicted on both counts.[5] At trial, the defendant alleged that the prosecutrix had consented to the sexual intercourse with him,[6] and thereby placed the question of her character in issue.[7] In response, the district attorney introduced the testimony of fourteen witnesses to show the good character and reputation of the complainant.[8] The first two witnesses testified "properly" as to her good general reputation in the community in which she lived,[9] and no exception was taken to their testimony.[10] However, when examining the other twelve witnesses, after receiving an answer to his question about the general reputation of Mrs. Kendall, the district attorney went on to ask each witness, "On what do you base your opinion?"[11] Eleven answered that their opinions were based upon her general reputation as well as upon their personal opinions about and observations of her.[12] One witness stated that her opinion was based solely upon her personal contact with the prosecutrix.[13] The defendant's second and third assignments of error were based on the trial judge's admission of this testimony.[14]

The North Carolina Supreme Court upheld the lower court's verdict and judgments,[15] abandoning the traditional North Carolina rule

3. *Id.* at 649, 213 S.E.2d at 271.

4. *Id.* at 640, 213 S.E.2d at 265.

5. *Id.* at 643, 213 S.E.2d at 267. Stegmann received a life sentence for the kidnapping charge and a death sentence for the rape charge.

6. *Id.* at 642-43, 213 S.E.2d at 267.

7. *Cf.* State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960); State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897); State v. Daniel, 87 N.C. 507 (1882); State v. Jefferson, 28 N.C. 305 (1846); 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 105 (Brandis rev. 1973). *See* text accompanying notes 19-20 *infra*.

8. 286 N.C. at 644-46, 213 S.E.2d at 267-69.

9. *I.e.*, in keeping with the traditional rule, they testified only to her general community reputation and did not speak of their personal opinions of her character or of specific acts or conduct of the prosecutrix.

10. 286 N.C. at 644, 213 S.E.2d at 267 (witnesses Frazee and Smith).

11. *Id.* at 647, 213 S.E.2d at 269.

12. *Id.* at 644-45, 213 S.E.2d at 268-69 (witnesses Hopkins, Judson, Godwin, Ledbetter, Porter, Parker, M. Reinburger, C. Reinburger, Riggin, Cimaglia and Peases).

13. *Id.* at 645-46, 213 S.E.2d at 269 (witness Harris).

14. *Id.* at 643, 213 S.E.2d at 267.

15. 286 N.C. 638, 213 S.E.2d 262 (1975). The majority opinion was written by

that character may not be evidenced by the opinion of the character witness or by specific acts of the person in question.[16] The court held that the district attorney's question "and the answers thereto tended to show the foundation for the character evidence given by the witnesses. A strong or weak foundation for the testimony of a witness aids the jury in determining the weight it will give that testimony. Thus, the question was properly permitted . . . ."[17] The court did, however, find the trial judge in error in admitting the testimony of Mrs. Harris, which was based solely on personal opinion.[18] In effect, the court held admissible testimony based in part on personal observation and in part on general community reputation.

The general rule in the United States is that when seeking to prove a person's character as a collateral matter,[19] the witness may testify only about the general reputation of the person in question in the community in which he lives. The witness is not permitted to testify about the person's specific acts or about the witness's personal knowledge or beliefs.[20] This general preference in favor of the indirect method of evidencing character by reputation, as opposed to the direct method of proof by personal opinion, has arisen despite serious questions raised by Professor Wigmore concerning the historical foundations of the rule.[21]

Justice Huskins. Chief Justice Sharp and Justice Copeland both dissented as to the death sentence for the rape conviction. Justice Exum filed a long dissenting opinion based upon his belief that "the only method of proof previously sanctioned by this Court and most other jurisdictions is by showing the general reputation of the witness in the community where she lived," excluding testimony based on personal opinion. *Id.* at 659, 213 S.E.2d at 277.

16. *Id.* at 647, 213 S.E.2d at 269.

17. *Id.* (citations omitted).

18. *Id.* at 649, 213 S.E.2d at 271.

19. Character is a collateral issue in a case when it is offered as evidence of the person's conduct on a particular occasion or of his truthfulness and veracity in general. For purposes of this note, no attempt will be made to differentiate between the various situations in which character evidence may come into issue, *e.g.*, the character of the accused in a criminal proceeding, the character of a witness who has given testimony, the character of a complainant in a rape case, the character of a party to a civil suit, the character of the deceased in a homicide case, etc. Both the majority and minority rules with regard to personal opinion evidence apply equally in all situations.

20. Michelson v. United States, 335 U.S. 469, 477 (1948); 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110 (Brandis rev. 1973); VII J. WIGMORE, EVIDENCE § 1980 (3d ed. 1940).

21. VII J. WIGMORE, EVIDENCE §§ 1981-82 (3d ed. 1940). In tracing the history of the rule, Wigmore demonstrates that prior to 1865, the universal practice was to permit character witnesses to state their personal opinions of the individual in question. *E.g.*, Trial of Cowper, 13 How. St. Tr. 1106, 1180 (1699); Trial of Hardy, 24 How. St. Tr. 199, 999 (1794); Case of Davison, 31 How. St. Tr. 99, 190 (1808); Trial of Jones, 31 How. St. Tr. 251, 310 (1809). This orthodox practice was altered by the decision in R. v. Rowton, Leigh & C. 520, 10 Cox Cr. Rep. 25 (Eng. 1865), where the court

Prior to the decision in *State v. Stegmann*, North Carolina followed the majority rule.[22] As stated in *Johnson v. Massengill*:[23] "The general rule is that a witness, offered to prove the character of another person, may not testify as to his personal opinion concerning the reputation of such other person but is limited to testimony concerning the character of such person in the community."[24]

The vast majority of other jurisdictions in the United States follow the limited rule.[25] The United States Supreme Court has spoken to this issue only once, in *Michelson v. United States*,[26] which was heavily relied upon in the dissent in *Stegmann*. Although the *Michelson* Court approved the general rule, it did so in less than unqualified terms. The Court first discounted the importance of its conclusion by speaking of its

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ignored a long line of precedents and held that testimony based on personal opinion alone was inadmissible and that the question to the witness must be framed in terms of the reputation of the individual in question. Wigmore believes this decision to be based in part upon a misunderstanding of a statement made by Lord Ellenborough, C. J. in Jones' Trial, 31 How. St. Tr. 310 (1809), that "It is reputation; it is not what a person knows" that may be used to prove character. Wigmore contends that this remark refers to the exclusion of particular facts attempting to demonstrate a specific trait, and not to the witness's speaking from personal knowledge. VII J. WIGMORE, EVIDENCE § 1982, at 146-47 (3d ed. 1940).

22. *See, e.g.*, Johnson v. Massengill, 280 N.C. 376, 186 S.E. 2d 168 (1972); State v. McKissick, 271 N.C. 500, 157 S.E.2d 112 (1967); State v. Steen, 185 N.C. 768, 117 S.E. 793 (1923); Edwards v. Price, 162 N.C. 243, 78 S.E. 145 (1913); Bottoms v. Kent, 48 N.C. 154 (1855); State v. Parks, 25 N.C. 296 (1843). *See also* 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110 (Brandis rev. 1973).

23. 280 N.C. 376, 186 S.E.2d 168 (1972).

24. *Id.* at 383, 186 S.E.2d at 173. There is one North Carolina decision that possibly cuts the other way. In *State v. Nance*, 195 N.C. 47, 141 S.E. 468 (1928), the court held that a witness, after stating the general character of the individual inquired about, may of his own accord say in what respect the person's character is good or bad.

One writer has viewed this case as upholding the use of personal opinion. Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 512 (1939) [hereinafter cited as Ladd]. Presumably, a witness could amplify his conclusion as to a person's character by stating that it was based on personal observation. However, the later case of *State v. Hicks*, 200 N.C. 539, 157 S.E. 851 (1931) seems to indicate that *Nance* was meant to allow the witness to qualify his conclusion "by adding that [the person's character] is good for certain virtues and bad for certain vices," thus limiting any elaborations to references to specific traits of character. *Id.* at 541, 157 S.E. at 852.

25. *See, e.g.*, Deschenes v. United States, 224 F.2d 688 (10th Cir. 1955); United States v. Neff, 343 F. Supp. 978 (E.D. Pa. 1972), *aff'd*, 475 F.2d 861 (3d Cir. 1973); People v. Ward, 134 Cal. 301, 66 P. 372 (1901); People v. Gordon, 103 Cal. 568, 37 P. 534 (1894); Gifford v. People, 148 Ill. 173, 35 N.E. 754 (1893); Hischman v. People, 101 Ill. 568 (1882); Borders v. Commonwealth, 252 Ky. 577, 67 S.W. 2d 960 (1934); State v. Harrison, 168 La. 1115, 123 So. 800 (1929); State v. King, 78 Mo. 555 (1883); State v. Pearce, 15 Nev. 188 (1880); State v. Todd, 28 N.M. 518, 214 P. 899 (1923); People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907); State v. Magill, 19 N.D. 131, 122 N.W. 330 (1909); Commonwealth v. Gaines, 167 Pa. Super. 485, 75 A.2d 617 (1950); Prater v. State, 104 Tex. Crim. 669, 284 S.W. 965 (1926); State v. Williams, 38 Wyo. 340, 266 P. 1056 (1928).

26. 335 U.S. 469 (1948).

lack of expertise in the field of evidence in general.[27] The Court then endorsed the majority rule, primarily because it was loath to make sweeping changes in the established law, and because the Court saw itself as an improper forum in which to fashion rules of procedure and evidence for state courts.[28] Significantly, *Michelson* did not deal with the issue in constitutional terms,[29] thus leaving it to the states to decide the matter for themselves. For all these reasons, *Michelson* should not be viewed as a preemptive or controlling decision in the area of character evidence.

In spite of the number of jurisdictions that adhere to the majority position, a few states, most notably Iowa[30] and Minnesota,[31] have stated that charcter evidence based upon a witness's personal observations of the person in question is as competent and worthy of consideration as evidence of that person's general reputation.[32]

Underlying the debate over the proper form of proof in this area are conflicting policy considerations. Two major propositions are often stated in support of the majority rule. First, there are the "overwhelming considerations of practical convenience."[33] As stated in *People v. Van Gaasbeck*:[34]

> If a witness is to be permitted to testify to the character of an accused party, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant and the particular actions of the defendant which have led him to his favorable conclusion. In most instances, it would be utterly impossible for the prosecution

27. This is because the law of evidence is normally developed by state courts of the last resort and due to the paucity of occasions that the Supreme Court has to rule on such matters. *Id.* at 486.

28. *Id.*

29. Spencer v. Texas, 385 U.S. 554, 563 (1967).

30. *See* State v. Sterrett, 68 Iowa 76, 25 N.W. 936 (1885); *accord*, State v. Ferguson, 222 Iowa 1148, 270 N.W. 874 (1937); State v. Richards, 126 Iowa 497, 102 N.W. 439 (1905).

31. *See* State v. Lee, 22 Minn. 407 (1876). *See also* Richmond v. Norwich, 96 Conn. 582, 115 A. 11 (1921); State v. Dickerson, 77 Ohio St. 34, 82 N.E. 969 (1907); Mathewson v. Mathewson, 81 Vt. 173, 69 A. 646 (1908); State v. Hosey, 54 Wash. 309, 103 P. 12 (1909).

32. It is important to note that the minority rule does not seek to exclude evidence of general reputation. It merely holds evidence based on personal opinion to be on an equal footing in terms of relevance and credibility and hence admissibility.

The MODEL CODE OF EVIDENCE rule 306 (1942) would allow opinion evidence, as well as evidence of general reputation, as proof of the character of the accused in a criminal action. The UNIFORM RULES OF EVIDENCE rule 608(a) (1974) would permit opinion evidence concerning the character for truthfulness or untruthfulness of a witness.

33. People v. Van Gaasbeck, 189 N.Y. 408, 418, 82 N.E. 718, 721 (1907).

34. 189 N.Y. 408, 82 N.E. 718 (1907).

> to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusions were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect, its admissibility would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation.[35]

This fear of opening up "a history of the person's whole life" at trial and thus diverting the focus of the proceeding and the attention of the jury has been expressed in a number of North Carolina cases.[36]

The second argument supporting the majority rule is based upon the fear that the personal opinion given by the witness may be based upon personal prejudice towards the individual in question or upon a misinterpreted or unrepresentative experience with that person.[37] Not only would testimony founded on such inadequate bases not be probative, but it could also lead into a discussion of specific acts of the person in question, which is universally condemned.[38] For these reasons, among others,[39] most courts have believed that reliability and credibility are gained by the use of the opinion of the community as a whole as opposed to that of a single individual.

Professor Wigmore was one of the earliest and most ardent supporters of the liberal minority position, and one of the most vociferous critics of the majority rule.[40] He argued that personal observations and opinion were simply a more credible and reliable form of proof and that

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35. *Id.* at 418, 82 N.E. at 721.

36. *See, e.g.*, State v. Adams, 193 N.C. 581, 137 S.E. 657 (1927); Edwards v. Price, 162 N.C. 243, 78 S.E. 145 (1913); Bottoms v. Kent, 48 N.C. 154 (1855). *See also* 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110, at 336-37 n.91 (Brandis rev. 1973); Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 WAKE FOREST L. REV. 17, 19 (1970).

37. Ladd, *supra* note 24, at 511, *citing* Phillips v. Kingfield, 19 Me. 375 (1841); State v. Shull, 131 Ore. 224, 282 P. 237 (1929); Kimmel v. Kimmel, 3 S. & R. 336, 8 Am. Dec. 655 (Pa. 1817).

38. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110, at 336-37 & n.91 (Brandis rev. 1973). *See* text accompanying notes 33-36 *supra.*

39. A number of other less important and less persuasive policies have been advanced in favor of the majority rule, including: the fear that testimony based on personal observations would violate the opinion rule, Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 WAKE FOREST L. REV. 17, 19 (1970); that such evidence would invade the province of the jury, as it is their job to infer character from the facts, Ladd, *supra* note 24, at 510; and that reputation is a fact which may be presented to the jury and utilized by them as a basis to evaluate character, *id.*

40. *See* note 21 *supra.*

it would be preferred both by the parties and by jurors.[41] Professor Stansbury contends that although attorneys and judges may know that the witness should limit his testimony only to that of general reputation, the layman is not so schooled in the ways of the law. The practical result is that often the witness will state what is in fact his personal opinion of the person in question, although couching it in terms of the person's general reputation in the community. Stansbury, therefore, argues that a more realistic approach would be to admit testimony based clearly and solely on the witness's personal opinion.[42]

Court decisions upholding the minority rule have relied on yet another theory to support their position. In both *State v. Sterrett*[43] and *State v. Lee*,[44] the two leading minority view cases, the courts reasoned that since the purpose of the introduction of character evidence is to present a foundation for a presumption by the jury that the person in question acted in a certain way, the crucial question becomes whether the person *in fact* possesses a certain disposition and not whether he is reputed to be of such disposition. Therefore, the personal opinion of the witness as to the person's character is evidence of that fact and is of equal competence to testimony of the reputation of the person's character. Although other equally persuasive arguments have been made,[45] these policies are the most popular justifications cited for the minority rule.

With this long standing theoretical controversy and the prior devel-

41. VII J. WIGMORE, EVIDENCE § 1986 (3d ed. 1940). "So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief." *Id.* at 166.

42. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 110, at 336-37 n.99 (Brandis rev. 1973); *cf.* Ladd, *supra* note 24, at 517, wherein the author states: "When reputation for character is offered . . . , the jury undoubtedly regard [*sic*] the statement of the accused's reputation as corresponding to the opinion of the witness."

43. 68 Iowa 76, 78-79, 25 N.W. 936, 937-38 (1885).

44. 22 Minn. 407, 409-10 (1876).

45. *See* Ladd, *supra* note 24. Reliance upon reputation as evidence is a throwback to the days of small, rural communities. In view of today's complex, urban society however, witnesses have little contact with the person in question other than personal observation. As a result, their testimony concerning the person's community reputation is, in reality, personal opinion evidence in the guise of reputation. *Id.* at 515, *citing* Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937); *accord*, State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973) (evidence of good character is no longer confined to reputation in the community in which a person lives), *overruling sub silentio* State v. Smoak, 213 N.C. 79, 195 S.E. 72 (1938).

The fear expressed in the majority rule jurisdictions that personal opinion testimony will be based on prejudice or isolated or trivial experiences (*see* text accompanying notes 37-38 *supra*) can be overcome by the device of cross-examination and requirements relating to the laying of a proper foundation for the character witness's testimony. Ladd, *supra* note 24, at 518.

opment of North Carolina case law in mind, the holding and the implications of the decision in *Stegmann* can properly be analyzed. First, the North Carolina Supreme Court did not completely embrace the minority rule. By excluding the personal opinion testimony of Mrs. Harris, but admitting that of the other witnesses,[46] the court espoused a middle ground. Clearly, testimony based solely on general reputation will continue to be admissible, while that based *solely* on personal opinion will be excluded. However, the holding of the case now makes it permissible to introduce evidence consisting of both personal opinion and observation *and* general reputation testimony. The district attorney's question, "On what do you base your opinion?", although criticized by the court as being "unnecessary and ineptly phrased"[47] will not constitute reversible error, and thus is allowable.

One problem in attempting to define the scope of *Stegmann* is that the court, in adopting this new rule, did not give a detailed discussion of the possible policy justifications for its decision. The reason given by the court for the decision[48] seems to fall within the policy adopted by the other minority state courts:[49] since the issue before the court is the *fact* of the person's disposition, personal opinion testimony is competent proof of such fact. The court did not cite those opinions, however, and it was silent as to the other popular policies in favor of the minority rule.[50]

The court's partial adoption of the minority rule can be criticized for taking a "half a loaf" approach. The personal observations of a witness, now allowed by the court, will assist the jury in evaluating the character evidence introduced. However, one can argue that jurors will likely not differentiate between the community-reputation evidence and the personal opinion evidence and so will not use the latter only to reinforce the former, as the court apparently intends. Professors Stansbury and Ladd believe that jurors already tend to interpret reputation testimony as consisting of the personal opinion of the witness.[51] The new rule increases this likelihood of jury confusion, so the court should drop its charade, recognize the practicalities of the situation and admit personal opinion evidence *per se*.

46. *See* text accompanying notes 9-16 *supra*.
47. 286 N.C. at 647, 213 S.E.2d at 269.
48. *See* text accompanying note 15 *supra*.
49. *See* text accompanying notes 43-44 *supra*.
50. *See* text accompanying notes 40-45 *supra*. Nor did the court refer to the decisions or policies which support the majority position.
51. *See* note 42 and accompanying text *supra*.

Furthermore, by recognizing the probative value of personal opinion testimony under limited circumstances, the court should go on to realize that the same value is present when the personal opinion testimony comes in by itself and that safeguards are available to prevent any adverse effects of such an offer of proof.[52] Having acknowledged the value of the evidence, there is no justification for the court's not differentiating between evidence of reputation and of personal knowledge and belief as suggested by Professor Wigmore.[53] In short, there would seem to be no reason why the court, if it is disposed to move away from the majority rule, should not completely embrace the minority position. As stated by Professor Ladd, "[t]he emphasis upon the means of proving character should be directed to the probative quality of the testimony to be obtained rather than to the formalistic procedure of satisfying the demands of legal ritual."[54]

The North Carolina Supreme Court's decision in *State v. Stegmann* raises almost as many questions as it answers and will obviously need clarification in later cases. However, it seems to represent the first tentative steps on the part of the court to adopt a new approach to the controversial area of character evidence. At least for the time being, it is clear that character testimony may consist of both the general reputation of the individual in question and personal observations and opinions of the witness concerning the person in question. This is a new rule, and practicing attorneys in North Carolina should take careful note of it.

STEVEN WILLIAM SUFLAS

Federal Courts—Bradford v. Weinstein: The Federal Courts Reopen the Door to Prisoners' Civil Rights Claims

Since the mid-1960's the federal courts have witnessed a tremendous influx of state prisoner petitions.[1] Claimants have sought civil

52. Proper requirements for laying a foundation for a witness's testimony and for cross-examination will serve to exclude testimony with an inadequate basis or founded on personal prejudice. Likewise, control of the proceedings by the presiding judge will avert a degeneration of the testimony into a listing of specific acts of the person in question or a recounting of his life's history, which are both still condemned.

53. VII J. WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

54. Ladd, *supra* note 24, at 517-18.

1. Petitions filed by state prisoners in the federal courts totaled 13,423 in 1974, an increase of 1,439.3% over the total in 1960. The 1974 total is more than double the

relief under 42 U.S.C. section 1983[2] and release from incarceration through writs of habeas corpus.[3] The impetus for this influx of claims arose from the lack of effective grievance procedures within the prison system,[4] as well as from the concern expressed by some federal judges over the acute conditions in many state prisons.[5] As a result of the increasing number of state prisoner petitions and the judicial activism of some judges, federal courts began to engage actively in prison reform.[6] In *Preiser v. Rodriguez*,[7] however, the United States Supreme Court greatly inhibited the consideration of the merits of prisoners' claims by the federal courts.[8] Apparently motivated by concern over jammed dockets[9] and fears of federal judicial activism destroying federal-state

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6,248 petitions filed in 1966. Habeas corpus petitions increased from 5,339 in 1966 to 7,626 in 1974, a 42.8% increase. Civil rights petitions increased from 218 in 1966 to 5,236 in 1974, a 2,301.8% increase. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 220-21 (1974).

2. 42 U.S.C. § 1983 (1970) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Habeas corpus was originally a writ at common law. It is now codified in 28 U.S.C. §§ 2241-55 (1970).

4. *See* Singer & Keating, *Prisoner Grievance Mechanisms*, 19 CRIME AND DELINQUENCY 367 (1973). Singer and Keating conclude that the lack of effective grievance procedures is one of the major reasons for prison violence.

5. An example of the judicial concern over the outrageous conditions in many state prisons can be seen in Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). In *Jordan*, Chief Judge George Harris, registering a sense of outrage over the conditions he saw at California's Soledad prison complex, took steps "to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States." *Id.* at 680.

6. The impetus for federal judicial action in the area of prison reform can be traced to the decision in Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). *See, e.g.*, Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

7. 411 U.S. 475 (1973).

8. The Washington Post described *Preiser* as a "setback for civil rights and civil liberties groups and the American Bar Association . . . . The Court effectively closed off access to federal courts which have shown the most sympathy for prisoner's grievances." Washington Post, May 8, 1973, § 5A, at 3, col. 3.

9. Although the Court in *Preiser* never referred to the large number of prisoner petitions, it is safe to assume that it was aware of the situation since briefs filed in the case dealt at length with this issue. Brief for Petitioner at 35, Brief for Respondent at 27, Brief for ABA as Amicus Curiae at 28, Preiser v. Rodriguez, 411 U.S. 475 (1973). The Study Group on the Caseload of the Supreme Court has suggested an imposition of unique exhaustion requirements on prisoners' section 1983 actions. *See* Doyle, *The Court's Responsibility to the Inmate Litigant*, 56 JUDICATURE 406, 409 n.8 (1973).

relations,[10] the Court placed serious restraints on the prisoner's use of section 1983.[11] The Court found that many categories of prisoners' section 1983 claims fall within the "core of habeas corpus" and thus require exhaustion of available state remedies before the federal courts can consider the claims.[12] A year after the *Preiser* decision, in *Bradford v. Weinstein*[13] the Fourth Circuit Court of Appeals extended jurisdiction to a prisoner's section 1983 challenge to a parole proceeding,[14] a situation in which the *Preiser* test arguably required habeas corpus proceedings.[15] *Bradford*'s rejection of the *Preiser* test in this situation illustrates the lower courts' desire to limit the applicability of *Preiser* and to establish the federal courts as a forum for prison reform.

The *Bradford* appeal was a consolidation of two class action suits, one brought in the name of Howard Bradford, an inmate in the North Carolina prison system, and the other by Levi Jenkins, a prisoner in South Carolina. Both prisoners brought section 1983 actions alleging that the hearings in which they were denied parole did not comport with due process of law.[16] The federal district court in North Carolina denied Bradford's claim, holding that the due process clause does not apply to parole proceedings. The federal district court in South Carolina dismissed Jenkins' petition on the ground that plaintiff's goal was parole and that therefore the claim was "within the core" of habeas corpus. The court concluded that under *Preiser* Jenkins would be required first to exhaust his state remedies.[17] On appeal the Fourth Circuit reversed the lower courts' decisions.[18] First, considering the due process claim, the court found that the due process clause does apply to parole eligibility proceedings.[19] However, the court postponed a decision on what procedure the due process clause requires in this situation until after the district court conducted a full evidentiary investigation.[20] The court then considered whether the prisoners' claims were proper under section 1983. After a short examination of *Preiser*, the court

10. 411 U.S. at 490-92.
11. *Id.* at 489-90.
12. *Id.* at 487-94.
13. 519 F.2d 728 (4th Cir. 1974). The Supreme Court heard the case and delivered a per curiam opinion that declared the case moot since Bradford had been released on parole prior to the date of hearing. 96 S. Ct. 347 (1975).
14. 519 F.2d at 734-35.
15. *See id.* at 735-38 (Bryan, J., dissenting).
16. *Id.* at 729-30.
17. *Id.* at 730.
18. *Id.* at 735.
19. *Id.* at 732.
20. *Id.* at 733.

concluded that the relief requested was not for immediate release from confinement and thus was not "within the core of habeas corpus" as defined by *Preiser*.[21] The court therefore held that it had jurisdiction to consider the prisoners' section 1983 claim.[22] Judge Bryan filed a vigorous dissent to the majority's granting of jurisdiction. Stating that *Preiser* must be applied broadly in order to protect the state interest in the area, Bryan viewed the plaintiffs' challenges to the parole hearings as attacks on their detention and thus proper subjects for habeas corpus.[23]

Before analyzing the conflicting applications of the *Preiser* test by the majority and dissent in *Bradford*, it will be helpful to examine the development of the writ of habeas corpus and section 1983. An understanding of the overlapping features of these two procedures will facilitate an understanding of the problems in applying the *Preiser* test to a situation such as the one in *Bradford*.

