UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 60 | Number 4 Article 6

4-1-1982

Notes

North Carolina Law Review

NOTES

Administrative Law—Public Access to Public Records in North Carolina: The Key to Good Government

Public access to public records provides the key to good government, a key that unlocks a storehouse of information, a key that upholds our democratic spirit.[1] But exactly how does an individual grasp that key? Consider a person who wants to know where the state zoo obtains the meat used to feed the lions.[2] As a program administered by the Secretary of the North Carolina Department of Natural Resources and Community Development, the zoo would fall under that agency's rules.[3] Presumably, those rules would contain provisions adopted pursuant to the state public records statute,[4] provisions detailing proper procedures for public access.[5] Consequently, persons seeking information might logically begin with departmental rules governing public access to public records. In order to examine such rules, the author canvassed seventeen state agencies. That examination led the author to create a set of model rules. The results of the agency inquiries and the recommendations of the model rules provide the subject of this Note.

The North Carolina public records statute has a public access provision that reads as follows: "Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law."[6] Unfortunately, the North Carolina appellate courts rarely have interpreted this statute;[7] indeed, the courts did not lay a

---

1. Surprisingly, the right to inspect does not have a constitutional basis, despite the obvious congruity of the first amendment. E.g., Parks, The Open Government Principle: Applying the Right to Know Under the Constitution, 26 Geo. Wash. L. Rev. 1 (1957). Instead, the right to inspect finds its source in English common law. E.g., The King v. Lucas, 103 Eng. Rep. 765 (K.B. 1808). Thus, when visitors to the National Archives Building in Washington, D.C., view the Constitution, they stand on the common law.

2. The example demonstrates that requests to inspect stem from a variety of reasons: the curiosity of a child; the greed of a knacker; the concern of a horse lover.

3. 15 N.C. Admin. Code 1, 12E (July 31, 1981).

4. N.C. Gen. Stat. §§ 132-1 to -9 (1981). The statute deals with public records in three main contexts: destruction, preservation and inspection. The statute does not deal with pretrial discovery of such records.

5. Id. § 132-6. This Note focuses on the right to inspect.

6. Id.

7. The North Carolina Court of Appeals recently handed down the state's sole appellate decision under the public access provision. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981). The opinion first stated that a letter written to the city manager by a consulting engineer employed to inspect construction of the city's water treatment plant constituted a "public record" under G.S. 132-1, and then stated that a corporation constituted a "person" under G.S. 132-6, -9. Id. at 504, 505, 281 S.E.2d at 69-70. Consequently, the court affirmed an order requiring the city to disclose the record to the publisher. Id. at 507, 281 S.E.2d at 71. Unfortunately, the court compromised this enlightened reasoning by adding that the existence of a single express exemption in G.S. 132-1.1 indicated a legislative intent to preclude judicial exemptions. Id. at 506, 281 S.E.2d at 70 (dictum). Actually, the facts of this case justified

common-law foundation for public access prior to the enactment of the statute. Consequently, many practical questions await clarification. Must the custodian provide space for inspection? What sort of supervision should the custodian give? Must the custodian permit a person to make his own copies? What should the custodian do before denying a request for access? What specific records fall within the definition of public records? The statute does not expressly address these questions.

Nevertheless, recent critical comment has shown that decisions in other jurisdictions can uncover the basic principles common to all public records statutes.[8] An effective right to public access necessarily includes adequate space[9] and personal copies;[10] however, the need to protect the records from damage and the agency from disruption limits the exercise of that right to the custodian's supervision.[11] Furthermore, any denial of the right should state the specific grounds in order to facilitate review.[12] Finally, the meaning of public records deserves a broad construction,[13] limited only by necessary exemptions.[14] Despite its brevity, the North Carolina statute would permit state judges to imply similar principles governing the practicalities of public access.

As a result, the rule-making power vested in each state agency can supplement the sparse language of the public access provision by anticipating these basic principles. For example, rules promulgated under this provision can articulate the procedures that follow a grant of inspection—the space provided, the extent of the custodian's supervision, the methods of making copies, and so forth. Similarly, such rules can articulate the procedures that follow a denial of inspection—a statement of the reasons for denial. Furthermore, the rules can provide guidance concerning what records qualify as public records. Until North Carolina courts speak to these matters, agency rules defining public access to public records must supply the necessary direction.[15]

The clear importance of rule-making to the right of access recommended a review of each agency's rules promulgated under the public access provision, as well as some measure of the general availability of such rules. Consequently, the author sent the following simple request to sixteen state agen-

---

the court's refusal to create an exemption, obviating the need to consider the validity of court-created exemptions. Id. at 507, 281 S.E.2d at 71.

8. Comment, Administrative Law—Public Access to Government-Held Records: A Neglected Right in North Carolina, 55 N.C.L. Rev. 1187 (1977). This excellent comment attempted to facilitate access by drafting a proposed state statute to replace the current North Carolina public records statute. Although the proposal failed to move the legislature, the research behind that proposal merits further attention. Consequently, this short Note suggests rules reform rather than statutory reform as a means to improving public access.

9. Id. at 1202.

10. Id. at 1204-05.

11. Id. at 1201-04.

12. Id. at 1219.

13. Id. at 1189-93.

14. Id. at 1193-99.

15. Any person denied access may seek a remedy in the courts. N.C. Gen. Stat. § 132-9 (1981). Nevertheless, the cost and the delay of litigation probably discourage enforcement of the statute. Consequently, the state's appellate courts have few opportunities to interpret the statute. Comment, supra note 8, at 1223.

cies:[16] "Please send me a copy of your agency's rules concerning public access to public records."[17] The request neither disclosed a purpose nor mentioned the statute because such requests should not depend upon prior justification or upon specific citation.[18] The author also contacted another agency while employed there as a summer intern.[19] These seventeen agencies, with heads either elected by the voters or appointed by the Governor, included all but one of the major administrative bodies in the state.[20]

The Department of Administration did not make a written response to the request for rules. The Department of Correction answered by suggesting resubmission of the request to the Attorney General, to the Law Librarian at the University of North Carolina School of Law, or to a named law student at that school "familiar with the manner whereby individuals . . . properly address requests . . . to state agencies."[21] Several agencies, including the Departments of Agriculture, Commerce, Crime Control and Public Safety, Cultural Resources, Human Resources, Insurance, Justice, Labor, State Auditor, and Treasurer, plus the State Board of Elections, indicated that they had not written any rules under the state's public records statute.[22] And the Attorney General, responding for the Departments of Revenue and Transportation, added these departments to the list of agencies without rules.[23] Thus, one state agency made no answer, another agency answered that the request should have gone elsewhere, and thirteen agencies answered that they had no rules.

Three of these thirteen agencies justified their lack of rules by arguing that they had no authority to write rules under the public records statute. The Department of Justice applied this view to itself as well as to the Department of Transportation,[24] stating that the public records statute "does not vest any agency with regulatory authority over the issue of public access to public

16. The agencies included the State Board of Elections and the North Carolina Departments of Administration, Agriculture, Commerce, Correction, Crime Control and Public Safety, Cultural Resources, Human Resources, Insurance, Justice, Labor, Revenue, Secretary of State, State Auditor, Transportation and Treasurer.

17. The request appeared under a North Carolina Law Review letterhead.

18. Presumably, a person asking how to make requests for public records would not realize that he should explain his curiosity and would not know of the existence of the public records statute. For an experimental design testing the availability of public records, see Divorski, Gordon & Heinz, Public Access to Government Information: A Field Experiment, 68 Nw. U.L. Rev. 240 (1973).

19. The North Carolina Department of Natural Resources and Community Development.

20. The North Carolina Department of Public Education inadvertently was omitted from the survey.

21. Letter from Department of Correction (Aug. 19, 1981) (on file at N.C.L. Rev. office).

22. Letters from Departments of Agriculture (July 2, 1981) (implicit indication), Commerce (July 13, 1981), Crime Control and Public Safety (July 27, 1981), Cultural Resources (June 30, 1981), Human Resources (undated), Insurance (July 1, 1981) (implicit indication), Justice (July 10, 1981), Labor (Aug. 18, 1981) (implicit indication), State Auditor (July 8, 1981) and Treasurer (June 29, 1981), and from the State Board of Elections (July 7, 1981) (all letters on file at N.C.L. Rev. office).

23. Letters from Department of Justice for the Department of Revenue (July 3, 1981) and for the Department of Transportation (July 2, 1981) (both letters on file at N.C.L. Rev. office).

24. Letter from Department of Justice for the Department of Transportation, supra note 23 (the public access provision "does not provide for regulations").

records."[25] The Department of Commerce also adopted this reasoning.[26]

Only two of the seventeen agencies contacted indicated that they had rules. The Department of the Secretary of State sent copies in response to the request,[27] and the Department of Natural Resources and Community Development supplied copies directly to the author during his employment with them.[28] A third agency, the Department of Human Resources, indicated that it had not written a rule under the public records statute, when such a rule did in fact exist.[29]

As previously described, fifteen of the seventeen agencies failed to make a satisfactory response or failed to write rules under the public access provision. This fact should cause surprise because public access lies at the very heart of democratic government. The idea of an informed populace,[30] and the corollary notion of governmental accountability,[31] demand readily available procedural rules describing the precise manner in which individuals may address their state agencies. Without such rules, governmental responses to requests for information may result in arbitrary limits on the right of inspection.[32] Rather than hinder public access, democratic government should help it.

Three agencies, including the Department of Justice, failed to write rules governing public access because they doubted their authority.[33] Although the public records statute itself does not mention such authorization, the legislature expressly delegated regulatory power under two other statutes. The Executive Organization Act of 1973 permits state agencies to adopt regulations governing "[t]he . . . performance of business . . . [and the] use . . . of the records . . . pertaining to department business."[34] More importantly, the Administrative Procedure Act requires each agency to "[a]dopt rules of practice setting forth . . . all formal and informal procedures available . . . [and to] [m]ake available for public inspection all rules . . . used by the agency."[35] Presumably, a request for public records would constitute "business," and the custodian's response would constitute "practice."[36]

---

25. Letter from Department of Justice, supra note 22.

26. Letter from Department of Commerce, supra note 22 ("the department has no . . . authority to adopt rules concerning public access").

27. Letter from Department of Secretary of State (undated) (citing 18 N.C. Admin. Code 1 .0601 (July 31, 1981)) (on file at N.C.L. Rev. office).

28. See 15 N.C. Admin. Code 1B .0600 (July 31, 1981).

29. Compare Letter from Department of Human Resources, supra note 22, with 10 N.C. Admin. Code 1D .0101 (July 31, 1981).

30. "[W]henever the people are well-informed, they can be trusted with their own government . . . ." Letter from Thomas Jefferson to Dr. Richard Price (Jan. 8, 1789), reprinted in 7 The Writings of Thomas Jefferson 253 (A. Bergh ed. 1905) [hereinafter cited as Writings].

31. "[W]hile in public service . . . I thought the public entitled to frankness, and intimately to know whom they employed." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in 15 Writings, supra note 30, at 32.

32. Comment, supra note 8, at 1201, 1220.

33. Letters from Departments of Commerce and Justice, both supra note 22, and Transportation, supra note 23.

34. N.C. Gen. Stat. § 143B-10(j) (1978).

35. Id. § 150A-11.

36. An implied authority to adopt necessary rules, based on the custodian's express authority

Although three agencies have written rules, those rules present problems. The Department of Human Resources[37] does not define public records and does not describe public access except to say that "[a] person may contact individual employees."[38] The Department of Natural Resources and Community Development[39] not only cites the wrong provision of the statute[40] but also violates the intent of the applicable statutory provision by narrowing the defi-

---

to supervise inspection, id. § 132-6, may also exist. See, e.g., In re Sorley v. Lister, 33 Misc. 2d 471, 472, 218 N.Y.S.2d 215, 217 (Sup. Ct. 1961) ("[T]he officer having . . . custody of . . . records . . . [must] give to citizens and taxpayers the privilege of inspection . . . ."). This argument deserves special consideration because the Administrative Procedure Act specifically exempts the Departments of Correction, Revenue and Transportation from the "rules of practice" provision. N.C. Gen. Stat. §§ 150A-1, -11 (1978).

37. The rule written by the Department of Human Resources reads as follows:

.0101 OBTAINING INFORMATION ABOUT THE DEPARTMENT

(a) A person may contact individual employees within a program or service in which the employee is personally involved and about which the employee is informed.

(b) A person seeking information concerning events or activities of major or urgent importance should contact the public information office.

History Note: Statutory Authority G.S. 132-1, -6;
Eff. February 1, 1976.

10 N.C. Admin. Code 1D .0101 (July 31, 1981).

38. Id.

39. The rules written by the Department of Natural Resources and Community Development read as follows:

.0601 PUBLIC RECORDS

Except as hereinafter provided any nonprivileged document made or received pursuant to law or regulation in the possession of the department is a public record for the purposes of this section.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.

.0602 INTERNAL MEMORANDA

Internal memoranda between and among employees and offices of the department are not public records for the purposes of this section.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.

.0603 ACCESS TO PUBLIC RECORDS

(a) All public records may be inspected by citizens of North Carolina for all reasonable purposes after making a proper request and receiving permission from the department.

(b) Access will be provided at the situs of the agency which has possession of the public record.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.

.0604 REQUEST FOR ACCESS

(a) Request for access to a public record shall be made to Secretary of the department.

(b) Request must be in writing and describe with reasonable specificity the document or documents desired to be received.

(c) The request must also give the reason the applicant desires to view the record.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.

.0605 VIEWING THE DOCUMENT

The applicant who has been given permission to inspect a document may inspect the document during business hours of the agency at the situs of the agency which has possession of the document.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.

nition of public record,[41] by limiting inspection to state citizens,[42] and by demanding to know the reason for the request.[43] The Department of the Secretary of State[44] anticipates broad disclosure but provides little practical guidance. Thus, only three agencies out of seventeen have rules,[45] and those rules really do not help individuals seeking information from their government.

The problems encountered with the rules actually adopted, and the scarcity of such rules, recommend immediate action. That action must take different forms, because the unique characteristics of a given office dictate different rules requirements. Consequently, the following model rules drafted by the author serve as catalyst rather than as copy.[46]

MODEL RULES OF PUBLIC ACCESS TO PUBLIC RECORDS

.0001 DEFINITIONS

The following definitions apply to rules contained in this Section:

.0606 RETENTION OF CUSTODY

No public document may be taken from the agency situs. Copies may be made at ten cents ($.10) per copy per sheet.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.

15 N.C. Admin. Code 1B .0601 to .0606 (July 31, 1981).

40. The provision cited deals with the remedy for the denial of public access to public records. N.C. Gen. Stat. § 132-9 (1981). The Department should have cited the public access provision. See id. § 132-6.

41. The rules omit the statutory phrase "in connection with the transaction of public business" but retain the statutory phrase "pursuant to law." Compare 15 N.C. Admin. Code 1B .0601 (July 31, 1981) with N.C. Gen. Stat. § 132-1 (1981). The omission makes a difference because the former phrase apprehends a broad definition of public records while the latter phrase apprehends a narrow definition. Comment, supra note 8, at 1190-91. Also note that the rules exempt internal memoranda. 15 N.C. Ad. Code 1B .0602 (July 31, 1981).

42. Although the rules read "citizens," the statute reads "any person." Compare 15 N.C. Admin. Code 1B .0603 (July 31, 1981) with N.C. Gen. Stat. § 132-6 (1981).

43. The rules state that the request must "give the reason the applicant desires to view the record"; however, the statute does not anticipate this requirement. Compare 15 N.C. Admin. Code 1B .0604 (July 31, 1981) with N.C. Gen. Stat. § 132-6 (1981). Whether motivated by curiosity, private gain or public responsibility, a person intending the lawful use of public records should gain access. Comment, supra note 8, at 1208 & nn.146-47.

44. The rule written by the Department of the Secretary of State reads as follows:

.0601 INSPECTION

Except where made confidential by law, all records filed with the Department of the Secretary of State are public records and are available for inspection during the hours of business specified in the rules of the particular division having custody of the records.

History Note: Statutory Authority G.S. 132-6;
Eff. February 1, 1976.

18 N.C. Admin. Code 1 .0601 (July 31, 1981).

45. The Department of Administration, the agency that failed to make a written response, does not have any public access rules. Though not included in the survey, an eighteenth agency, the Department of Public Education, also failed to write rules under the public access provision of the public records statute.

46. The model rules reflect the general requirements of the departments as opposed to the more specific requirements of the various divisions constituting those departments. For example, a division that receives many records requests may want to designate a particular area for inspections, while a division that receives few records requests may want only to provide an unoccupied desk for inspections. Whatever the division's specific requirements, the department should write rules that draw attention to the general need for divisional rules governing adequate space. See Comment, supra note 8, at 1202.