The principal means for prisoners to attack the legitimacy of their confinement has traditionally been to seek a writ of habeas corpus.[24] Originally the writ offered a prisoner a method to challenge the legitimacy of his confinement by attacking the validity of his sentence or conviction.[25] Release from confinement was the available relief.[26] However, the federal courts expanded the writ to remedy unconstitutional conditions of confinement and to alleviate gross mistreatment of prisoners.[27] It was no longer necessary for the inmate to seek total release from prison in order to obtain the writ.[28] However, there is one significant limitation on the use of habeas corpus. In the 1886 case *Ex parte Royall*[29] the Supreme Court strongly urged the federal courts, in cases of a state prisoner seeking habeas corpus relief, to await the exhaustion of available state judicial remedies before granting jurisdiction over the prisoner's federal habeas corpus claim. The requirement

21. *Id.* at 733-34.
22. *Id.* at 734-35.
23. *Id.* at 736.
24. *See* note 3 *supra*.
25. *See* Preiser v. Rodriguez, 411 U.S. at 484. *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).
26. *See generally Developments in the Law*, 83 HARV. L. REV., *supra* note 25, at 1079.
27. The federal courts expanded the writ in Coffin v. Riechard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) where habeas corpus was recognized as a remedy for unconstitutional conditions of confinement. The Supreme Court affirmed this expansive role in Wilwording v. Swenson, 404 U.S. 249 (1971).
28. In Johnson v. Avery, 393 U.S. 483 (1969), the Supreme Court approved the use of habeas corpus to challenge a prisoner's solitary confinement. It was not necessary for the inmate to seek total release from prison.
29. 117 U.S. 241, 251 (1886).

of exhausting state remedies, born of a policy of preserving comity between the federal and state judiciaries, is now codified.[30]

Although the reach of habeas corpus has been extended to allow consideration of the conditions of confinement,[31] section 1983 has been seen as a more appropriate vehicle to raise such challenges. The Civil Rights Act, of which section 1983 is a part, was designed to combat the injustices and discrimination that existed throughout the South during Reconstruction.[32] In *Monroe v. Pape*[33] the Supreme Court rejuvenated the statute by holding that section 1983 provides a federal remedy for violations of an individual's constitutional rights by officials acting under "color of state law."[34] The Act has since been applied to many areas of state involvement,[35] including prison problems.[36]

Although the coverage of the two acts clearly overlaps, there are several reasons for prisoners' preference of section 1983.[37] The most obvious reason is that section 1983 does not require exhaustion of state remedies.[38] Exhaustion is time-consuming and expensive,[39] and to prisoners, who have very little concern for federal-state comity, it simply appears to be another obstacle constructed by the judicial system to prevent consideration of their grievances. Additionally, section 1983 offers a wide range of relief, including damages and broad equity

30. 28 U.S.C. §§ 2254(b)-(c) (1970).

31. *See* note 27 *supra.*

32. *See* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965). This article contains a good discussion of the history of section 1983 and the Civil Rights Act. The article also includes excerpts from speeches by Congressmen showing their concern over violence in the South after the Civil War and demanding passage of the Act.

33. 365 U.S. 167 (1961).

34. *Id.* at 184-85, 187.

35. *See, e.g.,* Wood v. Strickland, 420 U.S. 308 (1975) (public education); Monroe v. Pape, 365 U.S. 167 (1961) (police procedure); Holmes v. New York Housing Authority, 398 F.2d 262 (2d Cir. 1968) (public housing).

36. The Supreme Court specifically approved the use of section 1983 for relief from certain prison conditions. The cases approved in *Preiser* were Haines v. Kerner, 404 U.S. 519 (1972) (per curiam); Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam); Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam); and Cooper v. Pate, 378 U.S. 546 (1964) (per curiam).

37. *See generally* Turner, *Federal Jurisdiction and Practice in Prisoner Cases,* in PRISONERS' RIGHTS SOURCEBOOK 243 (M. Hermann & M. Haft eds. 1973).

38. Monroe v. Pape, 365 U.S. 167, 183 (1961). In finding that one did not have to resort to a state remedy even if it would give the relief if enforced, Justice Douglas stated: "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

39. To complete the gamut of state remedies before federal relief is available may require months or even years. In cases where the challenge is to the parole procedure the case might actually become moot by the time the case is heard by the federal courts. *See* note 13 *supra.*

powers.[40] Class actions can also be maintained under section 1983.[41] Finally, section 1983 enables the petitioner to utilize the liberal discovery procedures under the federal rules of procedure,[42] as compared to discovery pursuant to a federal habeas corpus claim, which is allowed only upon obtaining a court order.[43]

Although these two statutory remedies were at one time equally available to state prisoners, the Supreme Court's attempt in *Preiser v. Rodriguez* to define the relationship between the two resulted in serious limitations on the use of section 1983.[44] The case involved a civil rights action by three prisoners. Their complaint alleged that they had been deprived of previously earned good time credits without being afforded due process.[45] The earned credits counted towards the reduction of their sentences. The Supreme Court noted that the "essence of habeas corpus is an attack by a person upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."[46] Since the remedy of restoration of the lost credits would shorten the prisoners' time of confinement, the Supreme Court read the prisoners' challenges as being to the "fact or duration" of their illegal confinement and "as close to the core of habeas corpus as an attack on the prisoner's conviction . . . ."[47] The Court held, therefore, that the prisoners' complaints should be treated as applications for writs of habeas corpus and dismissed for failure to exhaust state remedies.[48] The majority announced the test that if the prisoner is challenging the fact or duration of his confinement and seeking release or shortening of his term of confinement, then habeas corpus is the sole remedy.[49] The Court reasoned that this test would protect the policy behind the exhaus-

40. *See* note 2 *supra.*

41. The requisites of rule 23 of the Federal Rules of Civil Procedure must be met. FED. R. CIV. P. 23(b)(2). *See* Zagaris, *Recent Developments in Prison Litigation: Procedural Issues and Remedies*, 14 SANTA CLARA LAW. 810, 831 (1974). Zagaris points out that class actions are particularly well suited for prison plaintiffs. Zagaris notes several reasons including that: (1) with a class of plaintiffs, the complete action cannot be declared moot by the release of one prisoner, (2) the large number of plaintiffs allows more extensive discovery, and (3) that attorneys' fees are often awarded in the class action context. *Id.* at 831-34.

42. FED. R. CIV. P. 26.

43. *See* Harris v. Nelson, 394 U.S. 286 (1969).

44. 411 U.S. at 489-90.

45. *Id.* at 476-77.

46. *Id.* at 484.

47. *Id.* at 489.

48. *Id.* at 481. In essence the Court affirmed the court of appeals ruling in the companion case of United States *ex rel.* Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971).

49. 411 U.S. at 500.

tion requirement and allow the states to have the first opportunity to correct state errors.[50]

Despite the apparent simplicity of the test announced in *Preiser*, the decision left the lower courts confused as to how to apply the test. *Preiser* clearly barred certain section 1983 suits: challenges to procedures involving loss of good time credit, since relief in such a suit would result in the prisoner's early release;[51] and challenges to parole revocations, since a successful claim would reinstate parole.[52] Equally as clear, *Preiser* would not require exhaustion in certain situations: a challenge to the conditions of confinement, such as a claim of inadequate physical facilities; and a challenge for which no adequate state remedy existed.[53] However, there remained many intermediate situations which did not clearly fall either within or outside the Court's concept of the "core of habeas corpus."[54]

Bradford confronted the court of appeals with just such a difficult situation for application of the *Preiser* test. Since the prisoners were challenging the constitutionality of the procedure employed at the parole board hearings,[55] their allegations did not easily fall into the category of "conditions of confinement";[56] nor could their petitions be viewed as requesting "release." Rather, their claims were directed at the procedure of the parole board, which is an intricate part of the release system. If the court interpreted *Preiser* to apply only in the narrow circumstances in which the prisoner's challenge is directed towards the fact or

50. *Id.* at 491-92. Justice Brennan authored a dissenting opinion that criticized the majority's decision as "analytically unsound." The dissenters argued that the protection of federal rights should not succumb to protection of federal-state relations and that section 1983 should take precedence over habeas corpus and its exhaustion requirement. Justice Brennan pointed out the difficulty in applying the majority's test as well as its failure to prevent federal-state friction. *Id.* at 475, 500-25 (dissenting opinion).

51. *Id.* at 475.

52. In Morrissey v. Brewer, 408 U.S. 471 (1972), a case prior to *Preiser*, the Supreme Court found that exhaustion was required in an administratively imposed parole revocation. *See also* Mason v. Askew, 484 F.2d 642 (5th Cir. 1973) (per curiam). In *Mason* the prisoner contended that parole revocation was inflicted with substantive and procedural infirmities and sought relief under section 1983. The court denied the claim on the grounds of *Preiser*.

53. *See, e.g.*, Plano v. Baker, 504 F.2d 595, 597 (2d Cir. 1974).

54. Examples of situations not clearly within or outside the Court's concept of "core of habeas corpus" are challenges to parole hearings, challenges to procedures assigning an inmate to a special facility (such as a hospital for drug abusers) and challenges to transfers of an inmate from one prison facility to another.

55. 519 F.2d at 734-35.

56. The most clear cut situations falling within "conditions of confinement" are challenges to physical conditions or illegal actions of guards or other prison personnel. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

duration of his confinement and actual release is requested, then it would have to conclude that the prisoners should be allowed to pursue their section 1983 claims. However, if the court broadened the scope of *Preiser* to include within the core of habeas corpus any challenge to the release system, regardless of how remote the chance of actual release, then their claims would necessarily fail because state remedies were not first exhausted.

One member of the court, Senior Judge Bryan, chose the latter alternative and read *Preiser* to require habeas corpus relief when a prisoner is attacking the parole hearing process.[57] Reasoning that the parole hearing is an event in the chain of ultimate detention and that a change in the hearing procedure may eventually affect the duration of incarceration, Bryan believed that the prisoners' complaints related to their detention, not to the circumstances of imprisonment.[58] Therefore, he concluded that plaintiffs' claims fell within the core of habeas corpus, thus initially requiring exhaustion of state remedies.[59] Bryan's view raises the question whether the possibility of release, no matter how remote, should be regarded as within the core. In *Preiser* the prisoners were not actually seeking release but were challenging procedures that denied them good time credits.[60] However, if their claims had been successful they would have been entitled to immediate release, with no further proceedings necessary. Even so, release was actually collateral to the claim. Bryan seemed to have seized on the collateral nature of release in *Preiser* and extended it to support the proposition that any potential release is within the core. Bryan justified such an extension on the basis of protection of state-federal comity.[61]

Judges Winter and Butzner took the opposite approach in narrowly applying the *Preiser* test. They believed that *Preiser* does not apply unless the purpose of the suit is to seek release or to shorten the duration of confinement.[62] In *Bradford*, however, the prisoners did not request release; a favorable ruling would only entitle them to another parole hearing.[63] By narrowly construing the language of *Preiser*, the majority seemed to reason that the remote chance that the prisoners' claims would actually expedite their release was not sufficient to bring their

57. 519 F.2d at 736.
58. *Id.*
59. *Id.* at 736-37.
60. 411 U.S. at 476-77.
61. 519 F.2d at 736-37.
62. *See id.* at 733.
63. *Id.* at 730-32.

claims within the core of habeas corpus. Other lower federal courts have shared the majority's view that the "possibility of release" should not control in determining whether the claim is within the core of habeas corpus.[64]

The majority's restricted application of *Preiser* receives a great deal of support from *Gomez v. Miller*,[65] a three-judge district court opinion that was given summary affirmance by the Supreme Court.[66] As there was a detailed dissent by Judge Moore on the habeas corpus issue,[67] the Supreme Court must have considered the jurisdictional question and found the district court's opinion acceptable.[68] In *Gomez* three persons challenged their incarceration in hospitals for the criminally insane.[69] The plaintiffs, who were indicted for various felonies but were untried, brought a section 1983 action contending that the equal protection and due process clauses of the fourteenth amendment required the state to prove in a jury trial that they were "dangerous" before they could be committed to a prison hospital.[70] The case is similar to *Bradford*, for in neither instance was there a challenge to the state's right to place the plaintiffs in their particular situation, namely placing them in a hospital or denying them parole, as long as it was done constitutionally. The district court in *Gomez* rejected the state's contention that habeas corpus relief was required.[71] The court noted that at best the relief sought would result in a transfer to a civilian

64. In Wingard v. North Carolina, 366 F. Supp. 982 (W.D.N.C. 1973), a district court allowed a section 1983 claim, stating that the relief prayed for, if granted, would make the prisoner eligible for parole but would not constitute an actual grant of parole and thus not actual release. As in *Bradford*, the court read *Preiser* to require the prisoner to pursue habeas corpus when the only relief sought is an immediate or more speedy release from prison.

In Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), state prisoners brought section 1983 actions challenging the constitutionality of prison disciplinary procedures. They did not seek immediate or earlier release from prison. Even though the challenged disciplinary procedures had some effect on determining length of imprisonment, the Ninth Circuit found that the effect of those procedures on the duration of the plaintiff's sentence was too speculative and incidental to bring any part of the action within the core of habeas corpus.

65. 341 F. Supp. 323 (S.D.N.Y. 1972), *aff'd mem.*, 412 U.S. 914 (1973).

66. *Id.*

67. *Id.* at 333 (Moore, J., dissenting). Judge Moore felt that the petition should be read as a writ of habeas corpus and thus the prisoner should be required to exhaust state remedies. Judge Moore based his conclusion on the policy of protecting federal-state comity.

68. At least one federal court has agreed that the Supreme Court could not have overlooked the jurisdictional question in giving *Gomez* summary affirmance. Blouin v. Dembitz, 489 F.2d 488, 491 n.6 (1973).

69. 341 F. Supp. at 324.

70. *Id.*

71. *Id.* at 328.

hospital and not outright release.[72] Such reasoning seems equally applicable to *Bradford*, in which the relief would at best result in another hearing, not in outright release. In both *Gomez* and *Bradford* the relief being sought would bring the plaintiffs closer to release. But the Supreme Court in affirming *Gomez* impliedly approved the reasoning which found that simply improving the chances of release was not sufficient to require the use of habeas corpus.

The question still remains why the federal courts have been unwilling to extend *Preiser* to the limits suggested by Judge Bryan. There are several answers, two of which can be found in the *Bradford* court's use of *Wolff v. McDonnell.*[73] In *Wolff* the Supreme Court allowed a section 1983 challenge to the procedures used in revoking good time credits.[74] Judge Bryan took issue with the majority's citing of *Wolff* to support their interpretation of the *Preiser* test. Bryan distinguished *Wolff* on the ground that it involved a claim for damages, which made it automatically a proper subject for section 1983 relief.[75] Although correct in his conclusion, Bryan's reasoning points out a flaw in the *Preiser* test. *Preiser* recognized that since damages are not recoverable in habeas corpus, "a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies."[76] The result is that, when possible, prisoner petitions will request damage relief. In a situation in which there is a claim for damages coupled with a complaint that might otherwise be relegated to the habeas corpus procedure, the federal courts could either retain the entire case on theories of pendent jurisdiction or retain the damage claim only and send the remainder of the suit to the state courts.[77] The second alternative can result in waste of judicial energy as well as increased friction between the federal and state courts due to the possiblity of inconsistent results.[78] To avoid having to make

72. *Id.*
73. 418 U.S. 539 (1974), *discussed in* 519 F.2d at 737-38.
74. 418 U.S. at 554-55.
75. 519 F.2d at 737.
76. 411 U.S. at 494.
77. *See* Zagaris, *supra* note 41, at 831. However, one court has found that it would not consider a damage action if a ruling would imply that a state conviction is or would be illegal. Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974). In Edwards v. Illinois Dep't of Corrections, 514 F.2d 477, 478 n.3 (7th Cir. 1975), the court noted that it did not have to dismiss the plaintiff's claim for money damages for failure to exhaust state remedies. Also, in Henderson v. Secretary of Correction, 518 F.2d 694 (10th Cir. 1975), the court recognized that as long as the plaintiff asserted damages his claim could be heard.
78. Zagaris, *supra* note 41, at 831.

this choice, many federal courts have attempted to limit *Preiser* in order to have jurisdiction over most prisoners' section 1983 claims.

The majority in *Bradford* also had to deal with the broad language employed by *Preiser* in announcing a policy of protecting the state's interest in having the first opportunity to correct the errors made in the internal administration of its prisons. The language was arguably broad enough to include challenges to the parole system, as well as all other attacks on prison administration.[79] The question to be resolved was whether the policy of protecting the state's interest in the prison system demanded a consistently broad application of the *Preiser* test. The Fourth Circuit concluded that *Preiser* was clearly not intended to preclude all section 1983 challenges by prisoners. It supported this position by noting that the Court in *Preiser* had carefully reaffirmed its holding in four earlier cases in which prisoners had brought section 1983 claims challenging some aspect of the penal system.[80] Also, the *Bradford* court demonstrated that the Supreme Court had further limited the broad policy language by its later holding in *Wolff*. In *Wolff* the Supreme Court disallowed restoration of good time credits but did allow a determination of the validity of the procedures for revoking the credits.[81] Impliedly, the Court found that the state interest does not preclude such a challenge to prison administration systems as long as release is not sought.[82] Thus, the policy of protecting the state's interest should not preclude the claim in *Bradford*, since the claimant, as in *Wolff*, sought procedural protection without asking for release.

By limiting the application of the policy of protecting state interest to the situation in which the prisoner seeks release, courts are acting

79. The *Bradford* court was quick to acknowledge the broad scope of the relevant language. 519 F.2d at 734. The relevant discussion in *Preiser* can be found at 411 U.S. 491-92.

80. *Preiser* approved four state prisoner cases which did not require federal habeas corpus remedy: Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (claim arising out of an allegedly unconstitutional solitary confinement); Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam) (challenge to living conditions and disciplinary measures imposed while in maximum security of prison); Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam) (legal materials confiscated by prison officials); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (prisoner denied permission to purchase specific religious publications). It seems clear that in each case the Supreme Court is approving of the federal judiciary's interference with the state prison system.

81. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

82. *See id.* at 554-55.

Wolff can be distinguished from *Bradford* on the ground that the claimant is seeking damages, but as mentioned previously, this argument seems to be placing form over substance. There is no logic in an argument that state interests should be protected when no damages are sought while disregarding those interests if the claimant seeks damages. *See* text accompanying notes 71-74 *supra*.

consistently with the congressional intent in placing an exhaustion requirement in the habeas corpus statute.[83] Originally, the rule was based on considerations of comity between federal and state judiciaries and did not extend to challenges to state administrative action.[84] Exhaustion seems to have developed to allow states a chance to determine if the prisoner was being legally detained before the federal courts could pass judgment.[85] Thus, it seems to be correct to require exhaustion for challenges to state prison administrations only when a successful challenge would result in release. There is a valid distinction between the federal courts ordering relief that will release a prisoner who had violated state laws, as opposed to relief that will only require the states to adjust their administrative procedures. Since the prisoner violated state laws, the state courts should have the first opportunity to determine if the prisoner should be released. However, there is no similar policy requiring the state to have the first opportunity to consider allegedly unconstitutional prison administrative procedures. By limiting the policy expressed in *Preiser*, the courts have paid tribute to this distinction and have simplified the relevant inquiry to whether the claimant is seeking release or whether release would result from the relief requested.

A final underlying reason for the hesitancy of the federal courts to broaden *Preiser* is the changing view of the status of prisoners. In *Cruz v. Beto*[86] the Supreme Court, rejecting the notion that the prisoner occupies a basically rightless status, stated that the federal courts are "to enforce the constitutional rights of all 'persons,' including prisoners. . . . [and that] persons in prison, like other individuals, have the right to petition the Government for redress of grievances. . . ."[87] This changed concept of the prisoner's status seems to have developed during the prison reform period of the past decade. During this period the federal courts have offered prisoners the most sympathetic forum available,[88] and it seems that federal judges want the federal

83. Judge Parker, the author of the habeas corpus statute, explains the purpose of the statute. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

84. *Id.*

85. *See* S. REP. No. 1559, 80th Cong., 2d Sess. (1948); H.R. REP. No. 308, 80th Cong., 1st Sess. (1947).

86. 405 U.S. 319 (1972) (per curiam).

87. *Id.* at 321.

88. Judge James Doyle of the U.S. District Court for the Western District of Wisconsin commented on how he thought the courts should respond to prisoners' claims: "I believe that the courts should be no less and no more painstaking, searching, and respectful in their response to these litigants than they are in their response to any other constitutional litigation." Doyle based his answer on the oath administered to federal judges: "I do solemnly swear that I will administer justice without respect to persons . . .

courts to continue to be vehicles for prison reform. By limiting the application of *Preiser*, federal judges can continue to insure prisoners a forum in which to redress their grievances.

Bradford holds a place of importance among the numerous decisions applying the *Preiser* test. The challenge to the parole hearing presented the court with a situation in which it could have justified an extension of the *Preiser* test and channeled the claim back into the state courts. However, the court said in essence that simply improving the chances of release is not sufficient to be within the "core." *Bradford* interpreted *Preiser* to require prisoners to proceed under habeas corpus only when the challenge is *directly* to the fact or duration of confinement and the relief requested is immediate release from imprisonment.

Thus, in the Fourth Circuit, section 1983 will be useful not only to challenge poor physical conditions but also to challenge the internal administration of many prison proceedings. Besides allowing challenges to the parole hearing, the Fourth Circuit should grant jurisdiction of section 1983 claims that challenge the procedures used in deciding to transfer an inmate from one prison facility to another, assuming there was a deprivation of liberty or property, and challenges to the procedures that place an inmate in special facilities (such as special facilities for drug offenders).[89] In the above contexts, the prisoners should be able to seek a restraint of enforcement of present procedural rules and adoption of new ones.[90] Hopefully, these claims will force lower courts as well as the Supreme Court to rule on the constitutionality of many prison procedures. Favorable rulings in the federal courts will force the prisons to adopt procedures that reflect the fact that prisoners do have rights and will eventually lead to uniform procedures among the state prisons. Inmates have sought a forum in which they can play an active role in changing the penal system from one that views the prisoner as being constitutionally naked to one that recognizes that prisoners do have rights that must be protected.[91] *Bradford*'s extension of jurisdic-

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do equal right to the poor and to the rich . . . support and defend the Constitution." Doyle, *supra* note 9, at 406-07.

89. Even if a transfer from one facility is considered "release" within the *Preiser* rationale, the challenge to the procedures employed in deciding on the transfer should, under *Bradford*, be too remote to be considered a request for "release" and thus not within the "core."

90. Under section 1983 the prisoner can seek both declaratory and injunctive relief which would accomplish these results.

91. Singer and Keating have pointed out that the lack of effective grievance procedures is one of the major reasons for prison violence. Singer & Keating, *supra* note 4, at 367. It is difficult for the average citizen to appreciate the frustration that

tion over prisoners' section 1983 claims demonstrates that the federal courts will offer the prisoners this sympathetic forum and enable them to take an active role in correcting unconstitutional conditions and procedures in the state prisons.

WILLIAM SIDNEY ALDRIDGE

Federal Jurisdiction—The Status of Public Officials as "Persons" Under 42 U.S.C. Section 1983

The United States Supreme Court has declared that the right of a tenured public school teacher to continued employment is a protected property interest[1] that cannot be taken away without due process.[2] The employee facing removal is generally entitled to a hearing on the charges brought against him in which he can confront and cross-examine witnesses.[3] Recently, the Fourth Circuit Court of Appeals in *Burt v. Board of Trustees of Edgefield County School District*[4] and *Thomas v. Ward*[5] greatly enhanced the opportunity for the victim of

prisoners experience within the prison grievance system and parole system. James Hoffa, former president of the Teamsters' Union, commented on his observations of the parole board while he was in prison: "I know of an individual who served 27 years in prison and was allowed exactly three minutes to appear in front of the parole board and then they said, Well, we want to study you two more years. What they found out in 29 years that they couldn't find out in 27 I'll never find out." Hoffa, *Criminal Justice from the Inside*, 56 JUDICATURE 422, 425 (1973). Hopefully prisoners' section 1983 suits will be effective in eliminating this type of process.

One lawyer seemed to sum up the situation best: "It is often difficult for attorneys, or courts, whose entire universe revolves around rational decision-making, to fully comprehend the total and arbitrary power which has characterized prison authorities' control over the lives of prisoners. Administrative decisions which drastically affect the lives and liberty of thousands of prisoners have often been made on the flimsiest of information, without review." Brief for the National Council on Crime and Delinquency as Amicus Curiae at 3, Wolff v. McDonnell, 418 U.S. 539 (1974).

1. Board of Regents v. Roth, 408 U.S. 564, 576 (1972) (dictum). In Perry v. Sinderman, 408 U.S. 593 (1972), the Court expanded *Roth* to include not only those teachers who were formally tenured, but also those who had an implied or "de facto" tenure. Such tenure is to be ascertained by an examination of the historical policies and practices of the institution. 408 U.S. at 602-03. For a similar statutory doctrine see N.C. GEN. STAT. § 115-142 (1975) (establishing formal dismissal procedures for teachers with more than three consecutive years of service in one school district).

2. Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

3. McNeil v. Butz, 480 F.2d 314, 321 (4th Cir. 1973).

4. 521 F.2d 1201 (4th Cir. 1975).

5. Civil No. 74-1541 (4th Cir., Nov. 24, 1975).

a defective proceeding to secure restitutionary and injunctive relief against school authorities. The court held that individual members of a school board can be sued in their official capacity as "persons" within the meaning of section 1983 of the Civil Rights Act[6] in an original federal district court proceeding.[7] The practical effect of these decisions may be far-reaching, in that they seemingly open the treasuries of local governmental units to equitable reimbursement judgments in section 1983 actions. Furthermore, *Burt* and *Thomas* manifest the Fourth Circuit's continued resistance to Supreme Court decisions narrowing the scope of remedies against public bodies in civil rights actions.[8]

In the spring of 1970, the Board of Trustees of the Edgefield County, South Carolina, School District released teacher Helen Burt on the ground of incompetence. In May, 1972, she brought suit under section 1983 against the school board and each individual member of the Board alleging that her discharge was racially motivated and that she was denied adequate notice and an opportunity for a hearing. She sought 25,000 dollars for damages to her "character and person," plus reinstatement[9] with back pay and retirement benefits. Before trial, she dropped her damage claim, as well as her claim for reinstatement, but retained her demands for back pay and retirement contributions.[10] The district court supported the Board's finding of incompetence but determined that Mrs. Burt had been denied a hearing with due process

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6. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. 28 U.S.C. § 1343 (1970) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . .

The Supreme Court has interpreted section 1343(3) as conferring jurisdiction only when a proper cause of action is stated under section 1983. *See* City of Kenosha v. Bruno, 412 U.S. 507, 511-13 (1973). *See generally* Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 144, 147-51 (1961).

8. *See* Harper v. Kloster, 486 F.2d 1134, 1138 (4th Cir. 1973). *See also* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966).

9. 521 F.2d at 1203-04 n.1. By the time of trial Mrs. Burt had reached the normal retirement age of 65.

10. *Id.* at 1203.

safeguards. She was awarded back pay but not retirement fund contributions.

On appeal, the Fourth Circuit found it impossible to determine whether the lower court judgment ran against the trustees of the school district as individuals or as representatives of the school board. It vacated the judgment[11] and remanded the case for a clarification of the action as one for damages[12] or equitable reimbursment.[13] The court dismissed the action against the Board as an official body since it did not constitute a "person" under section 1983; however, it ruled that members of the Board acting in their official capacities were proper "persons" under section 1983 and thus subject to claims for equitable relief.[14]

The factual circumstances of *Thomas v. Ward* closely paralleled those of *Burt*. Lyle Thomas was dismissed from his teaching position by the Winston-Salem/Forsyth County, North Carolina, School Board following a hearing in which he was deprived of the opportunity to confront witnesses testifying by affidavit against him.[15] The district court

11. The court found that the judgment on its face ran directly against the board members as individuals, and ordered the named defendants to pay over damages to the plaintiff. 521 F.2d at 1204 n.2. Upon that determination, it further ruled that the trial court committed error in not allowing the defendant's demand for a jury trial. *Id.* at 1206. This result apparently reflects a change in judicial attitude from the Fourth Circuit's decision in Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966), in which the court ruled that an action for back pay did not constitute an action for damages, but rather only an integral part of the equitable remedy of reimbursement, and thus afforded no constitutional right to a jury trial. *See* Comment, *Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEXAS L. REV. 483 (1975).