(1) "Public Records"
  (a) "Public Records" means all documentary material, regardless of physical form, which the agency makes or receives pursuant to law, or which the agency uses in connection with the transaction of public business.
  (b) "Public Records" include documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, and artifacts.
  (c) "Public Records" do not include:
    (i) Records specifically exempted from disclosure by a federal or state statute.
    (ii) Records protected by a privilege.
    (iii) Records that the agency reasonably believes confidential because disclosure would invade personal privacy, reveal the identity of an informant, or harm governmental interests.

(2) "Agency" means the Department of _____, or any of its divisions or offices.

(3) "Custodian" means the public official in charge of an office having public records, or any person given personal control of such records by the public official.

History Note: Statutory Authority G.S. 143B-10(j); 150A-11; 132-1; 132-1.1; 132-2;
Eff. _____.

.0002 PUBLIC ACCESS

(a) Access to public records promotes frequent accountability by the government and informed participation by the people; consequently, the custodian shall prominently post this Section in his office.

(b) Any person may seek the custodian's permission to inspect the agency's public records by describing the records in terms sufficient to secure their retrieval.

(c) The custodian shall provide adequate space during office hours to all persons making a reasonable request for public records, and the custodian shall supervise the inspection in order to protect the public records and to prevent the disruption of the office.

(d) All persons making a request for public records may copy such records, or may ask the custodian to provide copies at ten cents ($.10) per page.

(e) Before denying a request for public records, the custodian shall seek an advisory opinion from the Attorney General's staff concerning such denial. However, the custodian shall not extend the deadline for his decision while awaiting the opinion. If the custodian denies access to any public record, the custodian shall give the person making the request a written statement of the reasons for the denial.

(f) The agency shall create a public records committee to review denials. The committee shall render its decision after considering the written statement prepared by the custodian and the advisory opinion submitted by the Attorney General's staff.

(g) The custodian's failure to deny or to grant the request within ten working days shall constitute a denial, and the committee's failure to render a decision within five working days shall constitute a final agency action.

History Note: Statutory Authority G.S. 143B-10(j); 150A-11; 132-6; 132-9;
Eff. _____.

The model rules respect the public's right to know. The definitions supplied track the broad definitions contained in the statute.[47] In particular, "public records" sweeps up every imaginable item, provided that a special statute does not control the record, that a privilege does not protect the record, and that certain policy considerations do not affect the record. Special statutes include those governing state employees' personnel files and legislative lobbyists' expense accounts.[48] Privilege extends beyond the public records statute's treatment to traditional notions of confidential communication.[49] Policy considerations include: personal privacy—for example, manufacturers who cooperate with pollution investigations by supplying inadmissible evidence;[50] informant identity—for example, individuals who report unlawful waste discharges into the state's river system;[51] and governmental interests—for example, the need to withhold the precise location of an endangered species' natural habitat.[52] Unless the public record fits one of these exemptions, the govern-

47. See N.C. Gen. Stat. §§ 132-1, -1.1, -2 (1981).

48. Id. § § 126-22 to -29 (state employees' personnel files not open to inspection); id. § 120-47.6 (legislative lobbyists' expense accounts open to inspection). For a more complete list, see Comment, supra note 8, at 1193 & n.44.

49. The statute mentions only communications made by counsel to the agency, suggesting that the legislature assumed that communications made by the agency to counsel, the essence of the attorney-client privilege, did not need express protection. After all, courts in other states have recognized that agencies may withhold privileged records. This argument preserves both the attorney-client privilege and the doctor-patient privilege. Id. at 1196-97. But see Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70 (1981) (the state legislature intended only the one exception provided in the statute) (dictum).

50. The proliferation of government information on individual citizens has caused many courts to protect personal privacy. Comment, supra note 8, at 1196. Although North Carolina courts have not considered privacy under the public records statute, they have recognized privacy in other contexts. E.g., In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976) (telephone company that cooperated with criminal investigation by supplying inadmissible evidence entitled to order prohibiting public disclosure), cited in Comment, supra note 8, at 1196 n.60. "Reverse freedom of information" suits in federal courts also indicate the growing importance of legitimate privacy interests. See, e.g., Note, Protection from Government Disclosure—The Reverse FOIA Suit, 1976 Duke L.J. 330, cited in Comment, supra note 8, at 1215 n.174. But see *Advance Publications*, 53 N.C. App. at 506, 281 S.E.2d at 70 (dictum).

51. Though more common in criminal law enforcement, the protection of government sources often serves the public interest in other administrative areas. Comment, supra note 8, at 1195-96. But see *Advance Publications*, 53 N.C. App. at 506, 281 S.E.2d at 70 (dictum).

52. Many courts permit agencies to withhold records when disclosure would harm the government's financial or other interests. Comment, supra note 8, at 1196, 1213. But see *Advance Publications*, 53 N.C. App. at 506, 281 S.E.2d at 70 (dictum).

ment may not keep the record secret.[53]

Procedures under the model rules also favor broad disclosure. A person may submit a request orally or in writing.[54] The person making the request need not demonstrate any interest in the record,[55] and the request itself need only meet a minimum standard of specificity;[56] however, the person must make a reasonable request—one that does not require an exceptionally large number of records to discover a relatively insignificant fact.[57] The custodian must make the records available during office hours[58] and must provide adequate space;[59] furthermore, the custodian's supervision must extend only to protection of the records from damage and protection of the office from disruption.[60] In addition to a request for a certified copy under the statute, a person may make his own copies or may pay the custodian for office copies.[61] To discourage a casual denial of a request to inspect, the rules require the custodian to seek an advisory opinion from the Attorney General's office[62]

53. Defining public records to exempt those records not open to inspection differs from creating specific exemptions to a general definition of public records. See Comment, supra note 8, at 1193. The statute prefers the latter method, defining public records in one provision and creating a single exemption for counsel-to-agency communications in another provision. N.C. Gen. Stat. §§ 132-1, -1.1 (1981). However, the Attorney General's opinions prefer the former method, defining any records not subject to inspection as "not public records." E.g., Public Records Opinion, 44 N.C. Att'y Gen. Rep. 340 (1975) ("police . . . [criminal] investigative reports . . . are not public records"). The model rules adopt the Attorney General's approach because agencies seeking the opinion generally phrase their questions in terms of public records/not public records. Id. Nevertheless, the statute's approach creates less confusion because a public record exempted from inspection still qualifies as a public record subject to preservation and discovery. N.C. Gen. Stat. §§ 132-8 to -8.2 (1981); 44 N.C. Att'y Gen. Rep. at 341; Comment, supra note 8, at 1192-93. See also *Advance Publications*, 53 N.C. App. at 504, 281 S.E.2d at 69 (issue defined as whether letter constituted "a public record subject to disclosure").

54. The agency does not have any reason to discriminate between telephone requests and mail requests. Comment, supra note 8, at 1218.

55. The statute says that "any person" may request inspection. N.C. Gen. Stat. § 132-6 (1981). Other states have interpreted such language as eliminating the common-law interest requirement. Comment, supra note 8, at 1199-1200.

56. The identification requirement should serve to locate the record rather than to restrict public access. E.g., In re Dunlea v. Goldmark, 85 Misc. 2d 198, 201, 380 N.Y.S.2d 496, 499 (Sup. Ct. 1976) (both the party making the request and the agency entertaining the request share responsibility under the state statute's identity requirement). Of course, the custodian should not have to perform general research beyond retrieving the record. Comment, supra note 8, at 1206, 1219.

57. An overly broad request would burden unnecessarily the custodian's supervision and other persons' inspections. Comment, supra note 8, at 1204.

58. Id. at 1200, 1203.

59. Id. at 1200, 1202.

60. If inspection threatens the original record with damage, then the custodian must substitute copies for the original. Id. at 1201-02. If inspection threatens the office with disruption, then the custodian must limit access; for example, the custodian may restrict access to a few hours per day when employees need the records in their work. Id. at 1203-04.

61. Although the public access provision of the public records statute does not say whether a person may make his own copies, the remedies provision refers to access for "inspection, examination or copying." Compare N.C. Gen. Stat. § 132-6 (1981) with id. § 132-9. See also *Advance Publications*, 53 N.C. App. at 505, 281 S.E.2d at 70 ("plaintiff . . . entitled to . . . copying rights"). Such right would exist in the absence of this statutory language. Comment, supra note 8, at 1204-05.