12. The judges were in disagreement as to the proper measure of damages if the judgment ran against the board members as individuals. Judge Craven would allow damages only for the value of the broken employment contract, which he found only nominal in the case of an incompetent teacher. 521 F.2d at 1204-05. Judges Winter and Russell would allow full recovery of back pay as damages. *Id.* at 1207-08, 1209.

13. The Fourth Circuit has long regarded suits for back pay as equitable in nature since such awards serve only to restore claimants to their rightful economic status. In Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966), the court ruled that in section 1983 litigation, back pay is simply an integral part of the equitable remedy of reinstatement. *See* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (back pay award under Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), ruled simply part of statutory equitable remedy); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). *But see* Horton v. Orange County Bd. of Educ., 464 F.2d 536 (4th Cir. 1972), in which discharged teacher was not entitled to reinstatement but was allowed to recover as "damages" her new pecuniary loss for the period she was disemployed to the date of trial. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.25, at 928-31 (1973).

14. 521 F.2d at 1205.

15. Thomas received a hearing in which the only evidence against him was letters of school officials, his personal file, and affidavits of several students who were later

ruled the hearing improper and ordered that Thomas be given another hearing. The second, constitutionally proper hearing confirmed his incompetence. Thomas filed another complaint in federal district court against the Board and each of its members, requesting reinstatement and back pay. The district court dismissed the action, but on appeal the Fourth Circuit ruled that the defective first hearing at least entitled Thomas to back pay until the time of his second hearing.[16] On the basis of *Burt*, the court reiterated that school board members acting in their official capacities are "persons" under section 1983.[17]

MUNICIPAL IMMUNITY UNDER SECTION 1983

The Fourth Circuit's approach in *Burt* and *Thomas* represents another attempt by one of the lower federal courts to confront the confusion surrounding the meaning of "person" in section 1983. Originally enacted in 1871,[18] section 1983 attempted to protect newly emancipated blacks against violence from the Ku Klux Klan with the open acquiescence of state and local authorities.[19] It provided a federal forum for actions against municipal and state officers who failed actively to enforce the law—especially the fourteenth amendment.[20] Like most of the early civil rights legislation, the statute lay practically dormant until the 1950's.[21] Its first modern interpretation came in the landmark case of *Monroe v. Pape*,[22] in which the United States Supreme Court upheld the right of six children and their parents to assert a damage action against Chicago policemen for unlawful invasion of their home. However, after careful scrutiny of the legislative history,[23] the *Monroe* Court concluded that Congress did not intend

shown to be disciplinary problems themselves. No witnesses were sworn and Thomas thus had no opportunity for cross-examination. The trial court found on this record a failure of due process. Civil No. 74-1541 at 4.

16. *Id.* at 9-10.

17. *Id.* at 11.

18. Ku Klux Klan Act of April 20, 1871, 17 Stat. 13.

19. *See* CONG. GLOBE, 42d Cong., 1st Sess. 662 *passim* (1871). *See also* Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972).

20. For accounts of the attrocities reported to the Congress during the debates on the Act see CONG. GLOBE, 42d Cong., 1st Sess. App. (1871).

21. *See generally* E. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Note, *The Proper Scope of Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

22. 365 U.S. 167 (1961).

23. Justice Douglas based his majority opinion on the rejection of the Sherman Amendment that would have made local governments liable for riots or violence occurring within their jurisdiction. *Id.* at 188-92. *See* CONG. GLOBE 42d Cong., 1st Sess. 704-05, 725, 800-01 (1871). *See generally* Kates and Kouba, *supra* note 19, at 131.

municipalities to be subject to the Act and that consequently they were not "persons" as defined in the statute.[24] Since the city could not be sued under section 1983, the Court ruled that it had no jurisdiction under 28 U.S.C. section 1343[25] and dismissed the action against the city. The *Monroe* result, limiting actions against municipalities, has been interpreted to include many local political subdivisions, including school boards.[26] The decision received much criticism,[27] and almost immediately lower federal courts sought methods to circumvent its meaning.

Twelve years later, the Court again confronted the *Monroe* situation. In *Moor v. County of Alameda*[28] petitioners brought damage actions under section 1983 against several law enforcement officers and against the County on the theory that the County was vicariously liable under state law for the officers' unconstitutional acts. Since under their construction of the California Tort Claims Act,[29] the County in effect consented to be sued in state court, petitioners asserted that it had also waived its immunity in the federal forum and thus could be treated as a "person" for section 1983 purposes. Furthermore, they argued that the Court's policy of exclusion of governmental units from section 1983 liability effectively denied plaintiffs an adequate recovery. In complainants' view, personal actions against individual officers did not provide a deterrent against official infringement of federal rights, since often the officers proved judgment proof or were protected by some type of official immunity.[30] In spite of these policy considerations, the

24. 365 U.S. at 191-92.

25. *See* note 7 *supra.*

26. *See* Singleton v. Vance County Bd. of Educ., 501 F.2d 429 (4th Cir. 1974).

27. *See* Kates and Kouba, *supra* note 19, at 132-36; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1 (1974); Comment, *Developing Governmental Liability Under 42 U.S.C. § 1983,* 55 U. MINN. L. REV. 1201, 1205-07 (1971).

28. 411 U.S. 693 (1973).

29. CAL. GOV'T CODE § 815.2(a) (West 1966).

30. The concept of the immunity of government officials sprang out of the common law's recognition of the necessity of permitting officials to perform their official functions free from personal liability. This was modified in Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Supreme Court held that government officials are not totally exempt from liability under section 1983. They were granted only a qualified immunity contingent upon such factors as the scope of discretion and responsibility of the officers plus the circumstances as they appeared at the time of the unconstitutional event. 416 U.S. at 247.

The latest standard for immunity in the school board disciplinary context (which closely parallels the teacher suspensions in *Burt* and *Thomas*) appeared in Wood v. Strickland, 420 U.S. 308 (1975): "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.* at 322. *See also* Note, *Consti-*

Court adhered to the rationale of *Monroe* and declared that Alameda County was not a "person" under section 1983.

Soon after *Moor*, the Supreme Court's decision in *City of Kenosha v. Bruno*[31] apparently closed the issue of local government liability under section 1983. In *Kenosha* appellee liquor store operators brought an action under section 1983 claiming deprivation of due process in the City's refusal to renew their one-year liquor license. They sought only declaratory and injunctive relief.[32] Although the jurisdictional issue did not surface at the trial stage, the Supreme Court dismissed the action against the City on the ground that it was not a "person" for section 1983 purposes. Justice Rehnquist's opinion concluded:

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe*, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983 . . . they are outside of its ambit for purposes of equitable relief as well as for damages.[33]

The mandate of *Kenosha* seems clear. The Court has specifically excluded municipalities and other local governmental units from "person" status under section 1983 whether the suit be couched in legal or equitable terms.

Although the Supreme Court has emphatically denied municipal liability under section 1983, it has not yet discussed the situation presented by *Burt* and *Thomas*, in which the individual members of the public body are sued in their representative capacities. Clearly, *Monroe* sanctions suits against public officials as individuals, but damage actions against such persons are often thwarted by various

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tutional Law—Neither the Eleventh Amendment nor the Doctrine of Executive Immunity Automatically Bar a Suit for Damages Brought against State Officials in their Individual Capacities under 42 U.S.C. § 1983—Scheuer v. Rhodes, 24 CATH. U. L. REV. 164 (1974); Note, *Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities*, 53 N.C.L. REV. 439 (1974).

31. 412 U.S. 507 (1973).

32. 412 U.S. at 508. The district court declared the statute in question unconstitutional, relying on two Seventh Circuit decisions holding officials to be proper "persons" in an action seeking equitable relief, namely, Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969), and Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961). 412 U.S. at 511. *See generally* Comment, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. COLO. L. REV. 105 (1971).

33. 412 U.S. at 513 (citation omitted).

forms of official immunity.[34] Likewise, an injunctive decree against an individual may fall outside the scope of his authority as an individual and thus block effective relief.[35] Suits against board members as officials would not encounter either of these obstacles. It would seem, however, that a judgment requiring municipal officials to pay damages or reinstate an employee is precisely equivalent to requiring the city to do so. Many lower federal courts have adopted this reasoning[36] in the wake of *Monroe* and *Kenosha.* In *Taliaferro v. State Council of Higher Education,*[37] for example, one court reasoned:

> The logic of *Bruno* seems inescapable . . . . Since this Court can perceive no distinction in principle between a state or county and the agencies or institutions into which it divides itself, or the agents in their official capacities through which it acts, the Court can reach no other conclusion than that the State Council of Higher Education, and the named defendants in their official capacities, are not 'persons' for purposes of either monetary or injunctive relief under § 1983.[38]

The Supreme Court has adopted the same reasoning in the analogous context of state immunity under the eleventh amendment from prosecution in the federal courts. Plaintiffs bringing suits against state officials in their representative capacities often are confronted by jurisdictional barriers by which the officials seek to define the action against them as one running against the state.[39] If the court characterizes the suit as one in essence against the state, it is compelled to dismiss the action for lack of jurisdiction, unless the state waives its immunity. In such suits against state officials, the Supreme Court has generally held that the classification of a suit as one against the state is to be determined by the nature and effect of the relief sought.[40] Thus, when an action involves recovery of money from the state treasury, the state is the real party in interest, and its officials are entitled to invoke the eleventh amendment even though they are

34. *See* note 30 *supra. See also* Kates and Kouba, *supra* note 19, at 131-32; *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 252, 256-63 (1973).

35. Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).

36. *See* Patton v. Conrad Area School Dist., 388 F. Supp. 410 (D. Del. 1975); Needleman v. Bohlen, 386 F. Supp. 741 (D. Mass. 1974); Hines v. D'Artois, 383 F. Supp. 184 (W.D. La. 1974).

37. 372 F. Supp. 1378 (E.D. Va. 1974).

38. *Id.* at 1381-82. *See also* Bennett v. Gravelle, 323 F. Supp. 203 (D. Md. 1971).

39. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232 (1974); Edelman v. Jordan, 415 U.S. 651 (1974).

40. Ford Motor Co. v. Department of Treas., 323 U.S. 459 (1945). *See also* Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

nominal defendants.[41] Applying this rationale, the Court has granted immunity to individual state officials in actions for tax refunds[42] and retroactive welfare benefits.[43]

While interpretations of the eleventh amendment have no binding effect on the definition of a "person" for the purposes of section 1983, the techniques employed to determine whether a suit against state officials is actually a suit against the state appear applicable in deciding whether an action against municipal authorities is in essence an action against the city and thus subject to the *Monroe* and *Kenosha* exemption. In an attempt to avoid this seemingly logical approach, courts allowing suits against officials in their representative capacities have developed two lines of reasoning to justify their decisions. The first argument adopts by analogy the limitations on state immunity defenses in equitable proceedings,[44] while the second approach simply confines *Monroe* and *Kenosha* to their literal holdings without regard to the rationale underlying them. The Fourth Circuit in *Burt* and *Thomas* adopted both of these approaches.

Ex Parte Young and Equitable Relief

In the landmark decision of *Ex Parte Young*[45] the Supreme Court ruled that the eleventh amendment did not bar an action to enjoin the Minnesota Attorney General from enforcing an unconstitutional railroad rate statute. In order to reach its result, the Court resorted to the creation of a legal fiction:

> [I]n every case where an official claims to be acting under the authority of the State . . . the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. . . . [H]e is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.[46]

The *Young* result clearly exalted form over substance, since it disqualified a suit against the Minnesota Attorney General but allowed the

41. Ford Motor Co. v. Department of Treas., 323 U.S. 459 (1945).
42. *Id.*
43. Edelman v. Jordan, 415 U.S. 651 (1974).
44. *See The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 252 (1973).
45. 209 U.S. 123 (1908).
46. *Id.* at 159-60.

same action against the person occupying that office. Obviously, the effect of the injunction on the State of Minnesota in either situation was the same.[47]

In *Ford Motor Company v. Department of Treasury of Indiana*,[48] the Supreme Court rejected the application of the *Young* fiction to suits for monetary remedies. In addition to the Department, the complainants joined the Governor, the Treasurer, and the State Auditor in their official capacities as the Board of the Treasury Department. Despite the joinder of these individuals, the Court determined that the payment of back taxes from the state treasury clearly involved direct action against the State's resources and sustained eleventh amendment immunity.[49] After *Ford Motor*, therefore, it appeared that equitable actions could be brought against state officials but that the eleventh amendment barred damage actions against them. However, the precedents left uncertain the result in a suit seeking an equitable reimbursement remedy accompanied by a claim for injunctive relief.

In 1974, *Edelman v. Jordan*[50] confronted that specific issue. Plaintiff welfare recipients brought an action alleging denial of equal protection in the Illinois method[51] of administering federally supported family assistance. The district court ordered Illinois to comply with federal guidelines for welfare distributions and, in addition, required state welfare officials to release retroactive benefits wrongly withheld from eligible applicants. On appeal, the Seventh Circuit affirmed the trial court's result and concluded that the *Young* rationale properly sanctioned the grant of a monetary award in the nature of equitable restitution.[52]

In reversing the circuit court's decision, the Supreme Court went beyond a simple characterization of the suit as "equitable" or "legal" and emphasized instead the nature of the relief sought. Since the funds would come directly from the state treasury, the Court concluded that the rule in *Ford Motor* applied and that the eleventh amendment effectively barred the action for retroactice payments.[53] *Edelman*

47. *See* McCormack, *supra* note 27, at 36.
48. 323 U.S. 459 (1945).
49. *Id.* at 464.
50. 415 U.S. 651 (1974).
51. Under Illinois procedure, grants were authorized beginning only with the month in which an application was approved. *Id.* at 665. The federal law allowed retroactive payments for all prior eligible months. 45 C.F.R. § 206.10(a)(6) (1972).
52. Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973).
53. 415 U.S. at 665.

therefore limited the *Young* rationale to suits for prospective relief only. Any suit requiring retroactive payment from a state treasury, regardless of the label placed on it, was deemed a suit against the state, irrespective of the naming of officials as nominal parties.

Given the Supreme Court's conclusion that a suit against a welfare official for reimbursement is in essence an action against the state, to insist that an action against a school board official for back pay is not in essence an action against the county defies logic as well as the thrust of the Supreme Court's decisions. Yet many federal courts have adopted this viewpoint[54] by refusing to consider the impact and rationale of *Edelman* in equitable actions against local officials. The Fourth Circuit in *Burt*, for example, cited two pre-*Edelman* circuit court decisions[55] interpreting officials as "persons" for equitable relief. Neither of these cases, however, could have considered the effect of *Edelman* on the *Young* fiction. In addition, the court cited two Supreme Court cases[56] in which plaintiffs were awarded equitable relief against local officials under section 1983. Both of these cases involved prospective relief only and consequently did not confront the issue of equitable reimbursement.

STRICT CONSTRUCTION OF MONROE AND KENOSHA

A second method used by the lower courts to define officials as "persons" under section 1983 involves the limitation of the *Monroe* rationale to its literal holding. Although recognizing the clear *ratio decidendi* of *Monroe* and *Kenosha*, these decisions allow jurisdiction against the officials simply because neither case specifically denied it.[57] The Fourth Circuit took this approach in *Harper v. Kloster*,[58] its first expression on section 1983 jurisdiction after *Kenosha*. In *Harper*, four black employees sued the City of Baltimore, its mayor, and the city

54. *See* Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Canty v. City of Richmond Police Dept., 383 F. Supp. 1396 (E.D. Va. 1974).

55. Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). These cases were cited at 521 F.2d at 1205.

56. Griffin v. County School Board, 377 U.S. 218 (1964); Douglas v. City of Jeanette, 319 U.S. 157 (1943). These cases were cited at 521 F.2d at 1205.

57. *See* Harkless v. Sweeny Indep. School Dist., 427 F.2d 319 (5th Cir. 1970). *See also* Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974).

58. 486 F.2d 1134 (4th Cir. 1973).

council as officials under section 1983 for racial discrimination in hiring and promotion. The district court granted substantial relief in the form of injunctions to prevent further discriminatory practices.[59] On appeal, the Fourth Circuit dismissed the action against the City of Baltimore on the basis of *Kenosha* but affirmed jurisdiction over the officials. The court specifically failed to give *Kenosha* "any wider application," although acknowledging that the dismissal of the City as a party would have absolutely no effect on the district court's relief.[60]

Harper's narrow reading of *Kenosha* may be justifiable, even in the post-*Edelman* context, since the remedy sought in *Harper* was prospective injunctive relief. In *Burt* and *Thomas*, however, the circuit court extended its application of the restrictive *Harper* approach[61] to cases involving equitable reimbursement. Although the *Burt* trial court[62] and other district judges within the circuit[63] have afforded *Kenosha* considerable weight, the Fourth Circuit seems willing to entertain suits against municipal officials in their representative capacities until the Supreme Court specifically rules otherwise. Thus, it appears that the Fourth Circuit will continue to ignore the well reasoned approach of *Edelman* and the clear import of *Kenosha*.

POLICY CONSIDERATIONS

Although in neither *Burt* nor *Thomas* did the Fourth Circuit discuss the policies lying behind its construction of "person" under section 1983, that court and other lower courts seem cognizant of the results of extending the *Monroe* and *Kenosha* rationale to its logical conclusion.[64] The elimination of municipal officials as proper defendants would practically deny plaintiffs effective redress under section 1983 against unconstitutional actions by municipal bodies,[65] since actions against the individual board members almost inevitably will face

59. Harper v. Mayor and City Council, 359 F. Supp. 1187 (D. Md. 1973).

60. "The decree of the district court will be just as effective if it applies only to the defendants, excluding Baltimore City, a municipal corporation, as if Baltimore City were also a defendant." 486 F.2d at 1138.

61. 521 F.2d at 1205.

62. *Id.* at 1204-05.

63. *See* Moye v. City of Raleigh, 503 F.2d 631, 635 n.11 (4th Cir. 1974); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378 (E.D. Va. 1974).

64. *See, e.g.*, Keckeisen v. Independent School Dist. 612, 509 F.2d 1062 (8th Cir. 1975).

65. *See* authorities cited notes 27 & 34 *supra*. *See also* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966).

assertions of official immunity.[66] Nevertheless, the *Monroe/Kenosha* rationale is plainly designed to limit actions against local governments. In *Monroe*,[67] *Moor v. Alameda County*,[68] and *Kenosha*,[69] the Supreme Court at least implicitly rejected these policy arguments by relying on distant legislative history to support its statutory construction.[70] Through its narrow reading of that history, the Supreme Court has determined that section 1983 will not be used as a statute to adjudicate any injured party's constitutional claims against municipal authorities.

Closing the loophole created by cases such as *Burt* and *Thomas* does not guarantee that plaintiffs will have no recourse, since several jurisdictional alternatives exist. Many plaintiffs will be able to meet the 10,000 dollar federal question requirement under 28 U.S.C. section 1331.[71] Claims against municipalities under state law may also be heard by federal courts under the doctrine of pendent jurisdiction.[72] Finally, some commentators have asserted that federal courts should allow claims under 28 U.S.C. section 1343(3)[73] regardless of whether they state a proper cause of action under section 1983.

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66. *See* note 30 *supra.*

67. 365 U.S. at 191.

68. 411 U.S. at 700-01.

69. 412 U.S. at 516-20 (Douglas, J., dissenting).

70. *See* authorities cited note 27 *supra.*

71. 28 U.S.C. section 1331(a) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Although this provision grants federal jurisdiction, the real issue in the section 1331 context is the ability to state a cause of action for which relief might be granted. Some courts attempt to expand the decision in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which granted a direct cause of action against federal officers directly from the Constitution. Attempts to formulate a federal cause of action against municipal officials have met with mixed success. *See* Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1377-78 (W.D. Pa. 1974) (rejection of first amendment claim); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972) (rejecting fourth amendment claim). *But see* City of Kenosha v. Bruno, 412 U.S. at 516 (Brennan, J., concurring); Maybanks v. Ingraham, 378 F. Supp. 913, 914-16 (E.D. Pa. 1974) (claim under thirteenth and fourteenth amendments allowed). *See generally* Bodensteiner, *Federal Court Jurisdiction of Suits Against "Non-Persons" for the Deprivation of Constitutional Rights*, 8 VAL. L. REV. 213 (1974); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1558-59 (1972); Note, *Municipal Liability in Damages for Violations of Constitutional Rights—Fashioning a Cause of Action Directly from the Constitution—Brault v. Town of Milton*, 7 CONN. L. REV. 552 (1975).

72. *See* Note, *A Federal Cause of Action Against a Municipality for Fourth Amendment Violations by Its Agents*, 42 GEO. WASH. L. REV. 850, 863 (1974). *But see* Moor v. County of Alameda, 411 U.S. 693 (1973).

73. *See* Paul v. Dade County, 419 F.2d 10, 12 (5th Cir. 1969); Bodensteiner, *supra* note 71, at 229-34. *But see* Comment, *The Civil Rights Acts and Mr. Monroe*, 49 CALIF. L. REV. 145, 148 (1961).

If existing jurisdictional procedures prove inadequate, Congress may change the statutes in any of three ways: (1) it could amend section 1983 to include specifically local governments as "persons";[74] (2) it could amend 28 U.S.C. section 1343 to confer original federal jurisdiction in any claim involving a deprivation of civil rights; and (3) it could simply add a new statute to allow jurisdiction over local governmental units to redress civil rights. These alternatives seem superior to the current lower court policy of ignoring the logical *Edelman* approach.

CONCLUSION

The Supreme Court on three occasions has unequivocably declared that Congress did not intend local governmental units to be subject to liability as "persons" under section 1983.[75] Despite this mandate, the Fourth Circuit in *Burt v. Board of Trustees* and *Thomas v. Ward* allowed plaintiffs to recover equitable back pay judgments against defendant school boards simply by naming the members as nominal defendants. In light of recent Supreme Court pronouncements in the analogous state sovereignty context, the reasoning in these cases seems strained and illogical. The division of authority on the issue indicates the need for further Supreme Court definition of "person" in the section 1983 context. The ultimate solution, however, would be a congressional overhaul of the federal civil rights statutes to provide an effective method of redressing constitutional wrongs in a federal forum.

JERRY ALAN REESE

Judicial Discipline—The North Carolina Commission System

"Courts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government."[1] Recently, North Carolina took steps to ensure that its judiciary exhibit this

74. *See* U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH 179-80 (1965). *See generally* U.S. COMM'N ON CIVIL RIGHTS, 1961 REPORT, BK. 5: JUSTICE, at 73-75 (1961).

75. *See* Moor v. County of Alameda, 411 U.S. at 710 n.27.

1. *In re* Diener, 268 Md. 659, 698, 304 A.2d 587, 607 (1973).

high standard of conduct. In addition to the traditional devices of impeachment[2] and address,[3] North Carolina now has, by virture of a constitutional amendment[4] and enabling legislation,[5] a new method of handling judicial misconduct—the Judicial Standards Commission.[6]

Traditional methods of handling judicial discipline have proven generally cumbersome and ineffective.[7] In recent years many jurisdictions have realized that a better system of judicial discipline is needed, especially when the judicial misconduct does not clearly warrant removal.[8] In response to this need, new discipline machinery has been established in a majority of the states over the past three decades.[9] California created the first judicial qualifications commission in 1960 by constitutional amendment.[10] The California model, in whole or in part, has been copied in many jurisdictions,[11] including North Carolina.

Upon recommendation of the Courts Commission[12] in 1971 a con-

2. Impeachment is a procedure in which the House of Representatives brings charges and the Senate sits as the court. Two-thirds of the senators present can convict. Judgment cannot extend beyond removal from and disqualification to hold office. N.C. CONST. art. IV, § 4.

3. Address is a procedure whereby a judge may be removed for mental or physical incapacity by a joint resolution of two-thirds of the General Assembly. N.C. CONST. art. IV, § 17(1).

4. The amendment changed art. IV, § 17(1), and added art. IV, § 17(2).

5. N.C. GEN. STAT. §§ 7A-375 to -377 (Cum. Supp. 1975).

6. Hereinafter referred to as Commission.

7. W. BRAITHWAITE, WHO JUDGES THE JUDGES? 12-13 (1971); Frankel, *The Case for Judicial Disciplinary Measures*, 49 AM. JUD. SOC'Y J. 218, 218-20 (1966). Address has apparently never been used in North Carolina. Since 1868, only two North Carolina judges have been impeached. Neither was convicted. A third judge had impeachment articles preferred, but they were withdrawn. Prior to 1868, judges were selected by General Assembly vote so it is unlikely that any were impeached. NORTH CAROLINA COURTS COMMISSION, REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY 19 (1971) [hereinafter cited as COURTS REPORT]. There are no digested cases of the North Carolina Supreme Court removing judges based on its supervisory power.

8. AMERICAN JUDICATURE SOCIETY, JUDICIAL DISABILITY AND REMOVAL COMMISSIONS, COURTS AND PROCEDURES *i* (1972) [hereinafter cited as AJS]; COURTS REPORT at 19-22.

9. AJS at *i*; COURTS REPORT at 22. New York became the first state to establish a modern disciplinary system when, in 1947, it created a court on the judiciary. The court is convened when a complaint is filed by officials specifically authorized by law to do so. N.Y. CONST. art. 6, § 22. Delaware and Oklahoma have similar courts on the judiciary. Compared to a commission system, the judiciary court system is more formal and cumbersome and, therefore, less desirable. It works on an ad hoc basis and handles only the most serious matters. COURTS REPORT at 25.

10. CAL. CONST. art. VI, §§ 8, 18.

11. Jurisdictions adopting a commission plan include: Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, Puerto Rico, Tennessee, Texas, Utah, Vermont, Virginia. AJS, *supra* note 8, at *i*.

12. The Courts Commission was originally established as a temporary commission

stitutional amendment was proposed and adopted, adding the following language to the North Carolina Constitution:

> (2) *Additional method of removal of Judges.* The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[13]

The General Assembly, acting on constitutional mandate, created the North Carolina Judicial Standards Commission effective January 1, 1973.[14]

The Commission has power to recommend to the supreme court the censure or removal of any judge or justice for the reasons given in the constitution.[15] The Commission may institute a preliminary investigation either upon citizen complaint or upon its own motion.[16] If further proceedings are warranted, a formal due process hearing is held on the exclusive basis of which the Commission may recommend discipline to the supreme court.[17] The entire process is confidential except for the recommendation and supporting record sent to the court and the court's subsequent proceedings.[18] Only the supreme court has the actual power of censure or removal.[19] The court, in its descretion, may dismiss the case, follow the Commission's recommendation, or remand for further proceedings.[20]

The commission system offers an excellent means of dealing with judicial impropriety. It is inexpensive, fair, and flexible. Easy access allows members of the public to raise their greviances, while confiden-

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in 1963 to design a modern, efficient court system for North Carolina. Res. of June 11, 1963, No. 73, [1963] N.C. Sess. Laws 1815. The Courts Commission was made permanent in 1969, Law of June 19, 1969, ch. 910, § 1, [1969] N.C. Sess. Laws 1046, but in 1975 was disestablished. Law of June 26, 1975, ch. 956, § 18, [1975] N.C. Sess. Laws 1405.