When the custodian makes copies, the state may charge a fee designed to recover the costs of reproduction excluding labor. Id. at 1206-07.

62. The Texas public records statute contains such a provision. Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 7 (Vernon Cum. Supp. 1982), cited in Comment, supra note 8, at 1223 & n.195.

and to prepare a written statement of his reasons.[63] These two requirements also facilitate agency review of denials.[64] The fifteen-day limit on that agency review prevents delays that could postpone judicial resolution.[65] Finally, the custodian must post these rules in his office and should provide copies of these rules free to persons making requests for public records, because rules that unlock governmental information deserve wide publication.[66]

Rules promulgated under the state's public records statute contain the key to good government. Our state agencies, however, have failed to adopt effective rules, depriving the public of a practical framework for the right to access. In turn, the resulting lack of disclosure discredits government by consent. Public distrust grows.[67] Perhaps a model set of such rules will encourage each agency to review its posture.

WILLIAM MCBLIEF

63. The statement should indicate the statute, the privilege or the policy that causes the record to fall outside the definition of "public records." Comment, supra note 8, at 1219.

64. This review proceeding does not anticipate an adjudicatory hearing; consequently, the Administrative Procedure Act's provisions on contested cases do not apply. See N.C. Gen. Stat. §§ 150A-2, -23 to -37 (1978).

65. Persons denied inspection may apply to the courts for "an order compelling disclosure." Id. § 132-9 (1981).

66. The publication requirement avoids arbitrary limits on public access. Comment, supra note 8, at 1218, 1219-20.

67. The News and Observer (Raleigh, N.C.), June 20, 1981, at 4, col. 1.

Administrative Law—*American Textile Manufacturers Institute, Inc. v. Donovan*: Judicial Review Under OSHA

The Occupational Safety and Health Act of 1970[1] set the ambitious goal of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions."[2] In both its language and its tone, the Act emphasized worker health and safety, which were to be promoted through the promulgation of national standards. The Secretary of Labor was directed in compelling but unfortunately imprecise terms to set standards that "to the extent feasible, on the basis of the best available evidence," would prevent material impairment of employee health.[3] In *American Textile Manufacturers Institute, Inc. v. Donovan*[4] the United States Supreme Court considered basic definitional parameters for the type of evidence that would be deemed sufficient to withstand the "substantial evidence" standard of judicial review mandated by the Act.[5] In *American Textile* representatives of the cotton industry, insisting that both highly exacting evidence[6] and cost-benefit analysis[7] were required under the Act, brought suit challenging the validity of the cotton dust standards set by the Secretary.[8] Giving a deferential reading to "substantial evidence," the Court ruled that feasibility analysis was sufficient for the enactment of standards[9] to combat cotton dust exposure and the resulting brown lung disease, regardless of the cost to the industry.[10] The Court thereby recognized the Secretary's broad power to regulate, even in cases in which data imperfection inevitably yielded evidence of debatable substance. The concern for the textile worker's health preempted the rigorous substantial evidence requirement and cost-benefit analysis urged by the industry.

The cotton dust exposure standards under attack in *American Textile* were those issued by the Secretary of Labor in June 1978.[11] Temporary stan-

---

1. 29 U.S.C. §§ 651-678 (1976).
2. Id. § 651(b).
3. Id. § 655(b)(5). The text of the section provides as follows:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity . . . . In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

4. 101 S. Ct. 2478 (1981).
5. 29 U.S.C. § 655(f) (1976) provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."
6. 101 S. Ct. at 2497.
7. Id. at 2483.
8. Id. The standards are codified at 29 C.F.R. § 1910.1043 (1981).
9. Id. at 2492.
10. Id. at 2504.
11. Codified at 29 C.F.R. § 1910.1043 (1981). See generally 101 S. Ct. at 2485-87 (providing a more in-depth treatment of the history of cotton dust standards in the United States).

dards had been promulgated in 1970,[12] but debate over allowable exposure standards continued through the next decade. In 1978, acting through the Occupational Safety and Health Administration (OSHA), the Secretary promulgated permanent standards that reflected a predominant concern for worker health.[13] However, it had become apparent long before 1978 that worker health in the textile industry was a matter of great national concern. By the 1960s, exposure to cotton dust had been shown unequivocally to bear a direct relation to the incidence of brown lung disease, or byssinosis, a serious respiratory disease that affects more than 100,000 workers in the textile industry.[14] Incidence rates range from twenty to thirty percent among workers exposed to the dust, and "each worker faces a substantial risk of health impairment."[15]

The variable 200/500/750 micrograms per cubic meter ($\mu g/m^3$) standard that ultimately was adopted was predicated on the results of two separate exposure studies.[16] Research Triangle Institute (RTI), an OSHA-contracted group, conducted the first study. The second study was the result of an independent investigation conducted by industry representatives (Hocutt-Thomas).[17] Both studies focused in part on the total cost of engineering con-

12. See 101 S. Ct. at 2485 (pursuant to 29 U.S.C. § 655(a) (1976)).

13. In 1966 the American Conference of Governmental Industrial Hygienists (ACGIH) had recommended that cotton dust exposure be limited to 1000 micrograms per cubic meter of air (1000 $\mu g/m^3$) per eight-hour workday. Id. at 2485. The temporary regulation promulgated in 1970 included the 1000 $\mu g/m^3$ limit for total dust exposure. See note 12 supra. In 1974 ACGIH lowered its recommended daily exposure levels to 200 $\mu g/m^3$, at which time the Director of the National Institute for Occupational Safety and Health (created by the Act, 29 U.S.C. § 671 (1976)) requested that the Secretary adopt the more stringent standard. 101 S. Ct. at 2485. By that time, the Textile Workers Union of American had joined with the North Carolina Public Interest Research Group to petition the Secretary to set an exposure limit of 100 $\mu g/m^3$. Id. After three hearings, much testimony, and numerous post-hearing comments and briefs, the following final cotton dust standards were adopted:

Mandatory Permissible Exposure Limit
Over Eight-Hour Period

Yarn manufacturing	200$\mu g/m^3$
Slashing and weaving operations	750$\mu g/m^3$
All other operations	500$\mu g/m^3$

101 S. Ct. at 2486-87.

14. See S. Rep. No. 1282, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5179 (noting that recognition of brown lung disease as a distinct occupational hazard was relatively recent in the United States despite repeated warnings from other textile-producing nations). For an overview of brown lung disease in the textile industry, see Brown Lung: Hearing Before a Subcomm. of the Sen. Comm. on Appropriations, 95th Cong., 1st Sess. (1978); Schrag & Gullett, Byssinosis in Cotton Textile Mills, 101 Am. Rev. Resp. Disease 497 (1970).

15. AFL-CIO v. Marshall, 617 F.2d 636, 646 (D.C. Cir. 1979), aff'd in part, vacated in part sub nom. American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (1981). Since *American Textile* was decided in June 1981, the American Textile Manufacturers Institute has conducted its own study, which reports that fewer than one-half of one percent of textile workers suffer from byssinosis. Telephone interview with Elisa Braver, Epidemiologist, in Washington, D.C. (Feb. 1, 1982). However, Braver cited a number of critical inadequacies with the Institute's methodology: the study lacked a control group, failed to use the conventional Schilling classification to diagnose health impairment and gave only marginal attention to exposure data. Thus, there is serious doubt as to the reliability of the Institute's conclusion that only 670 of the 400,000 workers surveyed suffered from byssinosis. Id.

16. 101 S. Ct. at 2497. See also note 13 supra.

17. Id. at 2497. See RTI, Cotton Dust: Technological Feasibility Assessment and Final Inflationary Impact Statement (1976); see also Statements of Hovan Hocutt, Senior Vice-President, Engineering, Pneumafil Corp., Ex. 60, 2228-47 and Arthur Thomas, Senior Vice-President, The

trols for the achievement of more stringent exposure levels than the temporary 1000 $\mu g/m^3$ limit.[18] The common focus did not lead to a common result, however. RTI estimated that compliance with proposed standards would cost the textile industry $1.1 billion, while Hocutt-Thomas indicated that similarly protective exposure levels could be achieved through engineering controls costing only $543 million.[19]

In the course of setting its standards, OSHA questioned the validity of both studies. RTI mistakenly had included in its computations both synthetic mills, whose operations do not generate cotton dust, and mills already in compliance. In addition, the RTI study lacked current data.[20] Hocutt-Thomas also was thought improperly to have included synthetic mills in its compliance calculations. Moreover, Hocutt-Thomas failed to take into account natural production trends to replace old machinery and technological advances likely to occur during the four-year compliance period.[21] In spite of these acknowledged data inadequacies, OSHA finally adopted the Hocutt-Thomas study as "more realistic" than that of RTI.[22]

Claiming that $543 million was a gross underestimate for compliance given the stringent standards finally adopted,[23] the industry brought suit challenging the standard in the United States Court of Appeals for the District of Columbia.[24] The court of appeals held that there was substantial evidence to support the standard and that feasibility analysis was contemplated by the Act.[25] Twelve individual cotton textile manufacturers and the American Textile Manufacturers Institute, Inc., which represents more than 175 companies, then petitioned the United States Supreme Court for review. Petitioners challenged the substantiality of the evidence supporting OSHA's determination that the cotton dust standard was economically feasible[26] and alleged that the

---

Bahnson Co., Ex. 62, 2248-57, reprinted in joint appendix to AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979). Because the Hocutt-Thomas study was the more recent of the two, it was perhaps more attractive to OSHA in its search for valid data.