13. N.C. CONST. art. IV, § 17(2).
14. N.C. GEN. STAT. §§ 7A-375 to -377 (Cum. Supp. 1975).
15. *Id.* § 7A-376.
16. *Id.* § 7A-377(a).
17. *Id.*
18. The accused has a right to have the proceedings open to the public. *Id.*
19. *Id.* § 7A-376.
20. *Id.* § 7A-377(a).

tiality protects judges from unjustified harrassment. Most importantly, the Commission acts as a strong deterrent to the kinds of offenses that are unlikely to result in impeachment but that, nevertheless, lower the public's respect for the justice system.[21] A recent case, *In re Crutchfield*,[22] is a good example of such misconduct.

Crutchfield provided the supreme court with its first recommendation from the Commission. The court, following the Commission's recommendation, censured Judge Crutchfield for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute"[23] when he signed orders allowing limited driving privileges to defendants who were not entitled to such privileges.[24] The orders were signed upon mere *ex parte* applications of the defendants' attorneys, violating the North Carolina Code of Judicial Conduct.[25] More serious, however, was the judge's total failure to determine the facts or controlling law.[26] The court found the judge's good faith defenses unavailing.[27]

Curiously, the defendant, Judge Crutchfield, never questioned the constitutionality of the untried Commission process in his brief. However, in a vigorous dissent, Justice Lake raised due process and equal protection issues on his own motion[28] and found that Commission procedure violative of both the United States and North Carolina Con-

21. COURTS REPORT, *supra* note 7, at 25-26.

22. No. 97 (N.C. Sup. Ct., Dec. 17, 1975) (unreported).

23. Majority Opinion at 7, *quoting* N.C. CONST. art. IV, § 17(2).

24. Persons arrested for driving under the influence are disallowed limited driving privileges by statute if they refuse to take a breathalyzer test. N.C. GEN. STAT. §§ 20-16.2, -179 (Cum. Supp. 1975).

25. "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." N.C. CODE OF JUDICIAL CONDUCT Canon 3(A)(4). Two Florida supreme court judges were similarly reprimanded for their mishandling or misuse of an *ex parte* memorandum. *In re* Boyd, 308 So. 2d 13 (Fla. 1975); *In re* Dekle, 308 So.2d 5 (Fla. 1975).

26. Majority Opinion at 6.

27. *Id.* at 5-6. Crutchfield raised three basic defenses: (1) justifiable reliance on an attorney to draw a proper order, (2) no bad faith, and (3) no financial gain. Brief for Petitioner at 1.

Two Maryland judges were *removed* for "conduct prejudicial," due to irregularities in disposing of traffic cases, although they received no financial benefit, and followed practices of predecessor courts. *In re* Diener, 268 Md. 659, 304 A.2d 587 (1973), *cert. denied*, 415 U.S. 989 (1974).

28. The dissent raises the constitutional issues on its own motion under the principle that jurisdiction is always a proper inquiry. The statute contains jurisdictional, procedural, and substantive provisions. The dissent reasons that because the substantive and procedural provisions violate the constitution, the statute is void, and the court lacks jurisdiction. Dissenting Opinion at 1-2.

stitutions.[29] Because the supreme court may act "only upon the recommendation of the Commission,"[30] and because the Commission has broad discretion in determining the sanction it will recommend, Justice Lake argued that there is an "invitation to gross favoritism" that violates equal protection.[31] The dissent also found due process violations in the procedural aspects of the Commission proceeding. The fact that the hearing is closed,[32] that the Commission is judge, jury, and prosecutor,[33] and that the Commission can write its own rules[34] all bear on Justice Lake's conclusion. Justice Lake would also hold void for vagueness the disciplinary ground of "conduct prejudicial to the administration of justice."[35]

The majority opinion is noticeably unresponsive to the dissent's concerns. Whether the majority felt that the issues were improperly raised or well settled is unclear; however, the latter is a sound conclusion based upon an examination of other cases.[36] This note will identify the responses of other courts to Justice Lake's arguments, and then examine some North Carolina constitutional issues not raised in *Crutchfield.*

The weight of authority at the federal level holds that wide discretion vested in an administrative body, in and of itself, does not violate the Constitution.[37] Stricter doctrines of non-delegation are justifiably found at the state level since "state legislatures much more than Congress tend to delegate [responsibility] to petty officials who are authorized to act without adequate safeguards."[38] Such concerns are inappropriate in the Commission setting where, not only is the Commis-

29. *Id.* at 1.

30. *Id.* at 4. The word "only" is inserted by the dissent. The statute reads: "[u]pon recommendation of the Commission, the Supreme Court may . . . ." N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1975). Thus, the court retains whatever authority it previously had, unless the court itself reads a negative implication into the statute.

31. Dissenting Opinion at 5.

32. *Id.* at 6.

33. *Id.*

34. *Id.*

35. *Id.* at 8.

36. *See, e.g.*, Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971); *In re* Hanson, 532 P.2d 303 (Alaska 1975); *In re* Kelley, 238 So. 2d 565 (Fla. 1970), *cert. denied,* 401 U.S. 962 (1971); *In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970); *In re* Diener, 268 Md. 659, 304 A.2d 587 (1973), *cert. denied,* 415 U.S. 989 (1974).

37. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 (1958) [hereinafter cited as DAVIS]. Equal protection does not assure uniformity of decisions, only freedom from intentional and purposeful discrimination. Snowden v. Hughes, 321 U.S. 1, 8 (1944). It is significant that there were no allegations in *Crutchfield* that intentional or purposeful discrimination had actually occurred. *See* Keiser v. Bell, 332 F. Supp. 608, 615-16 (E.D. Pa. 1971).

38. 1 DAVIS § 2.07, at 101.

sion a distinguished body of officials,[39] but the Commission's power is limited to recommending, and court review of Commission recommendations is mandatory.[40]

In those cases that have found an unconstitutional delegation of authority to an administrative body, the opportunity for arbitrary exercise of power went well beyond what was reasonably necessary for proper administration of the program involved.[41] The discretion granted the North Carolina Judicial Standards Commission is an integral and necessary part of the program.[42] The wide range of possible charges, fact situations, and substantiation, requires that the Commission have flexibility to respond to both major and minor cases.[43] Not suprisingly, it was the rigidity of the traditional methods of policing the judiciary that made them ineffective deterrents.[44]

Due process does not preclude delegation of decisions involving penalties to administrative agencies, so long as those penalties are not criminal.[45] The line between civil and criminal penalties is difficult to draw, but monetary penalties can clearly be civil.[46] Nor is there a distinction based on the severity of the penalty. Securities Exchange Commission (SEC) orders depriving persons of their professions as brokers have been upheld, even when the SEC determined not only that a penalty should be imposed, but also its extent.[47]

Commission systems in other jurisdictions have been upheld against many of the same due process attacks leveled in *Crutchfield*.[48] Unless some distinguishing feature of the North Carolina system is fatal, it too should pass constitutional muster. It is well settled law that an administrative body can be judge, jury, and prosecutor.[49] The full

39. The Commission consists of one court of appeals judge, one superior court judge, one district court judge, two senior members of the state bar, and two lay citizens. The judges are appointed by the Chief Justice, the citizens by the Governor, and the attorneys are elected by the State Bar Council. N.C. GEN. STAT. § 7A-375(a) (Cum. Supp. 1975).

40. *See* N.C. GEN. STAT. §§ 7A-376, 7A-377(a) (Cum. Supp. 1975). It is not clear precisely what standard of review the court is using, but other jurisdictions have adopted one in which the court reviews the transcript and makes its own independent findings of fact and law. *In re* Hanson, 352 P.2d 303, 308-09 (Alaska 1975).

41. 1 DAVIS § 2.10, at 114.

42. COURTS REPORT, *supra* note 7, at 24.

43. *Id.* at 21.

44. *Id.* at 19-20.

45. *See* 1 DAVIS § 2.13, at 133-34.

46. *Id.* at 135.

47. *Id.* at 134.

48. *See, e.g.*, Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971).

49. 2 DAVIS § 13.02, at 181. The judge-jury-prosecutor due process objection has

extent of due process is not required in a disciplinary proceeding because it is not criminal in nature.[50] The standard normally applied in this situation is "minimum due process" with the emphasis on notice and an opportunity to be heard.[51] Minimal due process protection is provided by the Judicial Standards Commission Rules.[52] Furthermore, the independent court review of facts and law upon any recommendation would seem adequate to insure that the system is not abused.[53]

Statutes are generally said to enjoy a presumption of constitutionality. Consequently, if a statute can be exercised in a constitutional manner it should be given that chance and not struck down on its face.[54] Thus, the fact that the statute does not outline specific due process safeguards to be followed, but instead instructs the Commission to develop procedures "affording due process of law,"[55] should not be fatal.

The *Crutchfield* dissent also charged that the confidentiality of the commission process up to the supreme court level is inconsistent with due process.[56] By contrast, the advocates of the system herald the confidentiality of the system as one of its greatest assets, and consider it vital.[57] Allegations of misconduct may be groundless and thus the faultless judge is protected from the publicity of an unsupported charge. Public confidence in the integrity of the court system is likewise protected from diminution by unfounded allegations. In addition, complainants and witnesses need not be reluctant to complain or testify for fear of publicity or reprisal.[58] Once the Commission recommends discipline,

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been rejected in every jurisdiction in which the issue was raised in a judicial commission context. *In re* Hanson, 532 P.2d 303, 306 (Alaska 1975).

50. Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971). In the judicial discipline context, all jurisdictions which have considered the question have rejected the criminal standard of proof. Most have also rejected a preponderance standard in favor of a clear and convincing test. *In re* Hanson, 532 P.2d 303, 307-08 (Alaska 1975). In *Crutchfield*, both majority and dissent agree the proceeding is not criminal. Majority Opinion at 5. Dissenting Opinion at 3.

51. *See, e.g.*, Allen v. City of Greensboro, 452 F.2d 489, 490 (4th Cir. 1971).

52. JUDICIAL STANDARDS COMM'N R. 8 provides for notice. R. 13 provides for opportunity to be heard.

53. *See In re* Hanson, 532 P.2d 303, 307 (Alaska 1975).

54. Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed*, 419 U.S. 1043 (1974). In *Smith* the court upheld a regulatory ordinance by inferring a hearing would be held and that decisions would be made on reasonable grounds. *Id.* at 537, 206 S.E.2d at 207.

55. The Commission is authorized to write its own rules, but must do so within an express due process limitation. N.C. GEN. STAT. § 7A-377(a) (Cum. Supp. 1975).

56. Dissenting Opinion at 6.

57. Confidentiality provisions are found in nearly all the commission systems of other jurisdictions. COURTS REPORT, *supra* note 7, at 25.

58. *Id.* at 24-25.

the purpose of confidentiality disappears and subsequent proceedings are, by law, public.[59] In sum, there seems to be a valid exercise of legitimate state interests, interests closely related to those served by the use of a grand jury in criminal proceedings. Again there is an ultimate check on abuse—the right of the accused to request public proceedings *at any time*.[60]

The void for vagueness attack on the power to discipline for "conduct prejudicial to the administration of Justice" has been rejected elsewhere.[61] The North Carolina General Assembly intended the Code of Judicial Conduct to be read into the phrase to give it meaning.[62] Indeed, if the Code is to have any real meaning such a provision is essential.[63] "Conduct prejudicial" is no more vague than many other valid concepts of law.[64] It should be noted that, not merely would the statute be void if this attack were sustained, but the constitutional amendment as well, since the grounds for discipline are enumerated therein.

One problem, not raised in *Crutchfield* and peculiar to North Carolina, poses a serious question of the constitutionality of the commission system as it is presently structured. The words of the commission statute, "[u]pon recommendation of the Commission, the Supreme Court may censure or remove,"[65] clearly either assume, or attempt to grant, supreme court jurisdiction. In North Carolina, supreme court jurisdiction is conferred by the state constitution and not by the General Assembly.[66] Supreme court jurisdiction to remove judges is not appar-

59. *See* N.C. GEN. STAT. § 7A-377(a) (Cum. Supp. 1975).

60. *See id.*; JUDICIAL STANDARDS COMM'N R. 4.

61. *See* Keiser v. Bell, 332 F. Supp. 608, 614-15 (E.D. Pa. 1971). *See also In re* Diener, 268 Md. 659, 671, 304 A.2d 587, 594 (1973), where the court says that "conduct prejudicial to the proper administration of justice" is incapable of precise definition "but it is unlikely we shall ever have much trouble recognizing and identifying such conduct."

62. COURTS REPORT, *supra* note 7, at 28. The majority approves of such a use of the Code. Majority Opinion at 7, *citing with approval* Spruance v. Commission on Judicial Qualifications, 13 Cal. 3d 778, 796, 532 P.2d 1209, 1221, 119 Cal. Rptr. 841, 853 (1975).

63. The Code of Judicial Conduct, unlike the Code of Professional Responsibility, does not have mandatory disciplinary rules. The Judicial Code is phrased in terms of "should" like the ethical considerations of the Code of Professional Responsibility. While the Code may be used to give meaning to the constitutional provision, discipline may be based only on a violation that rises to the level of a constitutional violation. *In re* Haggerty, 257 La. 2, 17, 241 So. 2d 469, 474 (1970).

64. *See generally In re* Foster, 271 Md. 449, 476-77, 318 A.2d 523, 537-38 (1974). *See also* Parker v. Levy, 417 U.S. 733 (1974) (upholding discipline of a military officer for conduct "unbecoming an officer and a gentleman" against a vagueness attack); Allen v. City of Greensboro, 452 F.2d 489 (4th Cir. 1971) (policeman).

65. N.C. GEN. STAT. § 7A-376 (Cum. Supp. 1975).

66. State *ex rel.* N.C. Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 422, 142 S.E.2d 8, 12 (1965).

ent on the face of the constitution. In fact, supreme court jurisdiction seems limited solely to appeals from "the courts below."[67]

The new discipline section in the North Carolina Constitution provides that "[t]he General Assembly shall prescribe a procedure, in addition to impeachment and address . . . for the removal of [judges] . . . ."[68] The import of that language would seem to be that the Assembly can exercise its removal power through a procedure other than impeachment or address. However, the same constitutional amendment altered another section to read: "[r]emoval from office *by the General Assembly* for any other cause [other than address] shall be by impeachment."[69] The two sections read together mandate that the Assembly prescribe a procedure for the removal of judges by a body other than the General Assembly.

The issue then becomes whether the Assembly can grant the power of removal to another body, or whether it is limited to merely prescribing a procedure for a body that already possesses the removal power. If the Assembly can vest the power of removal in another body, it may be restricted in the body it can choose. If the power of removal is characterized as a "judicial power," then the Assembly would seem limited by article IV, § 1 of the constitution to vesting the power of removal in the judiciary.[70] If the power of removal is non-judicial, or if the new discipline section[71] overrides the judicial power section[72] of the constitution, the Assembly may be able to give the power of removal to any body—executive, judicial, legislative (except itself).[73] There are of course many policy reasons why the Assembly might not want to vest the power in anyone other than the judiciary,[74] but that result is not necessarily mandated by the constitution. If the power were given to a non-judicial body, the scope of judicial review, if any, would be an unavoidable issue.

67. N.C. CONST. art. IV, § 12(1); State *ex rel.* N.C. Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 422, 142 S.E.2d 8, 12-13 (1965).

68. N.C. CONST. art. IV, § 17(2).

69. N.C. CONST. art. IV, § 17(1) (emphasis added to words affixed by amendment).

70. Art. IV, § 1 requires that the "judicial power of the State" be vested in a court. Some judicial powers can be given to administrative agencies, but ultimate power remains in the courts via appeal. *Id.* § 3.

71. *Id.* § 17(2).

72. *Id.* § 1.

73. *Id.* § 17(1).

74. A primary reason for giving the discipline power only to the judiciary is to retain a measure of judicial independence, an idea basic to our system of justice. *See* Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 136-37 (1970) (Douglas, J., dissenting).

If the General Assembly cannot vest the power of removal in another body but may merely *prescribe a procedure* for a body that already has the power, it apparently must rely on the supreme court's supervisory power over the other courts, found in article IV, § 12(1) of the constitution or at common law.[75] If the scope of the court's supervisory power under either theory extends to removal, the Assembly can comply with its constitutional mandate to "prescribe a procedure."[76] There are no disciplinary decisions as such in North Carolina, so the possibility that the supervisory power includes removal is at least not foreclosed.

In England the supervisory power of the common-law courts clearly extended to removal.[77] The writs used were *scire facias* and *quo warranto*.[78] The *scire facias* writ is especially analogous to removal under article IV, § 17(2). *Scire facias* was applied against judges who held office "during good behavior." The causes for which a writ would issue were similar to those listed in the constitutional provisions of article IV, § 17(2).[79] Some authorities argue that the judicial power of forfeiture in England was abolished by statute as early as 1700. Others consider removal by *scire facias* still available.[80] There appear to be no modern cases which rely on these early writs.[81]

Whether the common-law removal doctrines are good law in the United States is open to some question. The author can find no cases in which a court has *directly* removed a judge from office based on either its inherent common-law or constitutional supervisory powers.[82] Some courts have relied on their supervisory power to discipline members of the bar in an indirect attempt to deter judicial midconduct.[83] Some

75. It is difficult to say how the constitutional supervisory power relates to the common law power, but it would seem safe to assume the common law power is still viable either as an independent power or as a way to interpret the constitution.

76. If the legality of the Commission is based on this theory, one wonders why a constitutional amendment was necessary.

77. Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1479-82 (1970) [hereinafter cited as Berger]; Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 882-83 (1930) [hereinafter cited as Shartel]; Annot. 53 A.L.R.3d 882, § 3 (1973).

78. Shartel, *supra* note 77, at 882-83.

79. *Id.* at 883.

80. Berger, *supra* note 77, at 1482, 1500.

81. *Id* at 1482 n.38.

82. For a good review of the cases on supervisory power and discipline see *In re* Diener, 268 Md. 659, 699-715, 304 A.2d 587, 608-16 (1973) (Smith, J., dissenting).

83. *In re* Troy, 306 N.E.2d 203 (Mass. 1973) and *In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1972) appear to be such cases. *In re* Diener, 268 Md. 659, 688, 304 A.2d 587, 602 (1973).

courts find a direct power to suspend a judge in their supervisory jurisdiction, but exclude more severe penalties.[84] Others go no further than censure.[85] There are no North Carolina decisions on point. It may be said that courts are uniformly reticent about using their supervisory power for direct removal.[86]

Even if the supreme court is constitutionally authorized to remove judges, procedural problems remain. If the power is based on the court's supervisory jurisdiction over lower courts, it may be inapplicable to supreme court justices.[87] Regardless of the source of the authority, its exercise would seem governed by article IV, § 12(1) of the constitution which provides that the supreme court is strictly an appellate court with jurisdiction to hear cases solely from "the courts below."[88] This jurisdiction does not include direct appeals from agencies even though they may be quasi-judicial.[89] In spite of article IV, § 12(1), the direct commission to supreme court route might be justified. Under the statutory grant of power theory, the authorizing section of the constitution (article IV, § 17(2)) might be found to override article IV, § 12 (1). Under a supervisory power theory it might be held that the supervisory jurisdiction is separate and independant from other jurisdiction, and therefore, the "appellate only" limitation does not apply.[90]

CONCLUSION

The North Carolina Judicial Standards Commission is a significant improvement over traditional methods of judicial discipline. The Commission offers great promise in deterring activities such as those for which Judge Crutchfield was censured, activities which previously were virtually immune from control, but which jeopardize the citizen's confi-

84. *See* Ransford v. Graham, 374 Mich. 104, 131 N.W.2d 201 (1964); *In re* Graham, 366 Mich. 268, 114 N.W.2d 333 (1962).

85. *In re* Municipal Court, 188 N.W.2d 354 (Iowa 1971).

86. *See In re* Diener, 268 Md. 659, 699-715, 304 A.2d 587, 608-16 (1973) (Smith, J., dissenting).

87. *But cf.* McDonald v. Morrow, 119 N.C. 666, 672, 26 S.E. 132, 134 (1896), where the supreme court held individual justices could be treated as lower courts by the General Assembly in at least some contexts.

88. The Commission could arguably be considered a court, but this is an unlikely result since it would raise other problems. The constitution defines the court system in detail and does not provide for a court like the Commission. N.C. CONST. art. IV, §§ 2-10. Neither would the constitution allow delegation of rule making power to the Commission if classified as a court. N.C. CONST. art. IV, § 13(2).

89. *See* State *ex rel.* N.C. Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 420, 422, 142 S.E.2d 811, 812 (1965).

90. *See In re* Huff, 352 Mich. 402, 418, 91 N.W.2d 613, 620 (1958).

dence in his judicial system. The Commission system also adds some needed bite to the Code of Judicial Conduct. In light of the judicial commission cases from other jurisdictions, the North Carolina system seems unlikely to run afoul of the due process and equal protection challenges raised by the *Crutchfield* dissent. There are, nevertheless, some jurisdictional problems posed by the judicial article of the North Carolina Constitution. Hopefully, the General Assembly will remedy these problems, or the court will find a way to reconcile them, so that the Commission can fulfill its promise in North Carolina.

EDWIN WARREN SMALL

Property Law—The Beneficiary's Rights to the Proceeds of an Insurance Policy When He Takes the Life of the Insured

Enacted in 1961, Chapter 31A of the North Carolina General Statutes precludes one who is convicted of a wilful and unlawful homicide from acquiring a proprietary benefit because of the death of his victim.[1] In *Quick v. United Benefit Life Insurance Company*[2] the North Carolina Supreme Court had its first opportunity to interpret the life insurance provisions of this chapter.[3] Faced with the issue whether

1. Bolich, *Acts Barring Property Rights*, 40 N.C.L. REV. 175, 193 (1962).
2. 287 N.C. 47, 213 S.E.2d 563 (1975).
3. For the purposes of this note the relevant sections of N.C. GEN. STAT. § 31A (1966) are:

> **§ 31A-3. Definitions.**—As used in this article, unless the context otherwise requires, the term—
>
> . . . .
>
> (3) "Slayer" means
>
> a. Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the wilful and unlawful killing of another person; . . . .
>
> . . . .
>
> **§ 31A-11. Insurance benefits.**—(a) Insurance and annuity proceeds payable to the slayer:
>
> (1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or
>
> (2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent.
>
> . . . .
>
> **§ 31A-13.—Record determining slayer admissible in evidence.**—The record of the judicial proceeding in which the slayer was determined to be such, pursuant to § 31A-3 of this chapter, shall be admissible in evidence for or against a claimant of property in any civil action arising under this chapter.

a beneficiary who had been convicted of involuntary manslaughter for the killing of the insured could retain the proceeds of the insurance policy, the court held that proof of a conviction of involuntary manslaughter did not disqualify the beneficiary under the statute.[4] Nevertheless, because the statute was not intended to supplant completely the common law in this area,[5] the court, in an unprecedented holding, concluded that such a conviction was sufficient to bar the beneficiary on the common-law principle that "no one shall be allowed to profit from his own wrong."[6]

Jill Quick, having shot and killed her husband, Gary Quick, was indicted for murder, convicted of involuntary manslaughter, and sentenced to serve five to seven years in state prison. At the time of the killing, Jill was the named beneficiary of an insurance policy in the amount of $10,000 on the life of her husband. The present case arose when the administratrix of her husband's estate brought an action for declaratory judgment to determine the ownership of the life insurance proceeds. Named as defendants in the action were Jill Quick and United Benefit Life Insurance Company. The insurance company, however, was permitted to withdraw after paying the proceeds to the clerk of superior court.[7]

. . . .

§ 31A-15. Chapter to be broadly construed.—This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable.

4. 287 N.C. at 54, 213 S.E.2d at 567.

5. *Id.* at 56, 213 S.E.2d at 569.

6. *Id.* at 59, 213 S.E.2d at 570-71. Under the statute, a beneficiary who is precluded from receiving the proceeds of insurance on the life of the insured cannot receive these proceeds indirectly as an heir of the insured's estate. N.C. GEN. STAT. § 31A-4 (1966). This section confirms prior North Carolina case law. *E.g.*, Parker v. Potter, 200 N.C. 348, 354, 157 S.E. 68, 71 (1931). In other states, however, there is authority to the contrary. *E.g.*, Moore v. Prudential Life Ins. Co., 342 Pa. 570, 21 A.2d 42 (1941).

7. 287 N.C. at 49, 213 S.E.2d at 564. As a general rule, an insurance company is not relieved of its obligation to pay the proceeds of the policy when the beneficiary kills the insured. *See, e.g.*, Murchison v. Murchison, 203 S.W. 423 (Tex. Civ. App. 1918). There are exceptions, however, (1) if the policy contains provisions voiding it when the beneficiary causes the death of the insured, Grand Circle Women of Woodcraft v. Rausch, 24 Colo. App. 304, 134 P. 141 (1913); (2) if the beneficiary obtained the policy fraudulently, that is, intending at the time he procured it to kill the insured, Goldstein v. New York Life Ins. Co., 225 App. Div. 642, 234 N.Y.S. 250 (1929), *modifying* 133 Misc. 106, 231 N.Y.S. 161 (1928); *see* Henderson v. Life Ins. Co., 176 S.C. 100,

At trial, neither party introduced evidence as to the factual circumstances immediately preceding the death of the insured.[8] The only evidence before the court that related to the killing was the record of Jill's conviction of involuntary manslaughter which was submitted without objection from the defendant. Based on this evidence and a stipulation of the parties that the only issue to be decided was whether Jill was barred under the statute,[9] the court concluded that involuntary manslaughter was an unlawful and wilful killing within the meaning of section 31A-3(3)a of the General Statutes.[10] Hence, Jill's conviction of involuntary manslaughter disqualified her as a "slayer" under the statute. Alternatively, the court held that apart from any statutory grounds for forfeiture, Jill was barred from retaining the proceeds on the basis of common-law doctrine and public policy.[11] In light of these two conclusions of law, the trial court entered judgment ordering the clerk of superior court to pay the proceeds to the ancillary administrator.[12] Jill appealed,[13] and the North Carolina Court of Appeals reversed on the grounds that involuntary manslaughter is not a wilful killing within the meaning of the statute[14] and that the enactment of the statute had abrogated otherwise applicable common-law rules.[15]

On further appeal the North Carolina Supreme Court agreed that a "wilful killing" as used in section 31A-3 of the North Carolina General Statutes means an intentional homicide, and thus, a conviction of involuntary manslaughter does not, per se, bar recovery of the proceeds.[16] The court, however, reversed the conclusion of the court of appeals that the enactment of the statute had supplanted the common law, holding instead that "G.S. § 31A-15 preserved the common law

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179 S.E. 680 (1935); or (3) if the beneficiary is the only person having an interest in the policy, Anderson v. Life Ins. Co., 152 N.C. 1, 67 S.E. 53 (1910) (dictum). *Accord*, 5 A. SCOTT, THE LAW OF TRUSTS § 494.2 (3d ed. 1967). These exceptions would still have application under chapter 31A since the statute uses the word "proceeds" and a court faced with this issue could hold that no proceeds had accrued. [N.C.] GENERAL STATUTES COMMISSION, SPECIAL REPORT ON AN ACT TO BE ENTITLED "ACTS BARRING PROPERTY RIGHTS" 26 (1961) [hereinafter cited as SPECIAL REPORT].