18. See note 13 supra.

19. 101 S. Ct. at 2498. RTI had made cost estimates for permissible exposure limits (PELs) of 100, 200 and 500 $\mu g/m^3$, but OSHA found them too unreliable to adopt as final estimates. Id. at 2500 n.53. Hocutt insisted that a PEL of 200 $\mu g/m^3$ was technologically impracticable for certain production operations; therefore, he declined to prepare cost estimates for the 200 $\mu g/m^3$ level. Id.

20. Id. at 2498.

21. Id. at 2499.

22. Id. at 2498.

23. The guidelines ultimately promulgated not only set the variable exposure level of 200/500/750 $\mu g/m^3$, but also called for exposure monitoring, medical surveillance of employees, educational programs, provision of respirators in certain situations and transfer without loss of pay for any employee unable to wear a required respirator. Id. at 2487.

24. AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), aff'd in part, vacated in part sub nom. American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (1981).

25. Id. at 664-66. See note 3 supra & note 31 infra. The court expressed humanitarian concerns in rejecting cost-benefit analysis under 29 U.S.C. § 655(b)(5) (1976): "Especially where a policy aims to protect the health and lives of thousands of people, the difference in comparing widely dispersed benefits with more concentrated and calculable costs may overwhelm the advantages of such analysis." 617 F.2d at 655. These same concerns also offer a partial explanation for the court's very flexible application of the "substantial evidence" standard of review.

26. 101 S. Ct. at 2483 & n.5, 2497.

Act required the Secretary to engage in a cost-benefit analysis before promulgating any exposure standard.[27] Additionally, petitioners questioned the authority of OSHA to mandate a transfer with full pay for industry employees unable to wear required respirators.[28] The industry received a single, cold concession in the Court's ruling—the issue of transfer with pay was remanded for determination whether the provision bore a reasonable relationship to the protection of worker health.[29] The ruling of the court of appeals was upheld in all other respects.[30] Not only was an elaborate cost-benefit analysis rejected in favor of a simple feasibility analysis,[31] but also the admittedly imprecise Hocutt-Thomas study was found to present evidence of sufficient substantiality to warrant upholding the standards adopted by the Secretary.[32]

Although the decision was a difficult one for the industry to accept, it was well in keeping with the legislative history of the Act. The legislative intent behind the Act admittedly was "not crystal clear,"[33] but congressional debate was unmistakably "replete with concern about dangers" to worker health and safety.[34] In *American Textile* rejection of the substantial evidence challenge

27. Id. at 2483.

28. Id. at 2483 & n.5, 2504.

29. Id. at 2505-06.

30. Id. at 2506.

31. Id. at 2491-97. Cost-benefit analysis would consist of balancing costs to the industry against the resulting reduction in risk to the working population. Such an analysis certainly would require some calculation of the value of human life. By contrast, feasibility analysis requires that a regulatory agency address these three questions: (1) does the worksite present unsafe conditions of employment or significant risks to worker health?; (2) is the standard promulgated the most protective possible?; and (3) is achievement of the standard feasible? See generally Note, Section 6(b)(5) of the Occupational Health Act of 1970: Is Cost-Benefit Analysis Required?, 49 Fordham L. Rev. 432 (1980).

32. 101 S. Ct. at 2500. The evidence ultimately was found to support a total cost estimate for compliance which included engineering controls at $543 million (Hocutt-Thomas study), medical surveillance and monitoring at $7 million, and waste and seed processing at $106.5 million, for a total of $656.5 million. Id. at 2498 n.44.

In deciding whether OSHA's determination had been based on "substantial evidence," the Court followed the standard of review articulated in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). See 101 S. Ct. at 2497. In that case, the Court stated that "substantial evidence" is "more than a mere scintilla . . . . [It is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 340 U.S. at 477. While the reviewing court must take contradictory evidence into account, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Mar. Comm'n, 383 U.S. 607, 620 (1966). Ordinarily, an "arbitrary and capricious" standard of judicial review is used in cases involving informal rulemaking procedures. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976). However, the Administrative Procedure Act applies only when the statute in question does not provide specifically for a standard of review. Id. § 703. In the case of OSHA, the "substantial evidence" standard is mandated by 29 U.S.C. § 655(f) (1976). Thus, by combining the informal procedure of notice-and-comment rulemaking with the essentially formal standard of "substantial evidence" review, OSHA has a "hybrid nature." Industrial Union Dep't v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974). Review is therefore complicated for the court, since detailed records often are lacking because of the informal procedures. For an insightful treatment of "substantial evidence" review in this area, see Jaffe, Judicial Review: "Substantial Evidence on the Whole Record," 64 Harv. L. Rev. 1233 (1951); Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974); Note, Scrutiny of OSHA Regulation in the Courts: A Study of Judicial Activism, 14 U. Rich. L. Rev. 623 (1980).

33. 101 S. Ct. at 2493.

34. Note, supra note 31, at 445 (indicating that employee safety is paramount concern of the Act, as reflected in legislative history). As introduced by Representative Daniels in the House,

and the cost-benefit analysis represented a recognition by the Court that mathematical exactitude cannot be demanded when considering worker health in the light of state-of-the-art technology and present medical knowledge.

The Court had been offered an earlier opportunity in *Industrial Union Department v. American Petroleum Institute*[35] to clarify the issues of substantial evidence review and cost-benefit analysis in a case involving the benzene exposure standard. The issue of substantial evidence emerged as the touchstone of the Court's holding in *American Petroleum*. The cost-benefit issue never was reached, since the stringent benzene standards were held unenforceable because they were unsupported by evidence of sufficient scientific substantiality.[36] The threshold proof that a low exposure level was "reasonably necessary or appropriate" to effect a drop in the incidence of leukemia simply had not been produced.[37] On the basis of more than fifty volumes of exhibits and testimony, OSHA had found that a reduction in exposure from ten parts to one part per million of benzene was "likely" to yield "appreciable" benefits.[38] The Court, emphasizing that administrative procedure placed the burden upon the agency to justify any new standard promulgated, did not think that the evidence met the substantiality requirement.[39] The Court did recognize that "OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty."[40] In particular, the Court thought that section 655(b)(5), which specifically allows the Secretary to promulgate regulations on the basis of the "best available evidence,"[41] "gave OSHA some leeway where its findings must be made on the frontiers of scientific knowledge."[42] Nevertheless, the plurality remained unconvinced by the fifty volumes of benzene data and refused to approve the more protective standard.

The dissent in *American Petroleum* espoused a more liberal notion of "leeway" and expressed the strongly worded view that the Secretary clearly had produced "substantial evidence that exposure to benzene caused leukemia."[43] While the dissenters plainly recognized that it was their duty to un-

---

OSHA originally required a standard that "most adequately assures . . . that no employee will suffer any impairment of health." H.R. Rep. No. 1291, 91st Cong., 2d Sess. 4 (1970). Emphasizing that the House bill reflected an unfairly "single-minded punitive approach" towards employers, Senator Dominick led a drive that culminated in several restrictive amendments. Sen. Rep. No. 1282, 91st Cong., 2d Sess. 61 (1970). As finally codified, the Act was limited to concerns of "material health impairment" caused by "toxic materials or harmful physical agents." 29 U.S.C. § 655(b)(5) (1976). The scope of the Act was narrowed, but its preeminent concern was still worker health. See 101 S. Ct. at 2493-97.

35. 448 U.S. 607 (1980) (plurality opinion).

36. Id. at 653.

37. Id. at 638.

38. Id. at 653.

39. Id. at 652-53.

40. Id. at 656.

41. 29 U.S.C. § 655(b)(5) (1976).

42. 448 U.S. at 656.

43. Id. at 698. Justices Marshall, Brennan, White and Blackmun dissented in the judgment and roundly condemned the plurality's decision as "both extraordinarily arrogant and extraordinarily unfair." Id. at 695.

dertake a "searching and careful judicial inquiry" into the basis of the Secretary's findings,[44] they also recognized that this duty did not mean that they were to "undertake independent review of adequately supported scientific findings made by a technically expert agency."[45] Emphasizing that, even under the substantial evidence test, judicial review is "ultimately deferential,"[46] the dissent singled out three key factors which served to make substantial evidence review particularly difficult under OSHA: the high level of technological complexity, the impossibility of achieving definite resolution of factual issues, and the inability of avoiding policy considerations "when the question involves determination of the acceptable level of risk [to worker health]."[47] The dissent rejected the notion that these complications justified the plurality's excessively demanding review, and went so far as to say that "today's decision represents a usurpation of decisionmaking authority that has been exercised by and properly belongs with Congress and its authorized representatives."[48]

The rationale of the dissent in *American Petroleum* also was evident in the rulings of several lower courts on the issue of substantial evidence. In *United Steelworkers of America v. Marshall*,[49] one of the most notable lower court cases, the United States Court of Appeals for the District of Columbia held that the stringent, OSHA-promulgated lead exposure standard was enforceable even though based on "the inconclusive but suggestive results of numerous studies."[50] The scope of judicial review was expressed in very narrow terms,[51] and the court seemed to presage Justice Marshall's dissent in *American Petroleum* when it noted, "[W]e must remember that the precise choice of [a numerical toxic exposure limit] is essentially a legislative judgment to which we must accord great deference and which only must fall within a 'zone of reasonableness.' "[52]

The humanitarian concerns that ultimately held sway in *American Textile* were also present in the *United Steelworkers* decision. While the court of appeals faulted OSHA for being careless in some data presentation and analysis,[53] it refused to second-guess technologically complicated agency decisions and observed that "OSHA cannot let workers suffer while it awaits the Godot

44. Id. at 695 n.9.

45. Id. at 695. The dissent believed that de novo review was "especially inappropriate" when complicated scientific data was at issue, as the Court plainly lacked expertise in such matters. The logical thrust of this deferential approach was that the "reviewing court must be mindful of the limited nature of its role," even under substantial evidence review. Id. at 706.

46. Id. at 705.

47. Id. at 705-06.

48. Id. at 712.

49. 647 F.2d 1189 (D.C. Cir. 1980).

50. Id. at 1253 (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 37-38 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976)).

51. Review was restricted to "requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument." Id. at 1207.

52. Id. at 1253.

53. The majority proffered the slightly understated criticism that OSHA's carelessness "will

of scientific certainty. It can and must make reasonable predictions on the basis of 'credible sources of information. . . .' "[54] Although the substantial evidence issue was remanded in regard to some secondary segments of the steel industry, the standard was upheld in major respects, with the court noting that "we cannot require of OSHA anything like certainty."[55] The *United Steelworkers* court characterized the difficulty of substantial evidence review in clear-cut terms:

> The peculiar problem of reviewing the rules of agencies like OSHA lies in applying the substantial evidence test to regulations which are essentially legislative and rooted in inferences from complex scientific and factual data, and which often necessarily involve highly speculative projections of technological development in areas wholly lacking in scientific and economic certainty.[56]

Faced with such highly speculative projections, the *United Steelworkers* court struck the balance in favor of worker health and excused data inadequacies when the *American Petroleum* Court would not.[57]

In rejecting both the conceptually valid industry challenge to the substantial evidence issue and the cost-benefit analysis,[58] the *American Textile* Court moved far toward adopting the reasoning of *United Steelworkers* and the *American Petroleum* dissent. The *American Textile* Court therefore revealed a strong measure of deference to administrative rulemaking authority and considerable solicitude for worker health. Whereas fifty volumes of benzene data were deemed insufficient in *American Petroleum*, a generous reading of the faulty RTI and Hocutt-Thomas cotton dust studies met the substantial evidence standard in *American Textile*.

In evaluating the feasibility of the $656.5 million total compliance figure under section 655(f),[59] the court of appeals in *American Textile* had recognized that the task of the court under the substantial evidence requirement was "to provide a careful check on the agency's determinations."[60] But the court also believed that it had great flexibility in assessing whether the evidence was substantial. This flexibility becomes the essence of the judicial review standard in the Supreme Court opinion, and the concept of "careful check" conveniently

---

never place the lead exposure standard in the Pantheon of administrative proceedings." Id. at 1207.

54. Id. at 1266 (quoting AFL-CIO v. Marshall, 617 F.2d 636, 657-58 (D.C. Cir. 1979)).

55. Id.

56. Id. at 1206-07.

57. The *United Steelworkers* bench found ample precedent for its holding in an early toxic exposure case, Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), in which OSHA was found to have broad discretion in the area of toxics regulation. The *Hodgson* court held that when data was obtained "on the frontiers of scientific knowledge," regulations "must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis." Id. at 474.

58. 101 S. Ct. at 2491-92. The Court was aware of the difficulty the industry faced in achieving compliance and freely admitted that "some marginal employers may shut down rather than comply." 101 S. Ct. at 2501. Even on those facts, however, the value of worker health was thought to preclude any mechanical application of cost-benefit analysis.

59. See note 32 supra.

60. 617 F.2d at 649.

is omitted. The Court fully adopts the "familiar rule" that "[t]his Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below."[61] Although the exposure levels contemplated by Hocutt-Thomas were less stringent than those ultimately adopted by the Secretary, the Supreme Court agreed with the lower court's speculation that "little more than the dust control measures assumed by the industry [Hocutt-Thomas] would be necessary to achieve the final PEL."[62] In spite of conflicting and inapposite data, the Court nonetheless believed it was warranted in upholding the precise and demanding cotton dust standard mandated by the Secretary.[63]

A requirement of scientifically impeccable data and careful economic balancing undoubtedly would have been particularly inappropriate in the case of brown lung disease. Due to increased popular awareness of the dangers of toxic exposure, the class protected by the cotton dust standard engendered considerable public sympathy. The facts of *American Textile* offered the Court a perfect opportunity to recognize that neither a compendium of absolute scientific truth nor a mathematically precise economic analysis was mandatory where considerations of high technology response to imperfectly understood incidence of disease were involved.

Nonetheless, the legal foundation of the Court's decision is open to challenge. Had it not been for the emotional appeal of the protected class, the cotton dust standards might well have been invalidated because they were based on insubstantial evidence. Justice Stewart's dissent clearly echoes the demanding concept of substantial evidence review articulated in *American Petroleum* and suggests that the agency badly overstepped its bounds in promulgating cotton dust standards based on grossly insufficient evidence.[64] Neither the RTI nor the Hocutt-Thomas study was geared to the standards ultimately adopted. In addition, both studies suffered from assorted methodological inadequacies.[65] As Justice Stewart correctly noted, even feasibility analysis cannot be made without substantial evidence. His dissent attacked the majority decision for this very reason:

> The agency flatly rejected [the RTI] prediction as a gross over-estimate. . . . [Then] [t]he agency examined the Hocutt-Thomas study, and concluded that it too was an over-estimate of the costs of the less stringent standard it was addressing... . But in a remarkable non sequitur, the agency decided that because the Hocutt-Thomas study was an over-estimate of the cost of a less stringent standard, it could be treated as a reliable estimate for the more costly final Standard

61. 101 S. Ct. at 2497 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951)).

62. 617 F.2d at 660.

63. The Court did refuse, however, to "scrutinize the record to uncover and formulate a rationale" for the transfer with pay provision. 101 S. Ct. at 2505 n.73. That issue was remanded for further examination in the court below and thus represented the industry's sole success in its challenge to the standards.