8. 281 N.C. at 58, 213 S.E.2d at 570.

9. *Id.* at 49, 213 S.E.2d at 564.

10. *Id.* at 49, 213 S.E.2d at 565.

11. *Id.*

12. Because Ida Mae Quick was a resident of South Carolina, an ancillary administrator, Lester G. Carter, Jr., was appointed. *Id.* at 49, 213 S.E.2d at 564.

13. 23 N.C. App. 504, 209 S.E.2d 323 (1974).

14. *Id.* at 505, 209 S.E.2d at 324.

15. *Id.* at 507, 209 S.E.2d at 325. Judge Campbell dissented on grounds that section 31A-15 controlled and Jill Quick's act was an unlawful killing which would bar recovery. *Id.*

16. 287 N.C. at 54, 213 S.E.2d at 567.

both substantively and procedurally, as to all acts not specifically provided for in Chapter 31A."[17]

Having determined that common law applied, the court confronted the issue whether the evidence presented at trial was sufficient to bar recovery under North Carolina common law. The court held that although the record of a criminal conviction was generally not admissible in a common-law proceeding,[18] the trial judge did not err in considering such evidence because Jill had failed to object to its admission.[19] Moreover, the court concluded that such evidence was sufficient to support the trial court's conclusion that Jill was disqualified under the common law since "[c]ulpable 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."[20] Accordingly, the supreme court reversed and remanded for reinstatement of the trial court's original judgment.[21]

In *Quick* the court grounded its decision barring defendant on a maxim that has been the source of many common-law rules and statutory provisions disqualifying a beneficiary from receiving insurance proceeds when he has killed the insured.[22] Several problems frequently arise in applying these common-law and statutory rules to particular cases. The principal concerns are the type of homicide that will disqualify the killer and the admissibility of the criminal conviction record in the civil proceeding.[23]

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17. *Id.* at 56, 213 S.E.2d at 569.
18. *Id.* at 57, 213 S.E.2d at 569.
19. *Id.* at 59, 213 S.E.2d at 570.
20. *Id.* at 59, 213 S.E.2d at 571.
21. *Id.*
22. *See, e.g.*, cases cited notes 25-28 and statutes cited notes 36 & 37 *infra*. *See generally* Bolich, *Acts Barring Property Rights*, 40 N.C.L. REV. 175 (1962) [hereinafter cited as Bolich]; Grossman, *Liability and Rights of the Insurer Where the Death of the Insured is Caused by the Beneficiary or by an Assignee*, 10 B.U.L. REV. 281 (1930) [hereinafter cited as Grossman]; Lipscomb, *Insurer's Liability and Rights When Insured's Death is Caused by the Beneficiary or Assignee*, 8 MISS. L.J. 476 (1936); Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936); Annot., 27 A.L.R.3d 794 (1961).
23. A third problem is who is entitled to the insurance proceeds when the beneficiary is determined to be a slayer. The answer to this question depends on factors such as the relation of the beneficiary to the insured and the provisions of the insurance policy. If the beneficiary is not the insured's next of kin, generally the beneficiary will hold the proceeds as constructive trustee for the estate of the insured. 5 A. SCOTT, THE LAW OF TRUSTS § 494.1 (3d ed. 1967) and cases cited therein. On the other hand, if the beneficiary is the next of kin, the majority of the courts have held that the proceeds are to pass as if the beneficiary predeceased the insured. *Id.* Accordingly, the person next in line of succession would take, or if there were no possible takers other than the beneficiary the proceeds would escheat to the state. *Id.*

With respect to the first of these questions, the maxim itself provides no logical point at which to draw the line.[24] Applied literally, it could encompass all wrongs from premeditated murder to mere accident.[25] In the absence of a statute, however, courts uniformly hold that a beneficiary is not prohibited from taking insurance proceeds when the act causing death is merely a civil wrong.[26] At the other end of the scale, it is virtually certain that a beneficiary who kills the insured for the *purpose* of acquiring the proceeds would be barred.[27] Between these extremes there is at least some surface disagreement as to the test to be applied in determining which acts will preclude recovery. Several cases have held that the killing of the insured under circumstances that would constitute the crime of murder is sufficient to bar recovery;[28] other decisions hold specifically that manslaughter does not disqualify.[29]

Finally, if the primary beneficiary murders the insured and there is a contingent beneficiary named in the policy, the contingent beneficiary will take the proceeds. Parker v. Potter, 200 N.C. 348, 157 S.E. 68 (1931). *But see* Bullock v. Expressmen's Mut. Life Ins. Co., 234 N.C. 254, 67 S.E.2d 71 (1951), in which the Supreme Court of North Carolina held that when a policy designated a contingent beneficiary to take if the primary beneficiary failed to survive the insured, and the primary beneficiary feloniously killed the insured, the failure of the contingency to occur prevented the contingent beneficiary from receiving the proceeds which passed to the insured's estate. *Accord*, Beck v. Downey, 191 F.2d 150 (9th Cir. 1951), *vacated per curiam*, 343 U.S. 912 (1952).

24. Grossman, *supra* note 22, at 290.

25. Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 5, 3 N.E.2d 17, 18-19 (1936).

26. *E.g.*, Schreiner v. High Court Catholic Order of Foresters, 35 Ill. App. 576 (1890). The beneficiary also is not disqualified when the killing is justifiable or excusable. *E.g.*, Holdom v. Grand Lodge of Ancient Order of United Workmen, 159 Ill. 619, 43 N.E. 772 (1895) (insanity); American Nat. Life Ins. Co. v. Shaddinger, 205 La. 11, 16 So. 2d 889 (1944) (self-defense); Campbell v. Ray, 102 N.J. Super. 235, 245 A.2d 761 (Ch. Div. 1968), *aff'd per curiam*, 109 N.J. Super. 509, 259 A.2d 473 (App. Div. 1969).

27. *E.g.*, Goldstein v. New York Life Ins. Co., 133 Misc. 106, 231 N.Y.S. 161 (1928), *modified on other grounds*, 225 App. Div. 642, 234 N.Y.S. 250 (1929); *see* New York Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591 (1886). Although these cases hold that the existence of a purpose to obtain the proceeds is sufficient to disqualify a beneficiary, they do not say whether such a motive is required. That such a purpose is necessary has been suggested in a few concurring and dissenting opinions in cases not directly in point. Grossman, *supra* note 22, at 285, *citing* Gollnik v. Mengel, 112 Minn. 349, 128 N.W. 292 (1910) (concurring opinion); Box v. Lanier, 112 Tenn. 393, 79 S.W. 1042 (1904) (dissenting opinion). Other cases indicate that a purpose to accelerate the maturity of the policy is not necessary. Grossman at 286, *citing* Schreiner v. High Court Catholic Order of Foresters, 35 Ill. App. 576 (1890) (dictum); Smith v. Metropolitan Life Ins. Co., 122 Misc. 136, 203 N.Y.S. 173 (1923), *aff'd*, 125 Misc. 670, 211 N.Y.S. 755 (1925) (dictum); *cf.* Bryant v. Bryant, 193 N.C. 372, 378, 137 S.E. 188, 191 (1927) (dictum).

28. *E.g.*, Schmidt v. Northern Life Ass'n, 112 Iowa 41, 83 N.W. 800 (1900); Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N.E. 816 (1923). *See also* Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948).

29. *E.g.*, Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N.E.2d 17 (1936); *see* RESTATEMENT OF RESTITUTION § 187, comment *e* at 766-67 (1937).

Although these cases seem to indicate that the determinative factor is whether the homicide involved is technically murder or some lesser criminal offense, the few cases that have directly considered what elements are necessary to bar the beneficiary have held that the true test is whether the beneficiary *intentionally* killed the insured.[30] As one court noted in *Metropolitan Life Insurance Company v. McDavid*,[31] "the real reason for not permitting recovery is that the beneficiary intentionally took the life of the insured and that the intentional act should not place the beneficiary in position to enjoy a benefit which would not have been enjoyed and could not have been enjoyed except for the wicked intentional killing."[32]

In the North Carolina cases on point, the rule generally has been stated to the effect that a beneficiary is barred who "feloniously takes" the life of the insured.[33] While a felonious act in the criminal law context includes involuntary manslaughter,[34] the decisions in North Carolina, and in other jurisdictions where similar statements of the rule exist, indicate that courts have not used the word "felonious" in the strict criminal law sense but had in mind an intentional homicide.[35]

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30. *E.g.*, Tippens v. Metropolitan Life Ins. Co., 99 F.2d 671 (5th Cir. 1938); Schreiner v. High Court Catholic Order of Foresters, 35 Ill. App. 576 (1890); Commercial Travelers Mut. Acc. Ass'n v. Witte, 406 S.W.2d 145 (Ky. 1966); Schifanelli v. Wallace, 271 Md. 177, 315 A.2d 513 (1974); *cf.* Wells v. Harris, 414 S.W.2d 343 (Kansas City, Mo., Ct. App. 1967).

31. 39 F. Supp. 228 (E.D. Mich. 1941).

32. *Id.* at 232; *accord*, Throop v. Western Indemnity Co., 49 Cal. App. 322, 193 P. 263 (Dist. Ct. App. 1920). *See also* United States v. Kwasniewski, 91 F. Supp. 847, 852 (E.D. Mich. 1950).

33. *E.g.*, Bullock v. Expressmen's Mut. Life Ins. Co., 234 N.C. 254, 67 S.E.2d 71 (1951); Parker v. Potter, 200 N.C. 348, 157 S.E. 68 (1931).

34. N.C. GEN. STAT. § 14-18 (1969) provides:

> **Punishment for manslaughter.**—If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both.

In State v. Dunn, 208 N.C. 333, 180 S.E. 708 (1935), the North Carolina Supreme Court in an opinion by Justice Brogden held that the proviso to section 14-18 was intended merely to mitigate punishment for involuntary manslaughter and did not make involuntary manslaughter a separate offense classifiable as a misdemeanor.

35. In *Parker*, for example, a statement by the court that "if a husband insures his life for the benefit of his wife and afterwards *feloniously takes* her life, neither he nor his estate will be permitted to profit by his wrong," 200 N.C. at 352, 157 S.E. at 70 (emphasis added), is followed by a series of examples that suggest that the court was referring to an intentional killing. *Id.* Moreover, the court cited New York Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591 (1886), a case that also contains language that "strongly suggests that the court had in mind an intentional taking." Grossman, *supra* note 22, at 289. *But see* Anderson v. Life Ins. Co., 152 N.C. 1, 67 S.E. 53 (1910), in which the supreme court noted that "[i]t is a principle very generally ac-

Thus, historically, the dividing line between homicides that bar recovery and those that do not has been drawn short of involuntary manslaughter both by the North Carolina courts and courts in other jurisdictions.

Several states have enacted statutes that deal expressly with this problem, and, of course, in these jurisdictions the language of the statute controls.[36] Although these statutes lack uniformity in describing the acts that will bar recovery,[37] the courts, in interpreting them, generally have agreed that they apply only to intentional killings.[38]

An additional issue raised where such statutes are in force is whether they are intended to abrogate the common law. Most courts have held

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cepted that a beneficiary who has caused or procured the death of the insured *under circumstances amounting to a felony* will be allowed no recovery on the policy." *Id.* at 2, 67 S.E. at 53 (emphasis added). Apparently, this statement of the rule explains the dictum in the court of appeals' opinion in *Quick* that Jill Quick could not have recovered on the policy if the statute had not superseded the common law. 23 N.C. App. at 507, 209 S.E.2d at 325. However, the precise issue in *Anderson* was whether the estate of a beneficiary could recover on a life insurance policy when the beneficiary *murdered* the insured and committed suicide. Thus, for felonies other than murder, the rule stated in *Anderson* is merely dictum. Moreover, as noted by Grossman in cases such as *Anderson*, "the requirement that the homicide be wilful as well as felonious usually appears more or less definitely from the language of the decisions *as a whole*." Grossman at 289. (emphasis added). *See also* Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N.E. 816 (1923); Johnson v. Metropolitan Life, 85 W. Va. 70, 100 S.E. 865 (1919). In addition, where statutes simply require that the killing be felonious, the courts have interpreted this to mean an intentional killing. *E.g.*, Dowdell v. Bell, 477 P.2d 170 (Wyo. 1970); *accord*, Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968), *appeal dismissed and cert. denied per curiam*, 395 U.S. 161 (1969). In *Thompson*, the court in interpreting a statute that disqualified a beneficiary who "feloniously takes" the life of the insured, held that "the statute is meant to apply to those wrongdoers who intentionally cause the wrong and not to those who have been negligent." *Id.* at 557, 163 N.W.2d at 296; *accord*, Rosenberger v. Northwestern Mut. Life Ins. Co., 176 F. Supp. 379 (D. Kan. 1959), *modified on other grounds*, 182 F. Supp. 633 (D. Kan. 1960). *See also* Hatcher v. Aetna Life Ins. Co., 105 F. Supp. 808, 810-11 (D. Ore. 1952).

36. *E.g.*, OKLA. STAT. ANN. tit. 84, § 231 (Supp. 1975); S.C. CODE ANN. § 19-5 (1962); W. VA. CODE ANN. § 42-4-2 (1966).

37. *E.g.*, IOWA CODE ANN. § 633.536 (1964) (feloniously takes); S.C. CODE ANN. § 19-5 (1962) (unlawfully kills). The South Carolina statute specifically exempts involuntary manslaughter.

38. *E.g.*, Dowdell v. Bell, 477 P.2d 170 (Wyo. 1970) in which the court held that although the word "intentionally" is not used in the Wyoming statute, the statute codifies the common law, which historically was limited to intentional and felonious acts causing the death of the insured. *Id.* at 172; *accord*, Greer v. Franklin Life Ins. Co., 148 Tex. 166, 221 S.W.2d 857 (Tex. 1949); *see* Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968), *appeal dismissed and cert. denied per curiam*, 395 U.S. 161 (1969). *But cf.* Hamblin v. Marchant, 103 Kan. 508, 175 P. 678 (1918). At the time of the *Hamblin* decision, however, the Kansas statute made conviction of *any* killing a bar. *Id.* at 509, 175 P. at 678-79. The statute was amended to require a felonious killing which has been interpreted to mean an intentional homicide. Rosenberger v. Northwestern Mut. Life Ins. Co., 176 F. Supp. 379 (D. Kan. 1959), *modified on other grounds*, 182 F. Supp. 633 (D. Kan. 1960).

that the statutes only supplement common-law rules and do not supplant them.[39] Thus, when the act of the beneficiary is not specifically barred by the statute, it is still possible to prohibit recovery if it is shown that the beneficiary *intended* to kill the insured.[40]

A second problem encountered by courts when the beneficiary kills the insured involves the admissibility and weight to be accorded the record of the criminal conviction in the civil proceeding. As a general rule of evidence, the judgment of conviction is neither admissible nor conclusive.[41] The reasons given by the courts for this rule of exclusion include lack of mutuality,[42] the fact that the record of conviction is hearsay,[43] and differences in the burdens of proof[44] and in the rules as to competency of witnesses in criminal and civil proceedings.[45] Thus, in the absence of a statute, a party seeking to bar a beneficiary must produce evidence of the circumstances surrounding the killing in

39. *See, e.g.*, Keels v. Atlantic Coastline R.R., 159 S.C. 520, 157 S.E. 834 (1931); Smith v. Todd, 155 S.C. 323, 152 S.E. 506 (1930); Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934). *But see* Rose v. Rose, 79 N.M. 435, 444 P.2d 762 (1968).

40. *See* cases cited note 39 *supra.*

41. *E.g.*, Beckworth v. Phillips, 6 Ga. App. 859, 65 S.E. 1075 (1909) (not conclusive); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S.E. 301 (1922) (not admissible). The North Carolina cases follow this rule. *E.g.*, Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960); *see* cases cited in 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 143 (H. Brandis rev. 1973). There is an exception to this rule when a convicted criminal attempts to profit from his crime in a civil action. In such instances, some courts have held that a criminal conviction record is admissible, *see, e.g.*, Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932), and others have held that the judgment of conviction is conclusive. *E.g.*, Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962).

42. *E.g.*, Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968), *appeal dismissed and cert. denied per curiam*, 395 U.S. 161 (1969); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S.E. 301 (1922). The courts have held that there is no mutuality of estoppel because the defendant in the criminal case could not have used an acquittal in the subsequent civil action. Clearly, it is reasonable to deny giving conclusive effect to an acquittal in the civil proceeding, if not to exclude it entirely, because of the differences in the burdens of proof and the parties in the two proceedings. However, when the defendant has been convicted by proof beyond a reasonable doubt after having a full opportunity to present his case, it would seem both logical and convenient to allow the conviction at least to be used in the civil case. Apparently, however, the courts in denying the use of the judgment of conviction have found the desirability for preserving symmetry in the law more compelling.

43. *See* Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968), *appeal dismissed and cert. denied per curiam*, 395 U.S. 161 (1969). *See also* 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 143 (H. Brandis rev. 1973).

44. *E.g.*, Webb v. McDaniel, 218 Ga. 366, 127 S.E.2d 900 (1962); State v. Roach, 83 Kan. 606, 112 P. 150 (1910).

45. SPECIAL REPORT, *supra* note 7, at 29; *see* Webb v. McDaniel, 218 Ga. 366, 127 S.E.2d 900 (1962). *See also* Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S.E. 301 (1922).

order to establish a prima facie case.[46]

Where statutes have been enacted their language controls the use of the criminal conviction in the subsequent civil proceeding. If a statute does not require a criminal conviction in order to bar recovery, the court in the civil case must itself determine whether the killer was *guilty* of a proscribed homicide.[47] In such instances, the criminal conviction is not admissible to prove guilt for the same reasons applicable where no statute is in effect.[48] On the other hand, when the statute defines a slayer as one who has been *convicted* of a wilful homicide, the principle issue in the civil action is simply whether the person has been so convicted.[49] As the court noted in *Quick*, where such statutes are in effect, the record of the conviction is admissible in the civil action "not to prove guilt, but to prove the conviction as a separate relevant fact which would of itself bar the beneficiary from acquiring or retaining the proceeds."[50]

The court in *Quick* resolved many of the problems that arise when a beneficiary takes the life of the insured. In many respects, the opinion of the court merely reiterates well established common-law rules. In particular, the holding that a criminal conviction record is not admissible in a common-law civil proceeding is clearly supported by the weight of authority in North Carolina and in other jurisdictions.[51] Similarly, the holdings of the court that the statute applies only to intentional homicides and was not intended to supplant the common law are consistent not only with the legislative history of the statute[52] but also with the majority of decisions of other courts interpreting similar statutes.[53]

However, the conclusion of the court that "culpable negligence" is sufficient to bar recovery at common law marks an unprecedented extension of the rule disqualifying a beneficiary who caused the death

46. Quick v. United Benefit Life Ins. Co., 287 N.C. at 58, 213 S.E.2d at 570. *See also* Lillie v. Modern Woodmen, 89 Neb. 1, 130 N.W. 1004 (1911).

47. *See* 5 A. SCOTT, THE LAW OF TRUSTS § 492.4, at 3508 (3d ed. 1967).

48. SPECIAL REPORT, *supra* note 7, at 29.

49. *Id.* at 29-30; *see* Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934).

50. 287 N.C. at 57, 213 S.E.2d at 569; *accord*, Rosenberger v. Northwestern Mut. Life Ins. Co., 182 F. Supp. 633 (D. Kan. 1960), *modifying* 176 F. Supp. 379 (D. Kan. 1959); Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934). As the court also notes in *Quick*, "evidence that the 'slayer' was not in fact guilty of the crime would be both immaterial and inadmissible." 287 N.C. at 57, 213 S.E.2d at 569.

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

52. 287 N.C. at 54-56, 213 S.E.2d at 568-69.

53. *See* cases cited notes 35, 38 & 39 *supra*.

of the insured.[54] The court cited no cases from North Carolina or other jurisdictions supporting its conclusion. Instead, the court apparently justified its holding on the basis of comments to the proposed act contained in a report by the Special Drafting Committee of the General Statutes Commission.[55] Specifically, the court seems to have relied on the observation by the committee that "the fact that this Chapter covers only certain acts of wrongful killing does not necessarily preclude other wrongful acts from barring property rights by common law, such as involuntary manslaughter or an acquitted killer in some cases."[56] The court also quoted an article by Professor Bolich, a member of the Committee, in which he stated that "the fact that this chapter covers only wilful and unlawful homicide does not necessarily preclude other wrongful killings from barring property rights by common law, such as an unintentional killing resulting from reckless disregard for human life or during the commission of a felony."[57] Apparently, the court inferred from the comments of the committee and the statement of Professor Bolich that the common-law rule of North Carolina is that a beneficiary convicted of involuntary manslaughter should not be allowed to profit by his own wrong. Yet clearly, the purpose of these comments was merely to insure that common-law remedies were preserved as to acts not specifically provided under the statute. They are not addressed to the specific problem of what elements are necessary to disqualify a beneficiary in a common-law proceeding and certainly do not support the conclusion of the court that a conviction of involuntary manslaughter alone is sufficient evidence to bar recovery of the proceeds.

Moreover, other comments by the committee indicate that the better public policy is simply to bar one who *intentionally* takes the life of the insured. For example, in their comments on section 31A-3(1)a the committee states that "[t]he requirement that the killing be wilful and unlawful isn't the only possible rule, *but does seem a fair policy criterion.*"[58] Furthermore, the opinion of the court contains a state-

54. See cases cited notes 30-32 *supra.*

55. [N.C.] GENERAL STATUTES COMMISSION, SPECIAL REPORT ON AN ACT TO BE ENTITLED "ACTS BARRING PROPERTY RIGHTS" (1961). The members of the committee were Fred B. McCall, Professor of Law, University of North Carolina Law School; W. Bryan Bolich, Professor of Law, Duke University Law School; and Norman A. Wiggins, Professor of Law, Wake Forest College Law School. SPECIAL REPORT, *supra* note 7, at 1.

56. SPECIAL REPORT at 31, *quoted at* 287 N.C. at 55, 213 S.E.2d at 568.

57. Bolich, *supra* note 22, at 221, *quoted at* 287 N.C. at 55-56, 213 S.E.2d at 568.

58. SPECIAL REPORT at 12 (emphasis added).

ment by Professor Bolich that "this section utilizes the criterion adopted by a majority of the statutes and common law decisions on the subject—an intentional criminal homicide. *As an expression of public policy it seems a fair standard which requires the killing to be both unlawful and wilful.*"[59]

While it is true that both these statements relate specifically to the meaning of the word "slayer" as used in the statute, the statutory requirement that the killing be wilful in order to bar the beneficiary is an expression of the public policy of the state preventing one who intentionally kills another from unjustly enriching himself through his criminal act. It would seem, therefore, that the same policy and the same test should govern a proceeding at common law. In sum, the holding of the court that culpable negligence will bar recovery is not only unprecedented but also arguably contrary to the intent of the legislature and the public policy of North Carolina as expressed in the statute.

Even if one accepts this unique holding of the court, the result reached in *Quick* is certainly inequitable on the facts of the case. At trial both parties stipulated that the *only* issue to be decided was whether Jill Quick was barred from taking the proceeds under chapter 31A.[60] Arguably, this stipulation could be viewed as an agreement by the parties that Jill Quick was to be disqualified as a slayer under the statute or not at all. That is, the stipulation could be interpreted as a waiver by the plaintiff administratrix of any common-law remedy.[61] In that case, Jill should have been allowed to recover the proceeds since she was not a slayer under the court's interpretation of the statute. The court, however, held that it was not bound by the stipulation since it was one of law.[62] While it is true that the parties cannot stipulate as

59. Bolich, *supra* note 22, at 193-94, *quoted at* 287 N.C. at 52-53, 213 S.E.2d at 567 (emphasis added).

60. 287 N.C. at 49, 213 S.E.2d at 564.

61. In Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972), the court stated: "'[s]tipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, *or the waiver of a right not plainly intended to be relinquished*, . . .'" *Id.* at 380, 193 S.E.2d at 83 (emphasis added). *See also* J.L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 49 S.E. 946 (1905).

If the parties had agreed that the stipulation was a waiver of the administratrix's common law remedy, it seems that Jill would have objected to the trial court's second conclusion of law on the grounds that it was contrary to the terms of the stipulation. Thus, Quick's failure to object is evidence that there was no mutual intent that the stipulation was to have the effect of a waiver of any common-law remedy.

62. 287 N.C. at 56, 213 S.E.2d at 569.

to matters of law,[63] they can limit the issues to be considered by relinquishing otherwise available rights.[64] Thus, the manner in which the court dispenses with the stipulation fails to give sufficient consideration to the question whether the stipulation shows that the administratrix intentionally waived any common-law remedy existing independent of the statute.

Moreover, regardless of the legal effect of the stipulation, it is evident from its terms that Jill was under the impression that the "decisive question" was whether she was barred by the statute,[65] and since the statute, contrary to the common law, made the conviction record admissible, it is understandable that she failed to object.[66] Furthermore, there was simply no way she reasonably could have known that a conviction of involuntary manslaughter, even if admitted, would have been sufficient to bar recovery since all the authorities indicate that a person seeking a common-law remedy would have to prove by the preponderance of evidence that she *intentionally* killed the insured.[67] Thus, the holding of the court that the record of the criminal conviction though generally inadmissible was not only entitled to be considered in the civil case but was also conclusive as to the issue amounts to a substantial miscarriage of justice.[68]

In conclusion, the supreme court in *Quick v. United Benefit Life Insurance Company* provided "considerable guidance" in the resolution of issues that often arise when a beneficiary of a life insurance policy

63. *See, e.g.*, Moore v. State, 200 N.C. 300, 156 S.E. 806 (1931).

64. *See* Forbes v. Commissioner, 82 F.2d 204 (1st Cir. 1936).

65. 287 N.C. at 56, 213 S.E.2d at 569.

66. Moreover, it would not have been unreasonable for Jill Quick to have introduced the conviction into evidence as a defense to her prosecution under the statute. *See, e.g.*, Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934).

67. *See* cases cited note 30 *supra*.

68. There are a few other explanations for the result reached by the court. First, the court may have construed section 31A-15 to empower the courts to consider all the circumstances of each case in determining whether the act of the defendant was the type of unlawful killing that should prohibit recovery. That is, the legislature may have intended that the courts adopt a "functional test," *see* Hatcher v. Aetna Life Ins. Co., 105 F. Supp. 808, 810-11 (D. Ore. 1952), in deciding these cases under which "intent" would be an important but not necessarily determinative factor. Although such a test would introduce considerable uncertainty into this area of the law, it potentially would avoid the undesirable results which could be reached by barring any beneficiary who has acted in a culpably negligent manner in causing the death of the insured. Second, the court may have viewed the verdict of involuntary manslaughter as a compromise or sympathy verdict—Jill being in fact guilty of murder. However, the only significant fact from which the court could draw such an inference was the severity of the sentence handed down by the judge. Finally, the court may not have wished to remand the case for a hearing on the question of intent or for a new trial because of the likelihood that a new round of litigation would severely deplete the insurance proceeds.

takes the life of the insured. Unfortunately, the benefits gained through such guidance are more than offset by the unjust manner in which the court reached its final result. Besides the unfairness on the peculiar facts of this case, the abandonment of the heretofore universally recognized common-law test of intent to kill has the potential for producing results that most courts and commentators would find inequitable.[69] For example, under the rule laid down by the court in *Quick*, a son whose reckless driving caused the death of his father would not be allowed to recover any insurance proceeds accruing as a result of his father's death.