64. Id. at 2506-07.

65. See notes 20-22 and accompanying text supra.

> actually promulgated, never rationally explaining how it came to this happy conclusion. This is not substantial evidence. It is unsupported speculation.[66]

In light of the Court's demanding substantial evidence review in *American Petroleum*, Justice Stewart's dissent seems well taken. The rigorous cast of mind that prevailed on the *American Petroleum* bench perhaps was tempered by the more obvious peril to the cotton worker considered in *American Textile*. While the carcinogenic qualities of benzene at low levels were open to dispute, the fact that byssinosis "affected as many as 30% of the workers [in some production processes] in some American cotton mills" was fairly clear.[67] The public appeal of the cause in *American Textile* allowed the Court to direct its focus away from the substantial evidence requirement of section 655(f) and instead to speak of the "best available evidence" required by section 655(b)(5).[68] In effect, the *American Textile* decision may be read as at least a partial fulfillment of Justice Marshall's predictions in the *American Petroleum* dissent:

> In all likelihood, [*American Petroleum*] will come to be regarded as an extreme reaction to a regulatory scheme that, as the Members of the plurality perceived it, imposed an unduly harsh burden on regulated industries. . . . I am confident that the approach taken by the plurality today . . . will eventually be abandoned, and that the representative branches of government will once again be allowed to determine the level of safety and health protection to be accorded to the American worker.[69]

In minimizing the rigorous demands of the substantial evidence standard of review, the Supreme Court plainly followed the spirit of the court of appeals' holding in *American Textile*.[70] The lower court had predicated its holding on the fact that Congress "delegated unusually broad discretionary authority" to OSHA for the issuance of regulations.[71] The court evidenced an extremely deferential attitude toward agency determinations when it noted that "[t]o protect workers from material health impairments, OSHA must rely on predictions of possible future events and extrapolations from limited data. It may have to fill gaps in knowledge with policy considerations."[72] Likewise, the Supreme Court voiced a similar flexibility, rather than the exacting tone of the earlier *American Petroleum* decision, when it noted and readily excused the fact that "both the RTI and Hocutt-Thomas studies had to rely on assumptions the truth or falsity of which could wreak havoc on the validity of their

66. 101 S. Ct. at 2507.

67. 448 U.S. at 646. See also note 15 supra.

68. 29 U.S.C. §§ 655(b)(5), 655(f) (1976).

69. 448 U.S. at 723-24.

70. 617 F.2d 636 (D.C. Cir. 1979).

71. Id. at 649.

72. Id. at 651. The court went on to note that "standards do not become infeasible simply because they may impose substantial costs on an industry, force the development of new technology, or even force some employers out of business. Otherwise the Act's commitment to protect workers might be forever frustrated." Id. at 655.

final numerical cost estimates."[73]

The key issue in future litigation may well be just how much "havoc" the Court will allow before invalidating standards under the section 655(f) standard of review. The wide divergence of approaches to judicial review evidenced by *American Textile* and *American Petroleum* does not lend itself to a natural synthesis, but some directions of the Court are discernible. First, industrial noncooperation will not be tolerated lightly. Because the Secretary had been limited in the precision of his estimates "by the industry's refusal to make more of its own data available,"[74] the industry was not readily heard to complain once final standards were enacted.

Second, by strictly limiting its review function and simply "declin[ing] to hold as a matter of law"[75] that OSHA's determination was unsupported by substantial evidence, the Court may have given a first hint of abdicating the field of rigorous review so willingly entered in *American Petroleum*. As Milton Wright of RTI noted, "We establish *bounds* on the costs. We're encouraged to do so by the agencies."[76] "Hard evidence is almost non-existent"[77] for certain textile production stages, and the absence of data on other aspects of cotton dust exposure has been termed "particularly regrettable"[78] and "especially unfortunate."[79] Bounds and nonexistent data are hardly the stuff of which truly meaningful substantial evidence review can be made. Mr. Wright termed the Secretary's conclusions "fairly logical."[80] Perhaps after *American Textile* substantial evidence will come to be regarded as "fair logic" in protective veneer.

Third, even though the Court commited itself to a liberal interpretation of substantial evidence in *American Textile*, a major question remains as to exactly how far the Court will go in employing the substantial evidence review as a validation device for extremely costly industrial regulation. Substantial evidence may well demonstrate increased risk to worker health as industrial processes grow in sophistication and in toxic exposure levels, but a delicate balance ultimately must be struck between protective regulation and the survival of the industry under review. The *American Textile* Court explicitly refused to decide "the question whether a Standard that threatens the long-term profitability and competitiveness of an industry is 'feasible' within the meaning of . . . 29 U.S.C. § 655(b)(5)."[81] When faced with the possibility of indus-

73. 101 S. Ct. at 2500 n.54.

74. Id. at 2500. Hocutt referred to the confidentiality of his sources during committee hearings. Id. at 2500 n.51. On the other hand, Milton Wright of RTI, who supervised the engineering control estimates, remembered that the industry was "willing to be cooperative" and "didn't hesitate" to supply data when requested. However, Mr. Wright did not note that complete industry-wide data were not available and that the lack of a central source complicated estimate procedures. Interview with Milton Wright, Consultant, RTI, in Research Triangle Park, N.C. (Nov. 18, 1981).

75. 101 S. Ct. at 2500.

76. Interview, supra note 74 (emphasis added).

77. Id. (referring to weaving).

78. RTI, supra note 17, at vol. I, II-3.

79. Id. at III-6.

80. Interview, supra note 74.

81. 101 S. Ct. at 2501 n.55.

trial demise and resulting economic dislocation, the Court may feel itself constrained to preserve worker employment at the expense of worker health. This problem may become particularly acute in times of mounting concern over the debilitating effects of unemployment upon the nation as a whole. Some degree of judicial experimentation in this regard is to be expected in future litigation, with the Act's provision for industrial petition for variance in compliance serving as a buffer against the economic shock of restrictive regulation.[82]

It is to be hoped that such future judicial experimentation in review of agency action will preserve the element of concern for human well-being so eloquently expressed in *American Textile*. At bottom, it is precisely this sort of policy determination that lies at the core of the *American Textile* decision. An attempt to incorporate absolute quantification into such policy-making plainly would have elevated industry profit above worker health. In this respect, the Court's deferential treatment of the substantial evidence standard of review in *American Textile* is to be welcomed as a necessary and sensible response to a pressing human need.

GEORGIA L. HERRING

82. 29 U.S.C. § 655(d) (1976) makes specific provision for variance from standards promulgated by OSHA, allowing "[a]ny affected employer [to] apply to the Secretary for a rule or order for a variance."

Evidence—*State v. Freeman*: Adverse Marital Testimony in North Carolina Criminal Actions—Can Spousal Testimony Be Compelled?

Prior to the North Carolina Supreme Court's decision in *State v. Freeman*[1] adverse testimony by one spouse against another in a criminal action[2] was deemed incompetent and therefore inadmissible.[3] This common-law rule of incompetent spousal testimony prohibited the state from calling as a witness the husband or wife of any criminal defendant, with certain, limited, statutory exceptions.[4] In *Freeman* the court announced a major modification of the common-law rule by holding that henceforth the spouse of a criminal defendant shall be an incompetent witness for the state only when the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage.[5]

The facts of the case presented the court with a compelling setting for modifying the common-law rule. Defendant Freeman was indicted for first-degree murder. Defendant's wife of three years (though she and her husband had been separated for the last two) was prepared to testify that on June 6, 1980, she saw her husband shoot and kill her brother as she and her brother sat in an automobile outside Mrs. Freeman's place of employment.[6] The trial court granted defendant's motion *in limine* to suppress the testimony on the ground that under the common law of North Carolina, codified at G.S. 8-57,[7] a spouse is incompetent to testify against a defendant-spouse in a criminal

---

1. 302 N.C. 591, 276 S.E.2d 450 (1981).

2. Adverse spousal testimony in most civil actions is competent and compellable. Exceptions include actions for divorce on account of adultery and actions for criminal conversation. N.C. Gen. Stat. § 8-56 (1981).

3. The common-law rule is expressed in State v. Hussey, 44 N.C. 123 (1852).

4. N.C. Gen. Stat. § 8-57 (1981) provides:

> The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for communicating a threat to the other spouse, or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child.

5. 302 N.C. at 596, 276 S.E.2d at 453.

6. Id. at 592-93, 276 S.E.2d at 451-52.

7. See note 4 supra.

proceeding.[8] The state immediately appealed the order pursuant to G.S. 15A-979(c),[9] certifying that Mrs. Freeman was the only witness who could testify to the above stated facts, and that her testimony was essential to the case.