It is submitted that the court should have remanded the case for a hearing to determine whether Jill Quick intentionally killed the insured. In disposing of the case in this manner, the court could have avoided setting an unwarranted and inequitable precedent in North Carolina.

JOHN MULL GARDNER

Real Property—Implied Warranty: Seller of Land Limited by Restrictive Covenants Implicitly Warrants That the Land Was Usable for the Restricted Purpose

In a case of first impression and without appellate court precedent in any other jurisdiction,[1] the North Carolina Supreme Court rejected the venerable maxim that in a sale of land by deed there are no implied warranties.[2] By extending the implied warranty concept developed for new home sales,[3] the court created a new substantive right based on

69. *E.g.*, Hatcher v. Aetna Life Ins. Co., 105 F. Supp. 808, 810-11 (D. Ore. 1952).

1. Brief for Plaintiff at 13, Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975). *But cf.* Hyland v. Parkside Inv. Co., 10 N.J. Misc. 1148, 162 A. 521 (S. Ct. 1932) where it was held a landlord who specifically restricts the use of a leased premise for one purpose guarantees the fitness of the premise for that particular purpose.

2. Huntley v. Waddell, 34 N.C. 33 (1851). In some states the prohibition against implied warranties for real property is statutorily sanctioned. *See, e.g.*, ORE. REV. STAT. § 93.140 (1973). In these states it is unlikely that the decision of Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975) can be followed without statutory changes, implied warranty cases for new homes notwithstanding. Yepsen v. Burgess, 525 P.2d 1019 (1974) (en banc). For unlike the implied warranty in new home cases in which the courts attempt to avoid merger and preserve the contractual obligations, the implied warranty in *Hinson* is derived from the deed itself. 287 N.C. at 435, 215 S.E.2d at 111.

3. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974). The case is analyzed in Note, *Real Property—Implied Warranty of Workmanlike Quality in New Housing Sales: New Protection for the North Carolina Homebuyer*, 53 N.C.L. REV. 1090 (1975)

implied warranty for lands covered by restrictive covenants. As formulated in *Hinson v. Jefferson*,[4] whenever a deed contains a restrictive covenant that limits the use of conveyed property to one specific use, the grantor implicitly warrants that the land conveyed was at the time of the conveyance usable for the purpose to which it was specifically limited.

The decision is significant because it carves out a limited exception to the doctrine of *caveat emptor* and thus provides greater protection for the purchaser. The basis for the *Hinson* decision was not consumer protection, however. The state supreme court was dissatisfied with the vagaries of alternative restitutionary theories, such as mistake, particularly in the light of the countervailing policy in favor of stability in executed land sales. The *Hinson* warranty was thus created to ensure greater certainty.[5] An examination of the opinion reveals, however, that failure by the court to discuss the substantive issues that inhere in warranty actions could undermine its efforts.[6]

In 1971, defendants sold a small parcel of land in rural Pitt County to plaintiff, Mrs. Hinson, for $3,500.[7] Contained within the deed that conveyed the parcel were restrictive covenants that greatly limited the use of the land. Foremost among these restrictions was the requirement that the land be used exclusively for residential purposes.[8] Because the lot was not serviced by a municipal sewage system, Mrs. Hinson applied to the Pitt County Health Department for the required permit for the installation of a septic tank or an on-site sewage disposal system.[9] Subsequent inspections by the Health Department and the United States Department of Agriculture Soil Conservation Service disclosed that the lot purchased by Mrs. Hinson was only 2.6 feet above the water level of the Black Swamp. Consequently, unless several hundred thousand dollars were expended for channel improvements the lot could

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and Note, *Real Property—Implied Warranty of Habitability in North Carolina*, 11 WAKE FOREST L. REV. 155 (1975).

4. 287 N.C. at 435, 215 S.E.2d at 111.

5. *See* text accompanying note 18 *infra.*

6. *See* text accompanying notes 30-49 *infra.*

7. 287 N.C. at 424, 427, 215 S.E.2d at 104, 105.

8. *Id.* at 424-25, 215 S.E.2d at 104. In addition to restricting the parcel to exclusively residential uses, according to the covenants no residence at all was permitted on the parcel unless its construction cost exceeded $25,000. *Id.* at 424, 215 S.E.2d at 104. The deed prohibited the placing of trailers and mobile homes on the parcel. *Id.* Similarly, subdividing the lot into smaller lots was also prohibited. *Id.* at 425, 215 S.E.2d at 104. Finally, prior to any construction the buyer was required to submit the building plans and specifications to the defendants for their written approval. *Id.* at 424, 215 S.E.2d at 104.

9. *Id.* at 425-26, 215 S.E.2d at 105.

not comply with septic tank or on-site sewage disposal regulations.[10] Neither the buyer nor the seller knew of the subterranean hydrologic conditions of the lot.[11] Unable to build because of these conditions, Mrs. Hinson attempted to rescind the deed. The trial court held for defendants.[12]

The court of appeals refused to adopt plaintiff's implied warranty theory[13] but accepted the mutual mistake contention and reversed the trial court.[14] The court relied extensively on *MacKay v. McIntosh*,[15] an earlier North Carolina case in which a Florida realty company attempted to specifically enforce an executory land contract made by its agent and the buyer. The facts revealed, however, that prior to signing the contract of sale the buyer advised the seller's agent that her sole purpose for acquiring the property was to build a retail store. The agent assured her that the property was zoned for business purposes when in fact the local zoning ordinances prohibited business uses. The North Carolina Supreme Court therefore accepted defendant's contention that both parties acted on an honest mistake and rescinded the contract.[16] The *MacKay* decision recognized, however, that generally a contract is binding and only when a mistake was of a material fact which formed the basis of a contract could a contract be voided on the grounds of mutual mistake.[17]

10. *Id.* at 426, 215 S.E.2d at 105.
11. *Id.* at 427, 215 S.E.2d at 105-06.
12. *Id.* at 427-28, 215 S.E.2d at 106.
13. *Id.* at 429, 215 S.E.2d at 107. At the appeals court it was contended that the deed should be rescinded for either of two reasons. First, the terms and conditions of the covenants restricting the use of the conveyed property to a single use gave rise to a mutually dependent warranty on behalf of the grantor that the land was in fact usable for its restricted purpose. Second, since neither party knew about the high watertable at the time of the conveyance, a mutual mistake concerning the utility of the parcel had occurred. Two other contentions, although not made, appear relevant. First plaintiff could have argued that an existing impossibility at the outset of the transaction invalidated the deed. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 965-66 (1973). The impossibility theory, however, is subject to the same basic uncertainties as the mistake cases, *id.* at 965, and would probably have been rejected by the supreme court. Second, it could be argued that since it was impossible to comply with the restrictive covenant and build the contemplated single family house, the restrictions should be removed to permit development of the land for some other purpose. *See, e.g.*, Abate v. Hebert, 100 So. 2d 273 (La. App. 1st Cir. 1958). However, under this approach purchasers can receive a windfall since presumably their purchase price reflected the restricted use of the property. Thus the effect of this type of decision is to give the buyer an unrestricted fee at restricted prices. Furthermore, if the property was within a subdivision, removal of the covenant may adversely affect the interests and expectations of neighboring property owners.
14. Hinson v. Jefferson, 24 N.C. App. 231, 238-39, 210 S.E.2d 498, 502-03 (1974).
15. 270 N.C. 69, 153 S.E.2d 800 (1967).
16. *Id.* at 73, 153 S.E.2d at 804.
17. *Id.*

The state supreme court in *Hinson* replaced the mistake rationale of the court of appeals with a warranty theory. The court feared that the mistake doctrine was too uncertain a standard to rescind a completed land transaction.[18] Recent writings and cases lend support to this fear. One commentator has observed that in any mistake case the several factors[19] used by the courts may point toward different results, and one factor although important in one case may be ignored in another. Consequently neither lawyer nor judge can be assured what factors will be decisive in a particular case.[20] Even when a definite standard is developed, it is difficult to apply. In *MacKay*, it will be recalled, the North Carolina Supreme Court indicated that the *sine qua non* for applying the mistake doctrine was that the mistake form the basis of the contract.[21] Although easily stated, in practice this test is extremely difficult to apply. Differentiating between basic and collateral matters is highly subjective. The Michigan Supreme Court, for example, refused to apply the mistake doctrine in *A&M Land Development Co. v. Miller*, even though nearly one-half of the ninety-one lots purchased were unsuitable for septic tanks, the only available form of sewage disposal.[22] The court simply held that the buyer received the property for which he contracted.[23] Generally, when the courts apply the mistake doctrine their decisions are predicated on their perceptions about culpability, assumption of risk, and the relative hardships to the parties.[24] Although this balancing approach may reach an equitable result in a particular case it fails to provide any guidance to the seller or the purchaser.[25] In the *Hinson* case this uncertainty was, in the judgment of the supreme court, fatal to the mistake cause of action.

In contrast, a warranty action minimizes the discretionary judgment of the courts, and therefore increases the control the parties have over their own transaction. As applied in *Hinson* the warranty of fitness is coextensive with the restrictive covenant of the deed.[26] Thus, the legal obligations of the parties are defined by the provisions of the deed executed by the parties rather than by retrospective and unpredict-

18. 287 N.C. at 430-33, 215 S.E.2d at 108-09.
19. *See* text accompanying note 24 *infra.*
20. Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEXAS L. REV. 1273, 1275 (1967).
21. *See* text accompanying note 17 *supra.*
22. 354 Mich. 681, 94 N.W.2d 197 (1959).
23. *Id.* at 694, 94 N.W.2d at 203.
24. D. DOBBS, *supra* note 13, at 723-32.
25. *See* text accompanying note 20 *supra.*
26. 287 N.C. at 435, 215 S.E.2d at 111.

able judicial analysis of factors such as culpability, unjust enrichment, or relative hardship. Another advantage of the *Hinson* opinion is the lighter evidentiary burden required to sustain a warranty action. Generally, plaintiffs in a warranty action must prove only: (1) the existence of a warranty; (2) the scope of the warranty; and (3) that the breach of the warranty was the proximate cause of the loss.[27] By contrast, because the mistake cases are based on subjective evaluations, the evidence required to prevail is much greater. This does not mean, however, that the warranty doctrine applied in *Hinson* removes all factual disputes. One very important but difficult element critical to the buyer's cause of action under the *Hinson* rationale is proving that at the time of the conveyance the property was unusable for its restricted purpose. If either the seller or the purchaser had actually known the physical condition of the land at the time of the conveyance, the transaction undoubtedly would not have occurred in its present form. The passage of substantial periods of time between the conveyance and actual development will exacerbate the problem of proof.[28]

The major difficulty with a warranty action and the *Hinson* decision in particular is not evidentiary but substantive. The decision leaves too many important warranty issues unresolved. Moreover, since the opinion departs substantially from previous statutory and case analogies,[29] these analogies are inadequate guides to resolve these issues

27. N.C. GEN. STAT. § 25-2-314 (1965), Comment 13.

28. The evidentiary problem was not at issue in *Hinson;* the Court determined that the physical conditions existed at the date of the conveyance. 287 N.C. at 426, 215 S.E.2d at 105. The evidentiary problem is closely related to selecting an appropriate statute of limitations. This problem has troubled many commentators discussing the implied warranty in new home cases. Note, *Real Property—Implied Warranty of Workmanlike Quality in New Housing Sales: New Protection for the North Carolina Homebuyer,* 53 N.C.L. REV. 1090, 1094 n.28 (1975). Generally, the duration of the warranty adopted by the courts in the new home area has been a case by case test of reasonableness. *Id.* at n.30. Although the types of defects in the *Hinson* context are less numerous than in new home construction (*see* text accompanying note 40 *infra*), nonetheless, the reasonableness standard is preferable to some fixed period. The reason for this lies with the nature of the product. Unlike goods which are used immediately after purchase, realty is sometimes acquired for future use and defects cannot be determined until later.

29. There are at least three analogous warranties. First, N.C. GEN. STAT. § 25-2-315 (1965) provides:

> [w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

The second is the implied warranty of workmanlike quality for new homes. Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). Finally, a third analogy is the

without further court elaboration. In this respect the *Hinson* decision suffers from the same lack of guidance the court found so objectionable in the mistake cases.

The first serious omission in the *Hinson* decision was the court's failure to delineate a standard for determining what conditions constitute a breach of warranty. Because the land in *Hinson* was totally unusable in any practical sense for its restricted use,[30] it was clear that if a warranty existed at all, it was breached. Suppose however, the contemplated use was not frustrated but instead was $3,000 more costly to achieve. Would this constitute a breach of warranty under *Hinson*? Similarly, suppose the land was restricted to both single and multifamily housing, and later it was learned that the land was only suitable for single family housing. Clearly the value of the land is worth less, but does this constitute a breach of an implied warranty? Although the *Hinson* decision is silent about these circumstances, it hints at a strict standard of liability. First, unlike analogies from the Uniform Commercial Code[31] and implied warranties for new homes,[32] where it is inferred that the businessman has superior knowledge on which the consumer relies, neither the seller nor the buyer had knowledge of the hydrologic conditions[33] in *Hinson*. Apparently, the court believed, as between two innocent parties, the party who imposed the restriction ought to bear the risks that are attributable to the restrictions. Second, in contrast to *Hartley v. Ballou*[34] and its kindred cases,[35] the *Hinson* decision omits language limiting the scope of liability. Whenever the courts have resorted to implied warranties and imposed liability in the past, as in the case of defective new home construction, they have carefully circumscribed the scope of liability.[36] For example, in *Hartley* the North Carolina Supreme Court specifically held that the implied

landlord's implied warranty of habitability. *See* Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974).

30. *See* text accompanying note 10 *supra*.

31. N.C. GEN. STAT. § 25-2-315 (1965); Covington & Medved, *The Implied Warranty of Fitness for A Particular Purpose: Some Persistent Problems*, 9 GA. L. REV. 149, 151 (1975).

32. Commentary, *Real Property—Implied Warranties—Sale of House by Builder-Vendor Creates an Implied Warranty of Fitness and Habitability*, 24 ALA. L. REV. 332, 335 (1972).

33. *See* text accompanying note 11 *supra*.

34. 286 N.C. 51, 209 S.E.2d 776 (1974).

35. *See generally* Annot., 25 A.L.R.3d 383, 413-15 (1969).

36. In Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) the Idaho Supreme Court held "[t]he implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects . . . ." *Id.* at 68, 415 P.2d at 711.

warranty fell short of an absolute guarantee.[37] Therefore, in North Carolina liability for new home construction is imposed only when there is a breach of workmanlike quality.[38] In other states habitability[39] and reasonableness standards[40] are used to limit liability. These limitations are, however, based on policy considerations which are inapplicable to the *Hinson* land purchase context. The courts, for example, have recognized that there are too many considerations involved with housing construction and maintenance to require a builder-vendor or a landlord to build or rent a perfect house and that an absolute standard of liability would be unreasonable.[41] By contrast, the concern in *Hinson* is unidimensional— whether the parcel is suitable to accommodate the restricted use—and as such, the seller can more easily avoid liability. Another important policy difference between *Hartley* and *Hinson* is the disparate transactional impact of the two decisions. Since the courts are involved with the indispensable commodity of shelter when deciding housing warranty cases, their decisions are likely to have broad societal consequences. For example, unreasonable court requirements could discourage housing construction, encourage disinvestment in housing, or increase drastically the cost of housing to consumers. However, since the fact situation in *Hinson* occurs less frequently, its probable impact is slight. Therefore, in this situation the courts should be willing to include lesser impairments within the protective scope of the warranty.

Finally, a stricter standard of liability is consistent with the remedial flexibility provided by a warranty action.[42] Unlike the Hobbesian all-or-nothing choice of the mistake cases where the remedy is generally

37. 286 N.C. at 62, 209 S.E.2d at 783.

38. *Id.*

39. *See, e.g.*, Bethlahmy v. Bechtel, 91 Idaho 55, 68, 415 P.2d 698, 711 (1966).

40. *See, e.g.*, Smith v. Old Warson Dev., 479 S.W.2d 795, 801 (Mo. 1972) (en banc).

41. For a listing of the multitudinous types of defects that can occur in new home construction, see Commentary, *Real Property—Implied Warranties—Sale of House by Builder-Vendor Creates an Implied Warranty of Fitness and Habitability*, 24 ALA. L. REV. 332, 338-39 n.30 (1972). In the landlord-tenant field, although the landlord is not liable for all defects, Green v. Superior Court, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974), certain general principles have emerged for imposing liability on landlords. When defects deprive tenants of essential services, such as bathing, sleeping, and eating, liability is imposed. Similarly, liability is upheld when tenants are exposed to hazardous conditions which would result in tort liability if injury actually occurred. Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1455-62 (1974).

42. For a discussion about the advantages of a warranty action and when a landowner may want damages instead of rescission, see Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 391-93 (1967).

limited to rescission,[43] damages are an available alternative in a breach of warranty action.[44] Thus, in other fact patterns, in which the hardship to the buyer is less severe than in *Hinson*, the courts can avoid the difficulties[45] of rescission and subsequent changes in property records by giving the buyer either the difference between the market value as implicitly warranted and the market value in its actual condition or the amount of money required to bring the property into compliance with the implied warranty.[46]

The second major shortcoming of the *Hinson* decision related to the issue of liability is uncertainty about the right of the buyer and seller to exclude the implied warranty. Nowhere in the decision is this problem discussed. However, if the court applied the Uniform Commercial Code warranty of fitness analogy to the restrictive covenant warranty, then clearly a waiver clause is permissible. The code expressly provides a simple procedure for excluding implied warranties.[47] However, despite the obvious statutory parallel, the case law is hostile to waiver clauses. In new housing sales this hostility is evidenced by restrictive interpretation given to waiver clauses.[48] The courts are even more adamantly opposed to waiver clauses in cases involving landlords' implied warranty of habitability. For example, the Washington Supreme Court has held that a tenant does not waive the protection of an implied warranty even when he accepts a patently defective premise for reduced monthly rental payments.[49] Whether this reasoning will be followed by

43. *See* 13 S. WILLISTON, CONTRACTS, § 1542 (3d ed. 1970).

44. *See* Hartley v. Ballou, 286 N.C. 51, 63, 209 S.E.2d 776, 783 (1974).

45. *Id.* at 490, 219 S.E.2d at 194; *see* text accompanying notes 23-24 *supra*.

46. *Cf.* Hartley v. Ballou, 286 N.C. 51, 63, 209 S.E.2d 776, 783 (1974).

47. N.C. GEN. STAT. § 25-2-316(3)(a) (1965) provides: ". . . [A]ll implied warranties are excluded by expressions like as is, with all faults, or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . ."

48. *See, e.g.*, Wawak v. Stewart, 247 Ark. 1093, 1101, 449 S.W.2d 922, 926 (1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 800 (Mo. 1972) (en banc).

49. Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973). In Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081-82 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), Green v. Superior Court, 10 Cal. 3d 616, 625 n.9, 517 P.2d 1168, 1173 n.9, 111 Cal. Rptr. 704, 709 n.9 (1974), and Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973), explicit waiver clauses were not enforced by the courts. The decisions are based on two reasons. The *Javins* decision, for example, relied on the landlords' independent statutory duty imposed by the housing code to provide tenants with habitable premises as the basis for its opinion. Viewed in this context the prohibition against waiver clauses merely illustrates the principle that private parties can not by agreement remove a statutory duty. *See* Narramore v. Cleveland, C., C.&St. L. Ry., 96 F. 298, 302 (6th Cir. 1899). Another reason which is given to support the court's determination that a tenant may not waive the implied warranty of habitability centers on the adverse societal impact of renting substandard housing. Foisy v. Wyman,

North Carolina courts in the *Hinson* land purchase context is uncertain.[50] It would be anomalous, however, for the court to create a warranty right based on a policy of stability and then allow the buyer and seller to easily undermine this policy. For if the mere inclusion of a waiver clause can protect sellers from an implied warranty action, buyers would have no choice but to sue on a mistake theory, and thus reintroduce the uncertainty the court attempted to prevent.

The third critical issue for a warranty action left unanswered by the *Hinson* decision is deciding which individuals are protected by the warranty. Traditionally, North Carolina has taken a restrictive attitude towards privity.[51] In *Hartley*, for example, the implied warranty of workmanship protected only the "initial vendee."[52] In *Hinson*, however, the warranty of the grantor extends to the initial grantee and any subsequent grantees through mesne conveyances.[53] The reason for this departure from past precedent is not discussed in the opinion. More importantly, it is unclear whether the court truly intends to protect all subsequent buyers. For example, the implied warranty does not protect a buyer with knowledge. The decision therefore fails to provide a framework for determining when privity should be extended to subsequent grantees.

A solution for obviating this confusion is for the court in future cases firmly to equate the *Hinson* warranty to privity decisions under restrictive covenant law.[54] Apparently, the supreme court had this in mind when it held that the restrictive covenants in *Hinson* ran with the land.[55] The advantage of such a holding is twofold. First it would provide lawyers with a readily identifiable area of the law from which

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83 Wash. 2d 22, 28, 515 P.2d 160, 164-65. Whether these policies can be used to extend the prohibition against waiving implied warranties to other areas is uncertain. Pappas v. Hershberger, 85 Wash. 2d 152, 530 P.2d 642 (1975) (per curiam) (en banc).

50. The North Carolina Supreme Court has indicated that implied warranties do not protect buyers from patent defects or from reasonably ascertainable facts. Hinson v. Jefferson, 287 N.C. 422, 436, 215 S.E.2d 102, 111.

51. *See, e.g.*, Terry v. Double Cola Bottling Co., 263 N.C. 1, 138 S.E.2d 753 (1964); Byrd & Dobbs, *Torts Survey of North Carolina Case Law*, 43 N.C.L. REV. 906, 936-38 (1965).

52. 286 N.C. at 62, 209 S.E.2d at 783.

53. 287 N.C. at 435, 215 S.E.2d at 111.

54. *See, e.g.*, Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949).

55. 287 N.C. at 424, 215 S.E.2d at 104. It is not clear, however, whether characterizing the covenants in *Hinson* as running with the land is correct. In Julian v. Lawton, 240 N.C. 436, 440, 82 S.E.2d 210, 213 (1954), the court held that a covenant providing among other things that no building should be erected unless approved by the grantor or by an architect selected by him was a covenant personal to the grantor. *Accord*, Chappell v. Winslow, 144 F.2d 160, 162 (4th Cir. 1944).

they can delimit the warranty obligations. Second, because restrictive covenants that run with the land cannot be altered by subsequent buyers[56] absent court assistance,[57] it is only equitable that the original grantor who imposed the restriction be held liable.

Although the *Hinson* decision has left many important questions unanswered and therefore has undermined the efforts of the court to achieve stability in the land market, nevertheless, the problems are not insurmountable and future decisions along the lines suggested can achieve the desired objectives of the court. However, the North Carolina Supreme Court's novel decision in *Hinson v. Jefferson* does reflect an increasing willingness on behalf of the court to use implied warranties to protect purchasers of real property. Moreover, the decision may foreshadow future expansion of the implied warranty doctrine to other areas, such as landlord tenant relations.

IRA J. BOTVINICK

Security Interests—Garagemen's Liens and Duress of Goods

The doctrine that an artisan who enhances the value of a chattel at the request of its owner has a lien on that chattel for his reasonable charges is deeply rooted in the common law.[1] Equally venerable is the concept of duress of goods, a rule that protects an individual who finds himself coerced in some fashion through the wrongful seizure or detention of his property.[2] These two principles are similar in that each finds its application in a bailment of goods situation.[3] In *Adder v. Holman & Moody, Inc.*,[4] the North Carolina Supreme Court was presented with a question that involved an interplay between the two concepts: whether duress of goods was perpetrated when a garageman insisted that an owner-bailor sign a document purporting to waive all defenses based on poor workmanship before the garageman relinquished an automobile on which he had made repairs. The court, in

56. Sheets v. Dillon, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942).
57. *E.g.*, Muilenburg v. Blevins, 262 N.C. 271, 87 S.E.2d 493 (1955).

1. R. BROWN, THE LAW OF PERSONAL PROPERTY § 13.1, at 394-95 (3d ed. 1975); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 33.2, at 873 (1965).
2. This concept had its origin in the early eighteenth century. *See* note 23 *infra.*
3. *See* text accompanying notes 23-35 *infra.*
4. 288 N.C. 484, 219 S.E.2d 190 (1975).

finding no duress of goods, determined that the garageman had a valid lien on the car for the amount owing for services rendered. The court then held that although the owner-bailor had waived certain defenses by signing the document, he could still bring an affirmative suit.[5]

Adder was an action to recover damages for injuries allegedly resulting from defendant's negligence and breach of implied warranty in rebuilding plaintiff's automobile. Plaintiff James B. Adder entered into a contract with defendant that provided that defendant would convert plaintiff's 1971 Maverick automobile into a vehicle suitable for use on a drag strip or race track. By the time of the completion of the work, plaintiff had paid defendant approximately 10,000 dollars. Of this sum, twenty-five hundred dollars was borrowed from a bank by plaintiff, and defendant co-signed the bank note. Upon delivery of the automobile, defendant received plaintiff's personal check for $1538.03, the balance due on the contract. The check, however, was not honored due to insufficient funds. Several weeks later, as plaintiff was warming up the car for a race, the engine "blew." Plaintiff returned the automobile to defendant and requested that defendant determine the trouble.

A few weeks after the incident, plaintiff asked defendant for the automobile but was told that it would not be released until plaintiff tendered the amount due on the contract and also paid the bank note endorsed by defendant. After telephone negotiations between the parties' attorneys, plaintiff went to defendant's place of business with a certified check to pay the note. Defendant, however, refused to return the car unless provisions were made regarding the balance due; plaintiff subsequently agreed to pay the balance in several weeks. Defendant then telephoned its lawyer, who dictated a promissory note[6] and a second instrument referred to by the parties as a "release,"[7] which attempted to limit entirely defendant's liability.[8] Plaintiff signed

5. This latter finding was the subject of a dissenting opinion. *See* text accompanying notes 47-53 *infra*.

6. The text of this note is found in 288 N.C. at 487-88, 219 S.E.2d at 193.

7. *Id.* at 492, 219 S.E.2d at 195.

8. The text of the instrument is as follows:

> This will acknowledge my indebtedness of $1538.03 representing the balance due for labor and parts to finish my drag race car and that I have no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections.
>
> In consideration for an extension of time until August 10, 1972, I agree to execute and deliver to you my promissory note in the amount of $1538.03 and further agree that should I fail to pay by August 10, 1972, and you are

both documents and later testified that he had read and understood the writings before signing them and that he did not contact his attorney because the latter was in court at the time.[9]

The trial judge, at the close of testimony, ruled that the "release" was binding and dismissed plaintiff's action.[10] The court of appeals reversed the dismissal,[11] holding that plaintiff had been the victim of a scheme of duress designed to exact a release that would free defendant from liability. The supreme court similarly refused to dismiss the complaint,[12] but on different grounds. The court found the elements necessary for duress of goods to be absent because defendant's garageman's lien, which the court of appeals had thought to be extinguished, was still in existence.[13] The court, however, found the instrument's waiver provisions ambiguous, construed the "release" against the defendant-drafter, and concluded that plaintiff's affirmative suit for negligence and breach of warranty was not barred.[14]

Duress of goods is but one component of the larger doctrine of economic duress.[15] "Duress is a form of coercion. . . . [which] usually involves the transfer of money or property as a result of that coercion."[16] Although its limits are not clear,[17] the doctrine may be employed, for example, by the coerced party in a suit to void a transfer or a contract,[18] or it may furnish an affirmative defense in a suit brought to enforce a transaction.[19] Duress is related to and sometimes confused

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required to turn this note over to an attorney for collection, I will pay reasonably [*sic*] attorney fees.

I further agree that in the event that you should undertake suit against me on the note, I will not plead any defenses against payment of same.

Signed: JAMES B. ADDER

Id. at 487, 219 S.E.2d at 193.

9. *Id.* at 486, 219 S.E.2d at 192.

10. *Id.* at 488, 219 S.E.2d at 193. Judgment was also entered on defendant's counterclaim, plaintiff being required to pay defendant the amount due on the contract plus interest. *Id.* at 489, 219 S.E.2d at 194.

11. 25 N.C. App. 588, 214 S.E.2d 227 (1975).

12. 288 N.C. 484, 219 S.E.2d (1975) (two justices dissented).

13. *Id.* at 491-92, 219 S.E.2d at 195; *see* text accompanying notes 36-39 *infra*.

14. *Id.* at 493, 219 S.E.2d at 196; *see* text accompanying notes 47-53 *infra*.

15. *See* Dalzell, *Duress by Economic Pressure*, 20 N.C.L. REV. 237 (1942).

16. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 10.2, at 655 (1973); *see* Link v. Link, 278 N.C. 181, 191, 179 S.E.2d 697, 703 (1971).

17. *See* Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 288-89 (1947).

18. *See, e.g.*, Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

19. *See, e.g.*, People *ex rel.* Carpentier v. Daniel Hamm Drayage Co., 17 Ill. 2d 214, 161 N.E.2d 318 (1959); Gallagher Switchboard Corp. v. Heckler Elec. Co., 34 Misc. 2d 256, 229 N.Y.S.2d 623 (Sup. Ct. 1962).

with the doctrines of fraud and undue influence. The victim of duress is fully aware that he is being coerced to act contrary to his will. The victim of fraud, however, does not know that he is the object of wrongful action, for "[f]raud rests upon deception by misrepresentation or concealment."[20] The distinguishing feature of undue influence is the fiduciary relationship of the parties, with one party trusting and relying on the judgment of the other. Undue influence is exerted when the dominant party uses his position of trust to affect the judgment of the dependent party, who, like the fraud victim, is unaware of any wrongdoing.[21] Undue influence may therefore exist when the conduct falls short of duress.[22]

"Duress of goods" is the label applied when economic duress is attempted or accomplished through the seizure or detention of another's personal property.[23] In order to establish duress of goods under North Carolina law, it must be shown that (1) the person who has seized or detained the property has done so wrongfully, and (2) the owner of the property has been compelled to act in a way that operated to deprive him of "free will."[24] The courts, in determining the existence of duress of goods, will look beyond the form of the transaction to all of the circumstances surrounding the transaction.[25]

Duress of goods will not be found by the North Carolina courts when personal property is withheld from its owner by means of a valid lien, because the requirement of wrongful seizure or detention is not met.[26] Such is the case when the possessor is a garageman or other artisan with a lien[27] on the property. At common law a garageman has "a

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20. 278 N.C. at 191, 179 S.E.2d at 703.

21. Edwards v. Bowden, 107 N.C. 58, 62-63, 12 S.E. 58, 59 (1890).

22. 278 N.C. at 191, 179 S.E.2d at 703.

23. Originally at common law, relief was restricted to those situations in which duress took the form of physical violence, imprisonment, or threats of such action. *See* Dawson, *supra* note 17, at 254. In the early eighteenth century it was recognized that economic pressure as well could constitute duress, and the first such pressure acknowledged as duress was the wrongful detention of another's property, which was termed "duress of goods." *See* Astley v. Reynolds, 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1732).

24. Joyner v. Joyner, 264 N.C. 27, 31, 140 S.E.2d 714, 718 (1965); Smithwick v. Whitley, 152 N.C. 369, 371, 67 S.E. 913, 914 (1910). The concept of "free will" has long been criticized as being of little analytical value. *See, e.g.*, Dalzell, *supra* note 15, at 238-40; Dawson, *supra* note 17, at 266-67.

25. *See* Smithwick v. Whitley, 152 N.C. 369, 67 S.E. 913 (1910).

26. *See* text accompanying notes 37-39 *infra*.

27. It is necessary to distinguish artisans' liens—of which the garagemen's lien is one type—from "mechanics' liens." The latter term is more commonly employed to re-

possessory interest in a vehicle left in his care by the owner or legal possessor and in which he has invested labor and materials."[28] North Carolina General Statutes section 44A-2(d) codified this common law lien.[29] The power of a garageman to enforce his lien by sale of the motor vehicle, a right unavailable at common law,[30] is granted by North Carolina General Statutes section 44A-4.[31] Possession of the motor vehicle is essential to the lien,[32] and two rules relating to possession that had long been part of the case law are now statutory:[33] (1) the

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fer to security interests in real property, the word "mechanic" being used in its older sense to mean "laborer." *See* R. BROWN, *supra* note 1, § 13.1, at 393. Liens on real property are governed by N.C. GEN. STAT. §§ 44A-7 to -24 (Cum. Supp. 1975).

28. Caesar v. Kiser, 387 F. Supp. 645, 648 (M.D.N.C. 1975). Artisans' liens in North Carolina also have a constitutional basis. N.C. CONST. art. X, § 3 instructs the General Assembly to "provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Provisions for liens on personal property are contained in N.C. GEN. STAT. §§ 44A-1 to -6 (Cum. Supp. 1975).

29. N.C. GEN. STAT. § 44A-2(d) (Cum. Supp. 1975) provides:

> Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, or storing. This lien shall have priority over perfected and unperfected security interests.

30. 1 L. JONES, THE LAW OF LIENS §§ 11, 1033, 1038 (3d ed. 1914).

31. The original provisions of section 44A-4 enabled sale of the property to be accomplished without affording the owner the opportunity for notice and a hearing to determine judicially the validity of the underlying debt. These provisions were held to violate the due process clause of the fourteenth amendment because "actual [permanent] dispossession" of the personalty was possible without notice or hearing. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975). The *Caesar* decision is primarily based on Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), which "make it clear that due process requires notice and a prior hearing before property may be taken from a debtor." 387 F. Supp. at 649. The statute was amended to comply with the *Caesar* ruling. Act of May 29, 1975, ch. 438, § 1, [1975] N.C. Sess. Laws 436-39.

The statutes that provide for the existence of artisans' liens, N.C. GEN. STAT. §§ 44A-2 & -3 (Cum. Supp. 1975), survived that same due process attack in *Caesar*. The district court termed the lien "a balancing of the interests between ownership rights and the right of a craftsman to have security for payment for his service," and held, on the basis of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), that "interim retention" of the property without fulfilling notice and hearing requirements was not unconstitutional. 387 F. Supp. at 648, 649.

32. *See* Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957).

33. N.C. GEN. STAT. § 44A-3 (Cum. Supp. 1975) provides:

> When lien arises and terminates.—Liens conferred under this article arise only when the lienor acquires possession of the property and terminate and become unenforceable when the lienor voluntarily relinquishes the possession of the property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having a security or other interest in the property tenders prior to sale the amount secured by the lien plus reasonable storage, boarding and other expenses incurred by the lienor. The reacquisition of possession of property voluntarily relinquished shall not reinstate the lien.

lienor loses his possessory lien if he voluntarily surrenders possession of the property to the bailor,[34] and (2) once the lien is lost by voluntary surrender of possession, it cannot be reinstated by subsequent reacquisition.[35]

Thus, the issue of possession was crucial to the validity of the lien in *Adder*. The court of appeals found the defendant's refusal to return the car "wrongful" because its lien had been terminated by the previous surrender of the car.[36] Although seeming to comport with the statutes concerning possessory liens, the court of appeals committed a glaring error, for it ignored precedent nearly a half-century old which defined voluntary surrender of possession. In *Reich v. Triplett*,[37] a situation almost identical to the one in *Adder*, a check was tendered to a garageman for the full amount owed for repairs on an automobile and the vehicle was surrendered but the check was returned for insufficient funds. The North Carolina Supreme Court held that the garageman's lien still existed, for in those circumstances possession was not surrendered "voluntarily and unconditionally" as required.[38] In *Adder* the supreme court correctly applied *Reich*, held the lien to be valid, and thus found absent an essential element of duress of goods: wrongful possession of the property.[39]

This analysis by the supreme court was all that was necessary to find that plaintiff's signing of the "release" was a "voluntary adjustment of a dispute" and not duress of goods.[40] Unfortunately, the court con-

34. *See, e.g.*, Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957); Tedder v. Wilmington & W.R.R., 124 N.C. 342, 32 S.E. 714 (1899); Block v. Dowd, 120 N.C. 402, 27 S.E. 129 (1897).

35. *See, e.g.*, Barbre-Askew Finance, Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957); Block v. Dowd, 120 N.C. 402, 27 S.E. 129 (1897).

It is possible for a garageman to deliver the motor vehicle to its owner under an agreement that preserves the lien. However, such a preserved lien is one created by contract and does not arise by operation of law. *See* Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. at 148, 100 S.E.2d at 385. A contractual lienholder does not have the statutory assurance that his lien will have priority over perfected and unperfected security interests. N.C. GEN. STAT. § 44A-2(d) (Cum. Supp. 1975) (set forth in note 29 *supra*); *see* Lee, *Liens on Personal Property Not Governed by the Uniform Commercial Code*, 44 N.C.L. REV. 322, 330-31 (1966).

36. 25 N.C. App. at 591, 214 S.E.2d at 229.

37. 199 N.C. 678, 155 S.E. 573 (1930). The court of appeals correctly cited *Reich* for the proposition that "[p]ossession is necessary to the existence of the lien." 25 N.C. App. at 591, 214 S.E.2d at 229.

38. 199 N.C. at 682, 155 S.E. at 575. The court relied on Maxton Auto Co. v. Rudd, 176 N.C. 497, 97 S.E. 477 (1918), in which payment was stopped on a check tendered to a garageman and the court used an estoppel theory to reinstate the lien. *Id.* at 499, 97 S.E. at 478.

39. 288 N.C. at 491-92, 219 S.E.2d at 195.

40. *Id.* at 492, 219 S.E.2d at 195.

fused the problem by engaging in an unnecessary discussion of whether the parties were "on equal footing."[41] The relationship of the parties, particularly if it is a fiduciary one, is probative of the issue of whether the second element of duress of goods—the deprivation of the victim's "free will"—is present.[42] Even if the parties had been found to be on unequal footing, and they were not,[43] the absence of the element of wrongful possession alone would mean that there could be no duress of goods. The court seemed to say that, even if there is rightful possession by the bailee, a showing that he took advantage of an unequal relationship would support a finding of duress of goods.[44] Such a view is at odds with the court's affirmance of the two necessary elements of duress of goods (wrongful possession and subversion of "free will")[45] and is clearly incorrect. A finding of wrongdoing based solely on the abuse of an unequal relationship or of a position of trust is not duress of goods but rather undue influence.[46]

Although duress of goods was found not to be present, the court's final disposition of the case turned on an interpretation of the "release" signed by plaintiff.[47] The court found certain language to be ambiguous and construed it against the defendant-drafter. This language in the release acknowledged plaintiff's indebtedness and further stated that plaintiff had "no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections."[48] The court held that the writing only limited plaintiff's defenses or set-offs in the event defendant sued plaintiff for the amount due on the note that plaintiff contemporaneously executed and had no effect on plaintiff's claims based on negligence or implied warranty.[49] The serious diffi-

41. *Id.* at 491, 219 S.E.2d at 195.

42. *Cf.* United States v. Bethlehem Steel Corp., 315 U.S. 289, 300 (1942); Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 758 (2d Cir. 1967); Ingram v. Lewis, 37 F.2d 259, 263-64 (10th Cir. 1930); Annot., 70 A.L.R. 711 (1931).

43. 288 N.C. at 491, 219 S.E.2d at 195. The court placed great emphasis on the fact that plaintiff had counsel but chose to act without seeking his advice. Some courts have ruled that there can be no duress if the victim had an opportunity to consult with an attorney. *See, e.g.*, Alloy Prods. Corp. v. United States, 302 F.2d 528, 530-31 (Ct. Cl. 1962); Smith v. Lenchner, 204 Pa. Super. 500, 504, 205 A.2d 626, 628 (1964); Oremus v. Wynhoff, 20 Wis. 2d 635, 641, 123 N.W.2d 441, 444 (1963).

44. 288 N.C. at 491-92, 219 S.E.2d at 195.

45. *Id.* at 490, 219 S.E.2d at 194; *see* text accompanying notes 23-24 *supra.*

46. *See* text accompanying notes 21-23 *supra. See generally* D. DOBBS, *supra* note 16, § 10.3, at 672-74.

47. See note 8 *supra* for the text of this instrument.

48. 288 N.C. at 492, 219 S.E.2d at 196.

49. *Id.* at 493, 219 S.E.2d at 196.

culty presented by this holding was the basis of the dissent,[50] which found such a reading of the document to be "impermissible and totally illogical."[51]

The final result in *Adder* is not sound for the reason cited in the dissent: those defenses determined by the court to have been waived by plaintiff are the very subjects of his affirmative suit, an action that the court permitted to be brought.[52] Had defendant brought suit first, the negligence and warranty claims, since they arose out of the same transaction, would have been compulsory set-offs and counterclaims.[53] As such they would have been disallowed by the language in the instrument as interpreted by the court. The court has thus imparted a schizophrenic quality to the negligence and warranty claims, a trait that is wholly devoid of any logical basis.

Both the supreme court and the court of appeals had the protection of the consumer in mind in their treatments of the case. The difference between the opinions is in the tools chosen to achieve that aim. The court of appeals reached the desired result through an application of the duress of goods doctrine, while the higher court, in a slightly more sophisticated fashion, employed contract interpretation. The reasoning of each court, however, is equally incorrect. Plaintiff Adder, although forced to scratch at the drag strip, won the supreme court-sponsored race to the courthouse and the spoils of victory were his warranty and negligence claims.

CHARLES B. WAYNE

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50. Chief Justice Sharp wrote a dissenting opinion in which Justice Copeland joined. *Id.*

51. *Id.* at 495, 219 S.E.2d at 198.

52. *Id.*

53. *Id.* at 495, 219 S.E.2d at 197. N.C.R. Civ. P. 13(a) provides:

> **Compulsory Counterclaims.**—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if
>
> (1) At the time the action was commenced the claim was the subject of another pending action, or
>
> (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

Sovereign Immunity—Tort Liability of Municipal Corporations Operating Public Hospitals in North Carolina: Sides v. Cabarrus Memorial Hospital

Under the doctrine of sovereign immunity as first declared by the North Carolina Supreme Court in *Moffitt v. City of Asheville*[1] in 1889, and as more recently affirmed by the court in *Steelman v. City of New Bern*,[2] municipal corporations enjoy immunity from suit in tort if the tortious conduct complained of arose from the exercise of their governmental function.[3] However, there is no immunity from suit if the municipal corporation caused the alleged tort while functioning in its private or proprietary capacity.[4] The judicial classification of the various activities undertaken by municipal corporations as either governmental or proprietary is therefore crucial to the tort plaintiff seeking damages from such entities under North Carolina law. In *Sides v. Cabarrus Memorial Hospital*[5] the North Carolina Supreme Court confronted for the first time the question whether the construction, maintenance, and operation of a hospital by a county or a city is a governmental or proprietary function. In holding that it was a proprietary function,[6] and thus one in which the county or city was subject to unlimited liability in tort, the court followed the modern trend of restricting the doctrine of sovereign immunity as applied to municipal corporations.[7]

1. 103 N.C. 237, 254, 9 S.E. 695, 697 (1889). *See* text accompanying notes 32-33 *infra*.

2. 279 N.C. 589, 592-93, 184 S.E.2d 239, 241-42 (1971). The plaintiff in *Steelman* urged the court to completely abrogate the doctrine as applied to municipal corporations. He contended that the court was the appropriate body to do so since it had originally adopted the doctrine in North Carolina. The court refused to accept this challenge; instead it affirmed the historical approach taken in *Moffitt* and deferred any modifications or abrogations of the doctrine to the General Assembly. *Id.* at 594-95, 184 S.E.2d at 242-43.

3. For a definition of a "governmental function" and a full discussion of the subject see notes 33-39 and accompanying text *infra*. The N.C. General Assembly has authorized municipal corporations to waive their immunity under specific circumstances. N.C. GEN. STAT. § 160A-485 (1974), allows municipal corporations to waive their tort immunity for the operation of motor vehicles by purchasing liability insurance. N.C. GEN. STAT. § 153A-435 (1974), which is set forth in note 17 *infra*, permits a *county* to waive its immunity in tort by purchasing liability insurance coverage. Under both sections the waiver is only to the extent of such coverage.

4. For a definition of "proprietary function" and a more detailed discussion of the subject see notes 33-39 and accompanying text *infra*.

5. 287 N.C. 14, 213 S.E.2d 297 (1975).

6. *Id.* at 24-25, 213 S.E.2d at 304.

7. *See* notes 42-46 and accompanying text *infra*.

Plaintiff in *Sides* was the administrator of the estate of Mrs. Terry Compton Sides. He instituted suit against Cabarrus Memorial Hospital and others,[8] alleging negligence in the treatment and care of the intestate which resulted in her personal injury and wrongful death.[9] His claims against the hospital were based on the doctrine of *respondeat superior*. Defendant hospital moved under rules 12(b)(1), (2) and (6) of the North Carolina Rules of Civil Procedure to dismiss the complaint.[10] It argued that Cabarrus Memorial Hospital was an agency of the State of North Carolina, separate and apart from Cabarrus County,[11] and that therefore the North Carolina Tort Claims Act[12]

8. The named defendants were: Cabarrus Memorial Hospital; Drs. J. Vincent Arey and John R. Ashe, Jr., and their employer Cabarrus Clinic for Women P.A.; pathologists Drs. J.O. Williams and William J. Reeves; and nurse Nancy E. Deason. Brief for Appellee at 3-4, Sides v. Cabarrus Memorial Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974).

9. The plaintiff alleged that Mrs. Terry was admitted to the defendant hospital on the evening of March 8, 1971 under the advice and care of Drs. Arey and Ashe for the delivery of her third child, and that approximately one hour later she gave birth to a healthy female child but subsequently began to lose blood. It was further alleged that Nurse Deason, who was working for Drs. Reeves and Williams, failed to match and cross match her blood when a transfusion was necessary, which contributed to the alleged negligent transfusion by Dr. Arey of *B-positive blood* into her body when her blood type was *A-negative*. As a consequence of these alleged acts of negligence plaintiff contended that Mrs. Terry suffered a "transfusion reaction" resulting in great pain and suffering and eventually her death. 287 N.C. at 15, 213 S.E.2d at 298. *See also* Brief for Appellee at 3-10, Sides v. Cabarrus Memorial Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974).

10. The grounds were that the court lacked jurisdiction over the subject matter, that the court did not have jurisdiction over the defendant, and that the plaintiff failed to state a claim upon which relief could be granted. 287 N.C. at 15, 213 S.E.2d at 298.

11. 287 N.C. at 15, 213 S.E.2d at 298. Defendant's contention that Cabarrus Memorial Hospital was an agency of the state, separate and apart from Cabarrus County, was based upon defendant's interpretation of the Special Act of the General Assembly from which it derived its charter. *See* ch. 307, [1935] N.C. Pub.-Loc. L. 276.

12. N.C. GEN. STAT. § 143-291 (Cum. Supp. 1975). This statute constitutes a waiver by the state of North Carolina of its sovereign immunity from suit in tort up to $30,000. This section reads as follows:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate

placed exclusive jurisdiction of the claim in the North Carolina Industrial Commission, rather than in the superior court. Alternatively, defendant argued that even if the hospital were found to be an agency of the county, its operation was a governmental function and was insulated from suit in tort since there had been no waiver of its governmental immunity.[13] Treating the motion as one for summary judgment,[14] Superior Court Judge (now North Carolina Supreme Court Justice) James G. Exum, Jr. rejected both of these arguments.

Holding that the hospital was an agency of Cabarrus County, not of the State,[15] the North Carolina Court of Appeals affirmed Judge Exum's denial of summary judgment.[16] It further ruled that the purchase of medical malpractice liability insurance for the hospital by the County Commissioners constituted a waiver of the County's sovereign immunity, thus making it subject to liability in tort in the superior court to the extent of the insurance coverage.[17] Though the court of appeals never directly addressed the issue, it is consistent with its analysis to

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order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of thirty thousand dollars ($30,000).

13. *See* notes 17, 20-21 and accompanying text *infra.*

14. N.C.R. CIV. P. 56.

15. 22 N.C. App. at 122, 205 S.E.2d at 788. The court devoted its entire opinion to this issue. In holding that the hospital was an agency of the county, the court thereby destroyed defendants' argument that section 143-291 of the General Statutes applied since that section is limited to the state and its "agencies." Therefore the limited waiver of sovereign immunity authorized by that section ($30,000) was not applicable. The court based its decision on this issue on its interpretation of the special act of the General Assembly by which the hospital was authorized. *Id.* at 120-22, 205 S.E.2d at 787-88. The court also relied upon several rulings by various state and federal agencies that the hospital was an agency of the county. *Id.* at 122, 205 S.E.2d at 788.

16. 22 N.C. App. 117, 205 S.E.2d 784 (1974). The court accepted the hospital's appeal under N.C. GEN. STAT. § 1-277(b) (1974) which provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause."

17. 22 N.C. App. at 122-23, 205 S.E.2d at 788. N.C. GEN. STAT. § 153A-435(a) (1974) allows a county to waive its sovereign immunity as to governmental functions in this limited manner. This section reads as follows:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county. . . .

assume that the court considered the County's operation of the hospital to be a governmental function,[18] for otherwise the issue of waiver would not have arisen.

The North Carolina Supreme Court devoted much of its opinion to the affirmation of the court of appeals decision that the hospital was an agency of Cabarrus County.[19] However, because of its resolution of the issue whether the operation of the hospital by Cabarrus County was a governmental or proprietary function,[20] the court never reached the lower courts' decision concerning the County's waiver of its sovereign immunity.[21] Holding that such an activity is proprietary in nature, the court exposed Cabarrus Memorial, and all other similarly situated hospitals, to unlimited liability in tort for the negligent acts of employees committed within the course and scope of their employment.[22]

To evaluate the *Sides* decision properly, it is necessary to review the judicial history of the doctrine of sovereign immunity, specifically as applied to municipal corporations, and to examine the present status of its application to the operation of a hospital by such entities. The doctrine of sovereign immunity apparently evolved in the English common law from the monarchistic principle that "the King can do no wrong." It followed from that assumption that there was no reason for suits against the sovereign.[23] In 1798, *Russell v. Men of Devon*[24] extended this principle in England to cover the activities of a county. As was true of many other common law principles, the idea that government could not be sued in tort without its consent was soon embraced by American courts.[25] The extension of the doctrine to the activities

18. This approach would have limited the plaintiff's recovery to the amount of liability insurance purchased by the county which would be a larger maximum than the $30,000 in the Industrial Commission but still less than unlimited liability.

19. 287 N.C. at 16-20, 213 S.E.2d at 299-301. The court relied upon the same rationale as the court of appeals. *See* note 16 *supra.*

20. 287 N.C. at 20, 213 S.E.2d at 301.

21. *Id.* at 26, 213 S.E.2d at 304.

22. *Id.* This holding is most favorable to the plaintiff since there is no limit to the county's liability, as there would have been under the court of appeals approach and under defendants' argument that jurisdiction was with the North Carolina Industrial Commission.

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970-71 (4th ed. 1971); 72 AM. JUR. 2d *States, Territories and Dependencies* § 99 (1974).

24. 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788).

25. *E.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) in which Chief Justice John Marshall's opinion applied the doctrine to activities of the federal government. The doctrine has also been applied to the activities of state governments at one time by all the jurisdictions. W. PROSSER, *supra* note 23, at 975. *See also* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), in which Mr. Justice Holmes stated that "[a]

of a town was first accepted in the United States in 1812 in *Mower v. Inhabitants of Leicester*,[26] in which a Massachusetts court held that no action at common law could be brought against a town for defective highways.

The dual character of a municipal corporation, that it is at the same time both a governmental unit and a corporation, was utilized by a New York court in *Bailey v. City of New York*[27] in 1842 to limit the immunity of these entities. In that case the court distinguished between those activities of municipal corporations that were "public" or "governmental" in nature and those that were "private" or "proprietary"; the court limited the tort immunity to those activities classified as "public" or "governmental."[28]

There are several policy reasons that have been historically reiterated to support the immunity of municipal corporations from suit in tort when the activity involved can be classified as governmental in nature:

> [T]he municipality derives no profit from the exercise of governmental functions, which are solely for the public benefit; . . . in the performance of such duties public officers are agents of the state and not of the corporation, so that the doctrine of respondeat superior does not apply; . . . cities cannot carry on their governments if money raised by taxation for public use is diverted to making good the torts of employees; and . . . it is unreasonable to hold the corporation liable for negligence in the performance of duties imposed upon it by the legislature, rather than voluntarily assumed under its general powers.[29]

At first the North Carolina Supreme Court rejected the doctrine of sovereign immunity and its application to municipal corporations. In 1848 the court stated, "[b]ut as the maxim is somewhat harsh in its mildest sense, we are not disposed to extend its application . . . ."[30] Although this view was again approved in 1885,[31] the court eventually accepted the doctrine's application to municipal corporations. Using

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sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

26. 9 Mass. 247, 6 Am. Dec. 63 (1812).

27. 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

28. *Id.* at 539-40. For an excellent historical account of this distinction and an analysis of the *Bailey* decision see BARNETT, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations: The Antecedents of Bailey v. City of New York*, 16 OR. L. REV. 250 (1937).

29. W. PROSSER, *supra* note 23, at 978 (footnotes omitted).

30. Meares v. Commissioners of Wilmington, 31 N.C. 73, 86 (1848) (per curiam).

31. Wright v. City of Wilmington, 92 N.C. 156, 159 (1885).

the *Bailey* governmental-proprietary distinctions in *Moffitt v. City of Asheville*[32] in 1889, the court held that:

> The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. . . .
>
> When such municipal corporations are acting . . . in their ministerial or corporate character . . . they are impliedly liable for damage caused by the negligence of officers or agents . . . .
>
> On the other hand, where a city or town is exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers . . . .[33]

This approach is the one still utilized by the court today.

An examination of the decisions in which the North Carolina Supreme Court has had to draw the difficult line between governmental and proprietary activities reveals that it has considered two factors to be crucial. It has classified an activity as proprietary only when it has involved a monetary charge of some type,[34] regardless of whether this charge has generated a profit.[35] On the other hand, the court has classified as governmental only those activities that have historically been performed by government rather than by private corporations.[36] However, two further considerations enunciated by the court in *Sides*

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32. 103 N.C. 237, 9 S.E. 695 (1889).

33. *Id.* at 254-55, 9 S.E. at 697.

34. 287 N.C. at 22, 213 S.E.2d at 302. *See, e.g.*, Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972) (charge for use of garbate landfill); Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957) (charge for admission to public park); Foust v. City of Durham, 239 N.C. 306, 79 S.E.2d 519 (1954) (supplying water to customers for which a charge was made and from which a profit was realized); Rice v. City of Lumberton, 235 N.C. 227, 69 S.E.2d 543 (1952) (distributing electricity for profit); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949) (operation of an airport); Lowe v. City of Gastonia, 211 N.C. 564, 191 S.E. 7 (1937) (operation of a golf course).

35. 287 N.C. at 23, 213 S.E.2d at 303. *See, e.g.*, Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957) (charge collected for use of park did not meet operating expenses, held operation of park was a proprietary function); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949) (airport operated by the city at a loss yet held to be a proprietary function).

36. 287 N.C. at 23, 213 S.E.2d at 303. *See, e.g.*, State *ex rel.* Hayes v. Billings, 240 N.C. 78, 81 S.E.2d 150 (1954) (erecting and maintaining a jail by a county); Hamilton v. Town of Hamlet, 238 N.C. 741, 78 S.E.2d 770 (1953) (installation and maintenance of traffic light signals); Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937) (operation of police car); Cathey v. City of Charlotte, 197 N.C. 309, 148 S.E. 426 (1929) (erection and maintenance of police and fire alarm system); Howland v. City of Asheville, 174 N.C. 749, 94 S.E. 524 (1917) (furnishing water for extinguishing fires).

exemplify the leeway built into the traditional tests that has allowed the court to choose one classification or the other in order to effectuate its policy goals or to "do justice" in a particular case.[37] First, even though an activity may be labeled in general a governmental one, liability may be attached to certain of its phases; and conversely, although an activity may be determined in general to be proprietary, certain phases may be held exempt from liability.[38] Secondly, even though prior cases have held an identical activity to be of such a public necessity that funds expended in connection with it were held to be for a public purpose, this prior determination does not guarantee that the classification will be deemed governmental for tort purposes.[39]

The imprecision of the governmental-proprietary test and the court's ability to manipulate it in order to achieve a particular result are especially evident in the *Sides* case. Although *Sides* presented the North Carolina Supreme Court with an issue of first impression, the Fourth Circuit Court of Appeals had earlier held in *Hitchings v. Albemarle Hospital*[40] that if presented with the issue of immunity of a municipal hospital, the North Carolina Supreme Court would construe such an activity to be governmental in nature.[41] The *Hitchings* deci-

37. In Koontz v. City of Winston-Salem, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972) Mr. Justice Branch said: "[A]pplication of [the governmental-proprietary distinction] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary." The same opinion is expressed in Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, 938 (1936), in which the author states that "[t]he rules sought to be established are as logical as those governing French irregular verbs."

38. 287 N.C. at 21, 213 S.E.2d at 302. *Compare* Woodie v. Town of North Wilkesboro, 159 N.C. 353, 74 S.E. 924 (1912) (operation of municipal water plant held proprietary) *with* Klassette v. Drug Co., 227 N.C. 353, 42 S.E.2d 411 (1947) *and* Mabe v. City of Winston-Salem, 190 N.C. 486, 130 S.E. 169 (1925) (furnishing of water to extinguish fires held governmental).

39. 287 N.C. at 22, 213 S.E.2d at 302. *Compare* Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944) (expenditure of public funds for construction and maintenance of airport was for a *public purpose*) *with* Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949) (operation and maintenance of airport a *proprietary function*); *compare* James v. City of Charlotte, 183 N.C. 630, 112 S.E. 423 (1922) (city engaged in *governmental function* when it removed garbage for its inhabitants for a fee that covered only its actual collection and disposal expenses) *with* Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972) (city engaged in *proprietary function* in operating a landfill for disposal of garbage where city had contracted with county to dispose of county garbage for a fee).

40. 220 F.2d 716 (4th Cir. 1955).

41. *Id.* at 718. The court reasoned as follows:

> We must, of course, follow the law of North Carolina. No case directly in point has been found. We think, however, that the North Carolina cases show a distinct tendency to hold to the so-called majority rule, which would grant immunity in the instant case. We think, under these cases, the munici-

sion therefore points out that another well qualified court can apply the same tests utilized in *Sides* and yet reach the opposite conclusion concerning immunity.

Although *Hitchings* rather than *Sides* represents the majority rule in the United States as to municipal hospital liability,[42] this rule, like the doctrine of charitable immunity, is being increasingly abandoned.[43] Modern courts often apply the traditional classification tests in such a way as to restrict rather than to extend the tort immunity of municipal corporations, especially when they are considering the operation of a public hospital. The reason for this judicial trend is that the traditional arguments used to justify municipal tort immunity are no longer considered valid. The most plausible of these justifications was based upon the fact that municipal activities and treasuries were extremely limited; courts therefore concluded that holding municipalities liable for the torts of their employees would place an unbearable burden upon cities' treasuries, thus adversely affecting their service to the public.[44] Today, however, municipal operations have mushroomed to encompass a myriad of activities. Also, municipal revenues have grown dramatically on account of new tax levies and direct payments from citizens for services rendered. Considering the relatively inexpensive availability of liability insurance, the cost of paying for the torts of municipal employees can be absorbed as a normal operating expense. This additional outlay from the municipal treasury appears inconsequential when viewed against the gross inequity involved in totally denying relief to a tort victim just because his injury is attributable to the actions of a municipal employee or agent performing a governmental function.[45]

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palities here were, in operating the hospital, exercising a governmental function. Certainly, the health of its citizens is a matter of grave public concern to a State, or municipal subdivisions thereof.

Id.

42. For a state-by-state analysis see II A HOSPITAL LAW MANUAL, Negligence, Immunity to Suit, Section 3, 45-55 (1973); Annot., 25 A.L.R.2d 203 (1952).

43. *See* note 42 *supra*. For a thorough discussion of the demise of the doctrine of charitable immunity see Annot., 25 A.L.R.2d 29 (1952).

The North Carolina Supreme Court abolished the doctrine of charitable immunity as applied to hospitals in North Carolina in Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

44. *See* text accompanying note 29 *supra*.

45. Commentators for years have been calling for the abrogation of the doctrine of sovereign immunity. *See, e.g.*, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Note, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888; Note, *Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability*, 41 N.C.L. REV. 290 (1963). *See generally* Annot., 60 A.L.R.2d 1198 (1958); Annot., 120 A.L.R. 1376 (1939).

The North Carolina court was cognizant of these considerations in reaching its result in *Sides*.[46]

Although adhering to the historical classification approach, the North Carolina Supreme Court in *Sides* joined the ranks of a growing minority of jurisdictions that have refused to extend the immunity doctrine to the operation of a hospital by a municipal corporation. Noting the existence of this judicial trend and approving the policy reasons supporting it, the court applied the traditional tests and found that the hospital derived "substantial revenues" from room rents, nursing care, and laboratory work.[47] It also found that the operation of a public hospital was not one of the "traditional" services rendered by local governments.[48] Therefore, the court concluded that this activity possessed all of the characteristics that had been traditionally labeled as proprietary in nature.

The *Sides* decision indicates that, although steadfast in its refusal to modify or abolish the doctrine of sovereign immunity, considering any such action exclusively within the domain of the General Assembly,[49] the court is nevertheless willing to manipulate the traditional classification tests to ensure that the doctrine's coverage is not extended. Had it not so strongly desired to hold the hospital accountable for the acts of its employees, the court could just as easily have concluded, as did the Fourth Circuit in *Hitchings*, that the operation of a public hospital is a uniquely governmental function and is therefore shielded from liability.

In conclusion, it must be noted that the *Sides* decision may have a significant impact on future cases involving the application of the doctrine of sovereign immunity to other activities of municipal corporations. As a practical matter, this decision indicates that a tort plaintiff seeking damages from a municipal corporation and alleging negligence on the part of the municipality's employees or agents should structure his arguments within the framework of the traditional tests applied by the court in *Sides*, rather than attempting to convince the court to abrogate the immunity of such entities entirely. In a case in which there is not strong North Carolina precedent for classifying the municipal activity involved as governmental, the plaintiff's chances for recovery are

46. 287 N.C. at 24, 213 S.E.2d at 304.
47. *Id.* at 24, 213 S.E.2d at 303. *See* notes 36-37 and accompanying text *supra.*
48. *Id.* at 25, 213 S.E.2d at 304. *See* note 36 and accompanying text *supra.*
49. *E.g.*, Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).

excellent considering the court's statement in *Sides* that in cases of doubtful applicability, the rule should be resolved against the municipality.[50]

F. JOSEPH TREACY JR.

Workmen's Compensation—Apportionment of Disabilities Is Limited Under the North Carolina Act

The purpose[1] of the North Carolina Workmen's Compensation Act[2] is to relieve employees injured in industrial accidents from the cost of their resulting disabilities by passing the cost on to the consuming public.[3] To effectuate this purpose the Supreme Court of North Carolina has adopted a policy of liberal construction of the Act, particularly of the coverage clauses.[4] In *Pruitt v. Knight Publishing Co.*,[5] a case of first impression,[6] the North Carolina Court of Appeals held that a disability resulting from an industrial accident aggravation of a previous non-compensable injury cannot be apportioned under the North Carolina Act: the employer is responsible for the entire disability.[7] In so holding, the court followed the rule adopted by

50. 287 N.C. at 25, 213 S.E.2d at 304.

1. The North Carolina Act itself contains no statement of purpose; the purpose may be inferred from the critics' discussions of the North Carolina Act and the Workmen's Compensation Acts generally. *See* note 3 *infra*. The North Carolina Supreme Court has spelled out the purpose of the Act in several decisions, *e.g.*, Barnhardt v. Yellow Cab Co., 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 412, 132 S.E.2d 877, 879 (1963); Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958).

2. N.C. GEN. STAT. §§ 97-1 to -122 (1972), *as amended*, (Cum. Supp. 1975).

3. COMMISSION OF THE AMERICAN FEDERATION OF LABOR, WORKMEN'S COMPENSATION: REPORT UPON OPERATION OF STATE LAWS 13 (1914); Malone, *The Limits of Coverage in Workmen's Compensation—the Dual Requirement Reappraised*, 51 N.C.L. REV. 705 (1973).

4. *E.g.*, Hollman v. Public Util. Dep't, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 480, 57 S.E.2d 760, 762 (1950) (dictum); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 192, 41 S.E.2d 592, 597 (1947) (concurring opinion); Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E. 591, 593 (1930).

5. 27 N.C. App. 254, 218 S.E.2d 876 (1975).

6. No supreme court or appellate court case on the *Pruitt* issue has been found. Since the North Carolina superior court decisions and the North Carolina Industrial Commission decisions are unreported, it is not possible to say with certainty whether the issue has previously been presented in those forums.

7. 27 N.C. App. at 257, 218 S.E.2d at 878.

the large majority of jurisdictions.[8] As the dissent in *Pruitt* pointed out, however, the effect of the *Pruitt* decision may be to encourage discrimination in the hiring of handicapped persons and persons with previous injuries.[9]

The industrial accident in *Pruitt* occurred when plaintiff employee suffered a back injury while struggling to dislodge a stuck top from the gear box of a machine.[10] Both sides stipulated that plaintiff's injury resulted from an accident arising out of, and in the course of, plaintiff's employment with defendant employer.[11] Plaintiff sustained temporary total disability for one year, for which the employer compensated him.[12]

A controversy arose, however, over the payment of plaintiff's permanent partial spinal disability of thirty-five percent. Approximately ten years prior to the industrial accident, plaintiff suffered a noncompensable back injury in an automobile accident.[13] Plaintiff's doctor testified that the industrial accident aggravated the previous back injury, and he attributed twenty-five percent of plaintiff's permanent partial spinal disability to the original back injury and the other ten percent to the industrial accident aggravation of that injury.[14]

In conformity with the doctor's testimony, the hearing commissioner based plaintiff's award on a ten percent permanent partial disability and the full commission affirmed the award.[15] On appeal, the court of appeals reversed and remanded the case with directions to award compensation for the entire thirty-five percent disability.[16] One judge dissented from the court's opinion.[17] The *Pruitt* decision is the first that a North Carolina appellate court has rendered on the subject of apportionment in industrial accident aggravations of previous noncompensable injuries.[18] Both the supreme court and the court of appeals, however, have considered similar issues which bear discussion in relation to *Pruitt*.

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8. *See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 12.20, 59.20 (1972; 1976). 11 W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 2303 (perm. ed. 1957).
9. 27 N.C. App. at 260, 218 S.E.2d at 880 (dissenting opinion).
10. *Id.* at 255, 218 S.E.2d at 877-78.
11. *Id.* at 255, 218 S.E.2d at 878.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 259, 218 S.E.2d at 880.
17. *Id.* *See* text accompanying note 9 *supra.*
18. *See* note 6 *supra.*

In *Schrum v. Catawba Upholstery Co.*[19] the Supreme Court of North Carolina disallowed apportionment in the case of a workman who had a forty percent uncorrected loss of vision in his right eye due to astigmatism and then lost the entire vision of that eye in an industrial accident.[20] The court reasoned that since most adults have some impairment of vision[21] and the Act sets out a scheduled payment for the loss of vision in an eye,[22] an apportionment rule would require many people to come away with less compensation than the Act provides.[23] Such a result would be inconsistent with the court's policy of liberal coverage under the Act.[24] The court also pointed out that disallowance of apportionment avoids the necessity of examining into the condition of every employee's vision who suffers an industrial loss of vision.[25]

In two later supreme court cases,[26] the court in dicta foreshadowed the outcome of *Pruitt*. In both cases, the court expressed the view that an employee should be compensated under the Act for a disability arising out of his employment, even if the employee's own pre-existing disease or infirmity contributed to the disability.[27] Each time, how-

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19. 214 N.C. 353, 199 S.E. 385 (1938).

20. The court held that the Act of 1929, ch. 120, § 33, [1929] N.C. Pub. L. 131 (now N.C. GEN. STAT. § 97-33 (Cum. Supp. 1975)), requiring apportionment in certain circumstances, was inapplicable. Section 97-33 of the General Statutes provides:

> **Prorating permanent disability received in other employment.**—If any employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident . . . he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.

21. 214 N.C. at 355, 199 S.E. at 387.

22. Section 97-31 of the North Carolina Act (similar to the Act of 1929, ch. 120, § 31, [1929] N.C. Pub. L. 130-31) in pertinent part provides:

> **Schedule of injuries; rate and period of compensation.**—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:
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> . . . .
>
> (16) For the loss of an eye, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 120 weeks.
>
> . . . .
>
> (19) Total . . . loss of vision of an eye shall be considered as equivalent to the loss of such . . . eye. . . .

23. 214 N.C. at 355, 199 S.E. at 387.

24. *Id.*

25. *Id.*

26. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951) and Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

27. In *Vause*, the employee's hip injury resulted from an epileptic seizure which the employee suffered while doing business in his company's truck. 233 N.C. at 89,

ever, the court found that the claimant was not entitled to compensation on another ground,[28] which precluded any consideration of apportionment.[29]

In *Wyatt v. Sharp*[30] the Commission awarded compensation for the death of the employee when his weak heart gave out after a very minor fall in the course of his employment.[31] The North Carolina Supreme Court limited its review of the case to the evidentiary question whether the facts supported the Commission's award.[32] Its affirmative answer,[33] however, necessarily implies that, as a matter of substantive law, a job-related accident gives rise to compensation even though it merely aggravates a pre-existing infirmity of the employee. Full compensation was awarded without consideration of the possibility of apportionment.[34]

Two 1972 North Carolina Court of Appeals cases dealt with the closely related problem of occupational disease. In *Self v. Starr-Davis Co.*[35] the court upheld an award of compensation when the employee's death was caused primarily by a non-job-related tumor and only secondarily by his industrial asbestosis.[36] As in *Wyatt*,[37] the award was one of full compensation for the death of the employee and the court did not discuss the possibility of apportionment at all.[38] Apportionment was considered, however, and rejected in *Mabe v. North Carolina Granite Corp.*[39] In that case the employee's pre-existing infirmity consisted of

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63 S.E.2d at 174. In *Anderson*, the claimant wrenched his back while lifting a heavy safe out of a truck. His physician testified that, due to a congenital infirmity of the spine, the claimant was more prone to receive back injuries than the normal man. 233 N.C. at 373, 64 S.E.2d at 265-66.

28. In *Vause*, the employee parked the company truck in awareness of the impending seizure. The court found that by stopping the truck, the employee severed any causal relation between his employment and the injury. 233 N.C. at 98, 63 S.E.2d at 180-81. In *Anderson*, the court found no disability, since the employee lost no time from work or wages as a result of the injury. Therefore, there was nothing to compensate. 233 N.C. at 375, 64 S.E.2d at 267.

29. It is not clear whether the court's dicta mean that, if no other obstacle to compensation existed, the claimants would be entitled to *full* compensation or only an apportioned compensation.

30. 239 N.C. 655, 80 S.E.2d 762 (1954).

31. *Id.* at 657, 80 S.E.2d at 763.

32. *Id.* at 658, 80 S.E.2d at 764.

33. *Id.*

34. *Id.*

35. 13 N.C. App. 694, 187 S.E.2d 466 (1972).

36. *Id.* at 699, 187 S.E.2d at 470.

37. *See* text accompanying notes 30-34 *supra*.

38. 13 N.C. App. at 696, 187 S.E.2d at 468.

39. 15 N.C. App. 253, 189 S.E.2d 804 (1972).

his old age and lack of education.[40] When he became forty percent disabled from industrial silicosis, he could no longer perform the hard labor that had previously been his source of income.[41] Due to his old age and lack of education, he could get no other type of employment.[42] In affirming an award of one hundred percent permanent disability, the court of appeals said:

> [A]n employer accepts an employee as he is. If a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the pre-existing condition. . . . By the same token, if an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity.[43]

All of these North Carolina appellate cases demonstrate a strong tendency on the part of the courts to compensate fully employees for disabilities caused by industrial accident or disease, even when the industrial accident or disease is only a secondary cause of the disability and the primary cause is the employee's own pre-existing infirmity.

Pruitt was the first case to present the court of appeals squarely with the question whether a disability resulting from the combined effects of an industrial accident and a previous noncompensable injury should be apportioned between the two causes under the North Carolina Act, or whether the employer should pay for the entire disability. The court concluded that apportionment was neither required by the Act nor proper in *Pruitt*.[44] In support of its conclusion, the court reasoned that the Act provides compensation for disabilities, which are defined in terms of loss of earning power.[45] Since the employee suffered no loss of earning power until the industrial accident occurred,[46] that accident is the sole cause of his disability and he should receive full compensation for it.[47] The court further noted that the majority of jurisdictions disallow apportionment in a *Pruitt* situation unless they

40. *Id.* at 254, 189 S.E.2d at 805.
41. *Id.*
42. *Id.*
43. *Id.* at 256, 189 S.E.2d at 807 (citation omitted).
44. 27 N.C. App. at 259, 218 S.E.2d at 880.
45. *Id.* at 257, 218 S.E.2d at 879. *See* note 54 *infra.*
46. *Id.*
47. *Id.*

are compelled to require it by express provisions of their Workmen's Compensation Act.[48] Two provisions of the North Carolina Act do require apportionment;[49] but the court held that they were inapplicable to the facts of *Pruitt*.[50] Since the Act does not expressly provide for apportionment in a *Pruitt* situation,[51] the court followed the majority rule.[52]

Policy considerations are important when one is construing a humanitarian statute like the Workmen's Compensation Act. Two such considerations support the majority's holding in *Pruitt*. First is the belief "that industry in general should bear the financial burden of all industrial accidents rather than the workers who happen to be victims of particular accidents and that the only way this can be accomplished is through the agency of the employer who in computing costs and fixing the price of his finished product will include the industrial losses due to accidents."[53] This emphasis on the "financial burden" is reflected in the North Carolina Act, which provides for the compensation of "disabilities" and defines "disability" in financial terms.[54] Not until an employee's earning capacity is impaired is he entitled to compensation. If an employee has a latent physical impairment which does not impair his earning capacity, then there is no economic loss to be borne by either the employee or the industry. It is only when an accident triggers the defect into becoming a disability that economic loss occurs. If the accident is industrially related, then the purpose of the Act is served by placing the economic burden on the employer.[55]

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48. *Id.* at 258, 218 S.E.2d at 879-80.

49. *See* note 22 *supra*. N.C. GEN. STAT. § 97-35 (1972) provides:

> **How compensation paid for two injuries; employer liable only for subsequent injury.**—If any employee receives a permanent injury as specified in G.S. § 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks.
>
> If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only.

50. 27 N.C. App. at 259, 218 S.E.2d at 880.

51. Sections 97-33 and 97-35, *see* notes 20 and 49 *supra*, are the only apportionment provisions in the Act.

52. 27 N.C. App. at 258, 218 S.E.2d at 879.

53. COMMISSION OF THE AMERICAN FEDERATION OF LABOR, WORKMEN'S COMPENSATION: REPORT UPON OPERATION OF STATE LAWS 13 (1914).

54. N.C. GEN. STAT. § 97-2(9) (1972) provides that "[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."

55. *See* text accompanying note 53 *supra*.

Secondly, the North Carolina Supreme Court has consistently evinced the policy that "our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction."[56] As pointed out in *Schrum*, an apportionment rule would necessitate an inquiry into the exact percentage of disability attributable to the employee's pre-existing defect.[57] Such a requirement would have caused no problem in *Pruitt*, in which there was no lack of apportionment evidence. In a case, however, in which no apportionment evidence exists, the court would have either to award full compensation or to deny compensation altogether. If the court were to adopt the latter rule, then claimants would be denied the benefits of the Act because of their inability to produce evidence which is difficult to obtain. If it were to adopt the former rule, then these claimants would be awarded full compensation whereas the Pruitts (*i.e.* those who can prove apportionment) would be denied the full benefits of the statute.[58] Either rule contravenes the policy of the Act that benefits not be denied on a technical ground.

Judge Clark's dissent in *Pruitt* points out a countervailing policy consideration. If the employer must pay for the entire disability when part of it is traceable to an earlier noncompensable injury, then employers may protect their pocketbooks by discriminating in their hiring practices against persons with physicial infirmities. One commentator suggests that such discrimination is lessened by the fact that the types of latent infirmities involved in these cases are not visible.[59] Many of these infirmities are visible, however, to a trained medical eye after a thorough medical examination. Employers can, therefore, avoid high risk employees by requiring prospective employees to submit to a medical examination, or by requiring them to provide a complete medical history. Another way employers may protect themselves is to delegate previous-injury employees to tasks that are not hazardous to their condition. If the pay-scale corresponds to the risk level of the task, then the previous-injury employees again suffer from economic discrimina-

56. Hollman v. Public Util. Dep't, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968). *See also* note 3 *supra*.

57. Schrum v. Catawba Upholstering Co., 214 N.C. 353, 355, 199 S.E. 385, 387 (1938).

58. In practice, of course, such a rule would encourage the Pruitts to hide their apportionment evidence.

59. Note, *Workmen's Compensation—Successive Insurers and the Accident Which Aggravates a Pre-existing Condition*, 1956 WIS. L. REV. 331, 333.

tion. The Wisconsin Workmen's Compensation Act contains a special provision designed to discourage the former type of discrimination.[60] North Carolina's Act does not protect against either type of discrimination.

In other jurisdictions, as in North Carolina, the courts have rejected apportionment unless the legislature clearly indicated that it was appropriate.[61] When required, the resulting diminished compensation has usually been mitigated by application of a legislative Second Injury Fund to the situation.[62] North Carolina has a Second Injury Fund which supplements the compensation received by employees under the Act's apportionment provisions.[63] The combined effect of the apportionment provisions and the Second Injury Fund is to compensate fully the injured employee[64] without placing an undue burden on the employer. In fact, the purpose of these provisions is to relieve the employer of part of his burden when that burden is too great,

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60. WIS. STAT. § 102.31(5) (1973) provides that insurance companies will have their license revoked if they "encourage, persuade or attempt to influence any employer, arbitrarily or unreasonably to refuse employment to, or to discharge employees . . . ." Also, an employer who qualifies for exemption from the insurance coverage requirement will have that status revoked if he "shall arbitrarily or unreasonably refuse employment to or shall discharge employees because of a nondisabling physical condition . . . ." WIS. STAT. § 102.31(4) (1973).

61. *See* text accompanying note 8 *supra*.

62. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.20, at 10-268 (1976).

63. Section 97-40.1 of the North Carolina Act in pertinent part provides:

> **Second Injury Fund.—**
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> . . . .
>
> (b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:
>
> (1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.
>
> (2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under that section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

Since the Second Injury Fund provision is keyed to the apportionment provisions, the monies automatically become available to employees who qualify under the terms of section 97-40.1.

64. Once found qualified under section 97-40.1, the claimant automatically receives the difference between what he receives under the apportionment provision and what he would receive if he were entitled to full compensation. Telephone conversation with Ms. Christine Denson, Deputy Commissioner, North Carolina Industrial Commission, on February 25, 1976.

thus removing any motive to discriminate against the employees who present the risk of such a burden.[65]

The *Pruitt* situation should fall within the above category. When, as in *Pruitt*, a definite percentage of the disability can be attributed to the prior injury, requiring the employer to compensate the employee for that portion of his disability seems an undue burden. Moreover, discrimination is feasible in a *Pruitt* situation because weaknesses due to prior injuries can readily be discovered by employers and because the North Carolina Act provides no deterrent to discrimination. Concededly, the difficulty of obtaining accurate apportionment evidence hinders the process of making a fair apportionment. The fairest solution seems to be to put the burden of proving a basis for apportionment on the employer. The employer would fully compensate the employee unless he met his burden, in which case he would compensate the employee only for that portion of the disability attributable to the industrial accident and the Second Injury Fund would take up the slack. Under this system, the employee would be assured of full compensation while the employer would be given an opportunity to mitigate his burden.

One way of achieving this result is to construe the Act such that the apportionment and Second Injury Fund provisions are applicable to the *Pruitt* situation. The court of appeals, however, properly rejected this construction, because the plain language of the North Carolina apportionment provisions clearly does not extend to the *Pruitt* situation. Rather, the solution appears to be a legislative amendment to the Act, bringing disabilities caused by the combined effects of an industrial accident and a prior non-disabling weakness within the ambit of the apportionment provisions of the North Carolina Act when the employer successfully carries the burden of proving a basis for apportionment.

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65. 12 W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 2544, at 336 (perm. ed. 1959).