Before modifying the rule, the court first had to hold that G.S. 8-57 did not codify the common-law rule prohibiting adverse spousal testimony in criminal trials. The statutory language on which the trial court relied was the portion of G.S. 8-57 that reads: "Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding . . . ."[10] The supreme court acknowledged that if this language did in fact codify the common-law rule, the court was without power to modify it judicially.[11] The court previously had addressed this precise issue in *State v. Alford*,[12] in which it modified the common-law rule to permit a divorced spouse to testify against her ex-husband-defendant.[13] There the court held that G.S. 8-57 simply provides that in all proceedings not specifically excepted in the statute, common-law rules with reference to whether one spouse is competent to testify against another are unaffected by the statute. The court observed that the portion of G.S. 8-57 quoted above differs from the portion immediately preceding it. The latter provides directly and positively that "[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."[14] The court reasoned that the legislature would have used similarly definitive language had it intended to state positively that adverse spousal testimony in general was incompetent.[15] It concluded that by using nondefinitive language the legislature simply was expressing no opinion on this aspect of the common-law rule. Thus, absent any legislative declaration, the supreme court possesses the authority to alter judicially created common law when it deems such action necessary "in light of experience and reason."[16]

With the statutory impediment thereby removed, the court proceeded to reassess the continuing validity of the spousal incompetency rule. After a brief

---

8. 302 N.C. at 592, 276 S.E.2d at 451.

9. N.C. Gen. Stat. § 15A-979(c) (Cum. Supp. 1981) allows an immediate appeal of a superior court order granting a motion to suppress evidence if the prosecutor certifies that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

When this section and N.C. Gen. Stat. § 7A-27(a) (1981), which provides for a direct appeal to the supreme court in capital offense cases, are considered together, it is proper to appeal a suppression order directly to the supreme court if the punishment for the charge is either death or life imprisonment. State v. Silhan, 295 N.C. 636, 639-40, 247 S.E.2d 902, 904 (1978).

10. 302 N.C. at 594, 276 S.E.2d at 452. See note 4 supra for full text of the provision.

11. 302 N.C. at 594, 276 S.E.2d at 452.

12. 274 N.C. 125, 161 S.E.2d 575 (1968).

13. The court in *Freeman* could have held that a two-year separation was the equivalent of divorce for purposes of the spousal privilege, but it expressly declined to do so. The reason behind the abolition of the privilege in divorced spouses could apply equally in this case—there is no true marital relationship to protect. The court declined to so hold for two reasons: (1) public policy favors encouraging reconciliation between separated spouses, and (2) the courts would be unduly burdened if required to make findings on the possibility of reconciliation in each case. 302 N.C. at 598 n.2, 276 S.E.2d at 455 n.2.

14. 274 N.C. at 129, 161 S.E.2d at 578.

15. Id.

16. 302 N.C. at 594, 276 S.E.2d at 452.

discussion of the historical development of the rule,[17] the court concluded that the doctrine prohibiting one spouse from testifying against the other remains in effect solely by force of the modern justification of encouraging free and open communication between marriage partners. It is thought that open communication might be impaired if spouses run the risk of a subsequent betrayal of confidence.[18] A rule that prohibits *all* adverse spousal testimony "sweeps more broadly"[19] than its purpose and therefore should be modified. Open communication between marriage partners could be encouraged just as effectively by a rule that limits the exclusion of testimony only if its substance concerns a confidential communication.[20]

The narrow holding of *Freeman* is that nonconfidential adverse spousal testimony in criminal proceedings is now competent. The court did not address the question whether such testimony is also compellable.[21] It is submitted, however, that because the court recognized the sole justification for the rule as existing in the policy of encouraging free and open communication in the marriage, it inadvertently may have suggested an affirmative answer to this question. This note examines two additional modern justifications for the common-law rule—maintaining peace between the marriage partners and avoiding the moral repugnance of forcing one spouse to condemn a life-long partner—both of which support a rule that makes adverse spousal testimony noncompellable.

At the outset it is important to distinguish between three separate common-law exclusionary doctrines: the privilege against adverse marital testimony in general; the disqualification of one spouse to testify on the other's behalf; and the privilege for confidential communications between husband

17. The court in one sentence surveyed the historic origins of the privilege. Id. This sentence, however, describes the genesis of an entirely distinct rule of common law, the disqualification of favorable spousal testimony. See text accompanying notes 29-31 infra.

18. 302 N.C. at 595, 276 S.E.2d at 453. The notion that open communication might be impaired if spouses were subject to the risk of betrayal is similar in rationale to the privileges for communications between attorney and client, doctor and patient, and clergyman and penitent. Trammel v. United States, 445 U.S. 40, 51 (1980). See Guy v. Avery County Bank, 206 N.C. 322, 173 S.E. 600 (1934) (attorney); Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 139 S.E. 228 (1927) (physician).

19. 302 N.C. at 595, 276 S.E.2d at 453.

20. The court stated that in determining whether a particular segment of testimony includes a "confidential communication" within the meaning of the rule adopted in this case, deference should be given to its previous decisions interpreting the term under N.C. Gen. Stat. § 8-56 (1981), the statute preserving a privilege in civil actions not to testify about "confidential communications" with one's spouse. Id. at 597-98, 276 S.E. 2d at 454. These cases hold that the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence and loyalty engendered by such relationship. Hence, a communication made in the known presence of a third person or a communication relating to business matters which by their nature might be expected to be divulged are not protected. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967); 1 D. Stansbury, North Carolina Evidence § 60, at 192 (H. Brandis rev. 1973). Interestingly, the rule laid down by the court—that confidential communications between husband and wife are privileged in criminal actions—is already codified at N.C. Gen. Stat. § 8-57 (1981): "[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

21. Since Mrs. Freeman had volunteered her testimony, the court did not have to address the issue of compellability. See State v. Byrd, 21 N.C. App. 734, 736, 205 S.E.2d 326, 328 (1974), for the proposition that the privilege embodies distinct issues of competency and compellability.

and wife. Judicial confusion of these doctrines has been frequent,[22] and the *Freeman* court commingled all three.

The origins of the common-law privilege against adverse marital testimony in general are couched in obscurity.[23] The privilege appeared as early as 1580 in the case of *Bent v. Allot*[24] in which a husband was allowed to suppress the testimony of his wife when she was called as a witness for his opponent. While the original justification for the privilege is uncertain, Professor Wigmore suggests that the court of chancery may have drawn upon analogies to the Roman civil and the ecclesiastical law, which disqualified spouses, dependents, parents and servants.[25] This analogy fails, however, to explain why the common-law judges privileged only spousal testimony while permitting that of all other members of the defendant's household.[26] Professor Wigmore concludes that perhaps the true explanation of the rule's origin lies in a "natural and strong repugnance" toward condemning a man by admitting to the witness stand one who lived under his roof, shared the secrets of his domestic life and depended on him for sustenance.[27] This would tend to explain why nearly all the recorded instances of the privilege deal with the dependent wife's testimony against her husband and not vice versa.[28]

The disqualification of favorable spousal testimony first appeared as an established principle around 1628 when the English courts generally recognized any "interest" as a ground for disqualification.[29] The conclusion that the privilege arose before the disqualification is evident from the observation by the court in *Bent v. Allot* that the defendant would have been permitted to call his wife to testify on his behalf.[30] The disqualification branch of the rule was premised on two canons of medieval jurisprudence: first, the accused himself was prevented from testifying because of his interest in the outcome; and second, testimony from the wife was the legal equivalent of testimony from the husband, because husband and wife were considered a single legal

22. Note, Evidence—Privileged Communications Between Husband and Wife, 15 N.C.L. Rev. 282, 283 (1937).

23. 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

24. 21 Eng. Rep. 50 (Ch. 1580). The privilege was engraved firmly into the common law in the early part of the seventeenth centry when Lord Coke pronounced: "Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband . . . . and it might be a cause of implacable discord and dissertation between the husband and wife . . . ." 1 E. Coke, A Commentarie upon Littleton § 6b (1628). The first recorded common-law exception to this rule came only three years later in Lord Audley's Trial, 123 Eng. Rep. 1040 (1631), in which the judges resolved that the wife could be a witness against her husband for rape upon her. This common-law exception is codified at N.C. Gen. Stat. § 8-57 (1981), reproduced at note 4 supra.

25. 2 J. Wigmore, Evidence § 600 (3d ed. 1940); 8 id. § 2227 (McNaughton rev. 1961).

26. See State v. Parish, 104 N.C. 679, 10 S.E. 457 (1889) (daughter against father); 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

27. 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

28. Id.

29. 2 J. Wigmore, Evidence § 600 (3d ed. 1940). Lord Coke's pronouncement in 1628 (see note 24 supra) is the first recorded utterance of the disqualification of favorable spousal testimony. Lord Coke's coupling of the privilege and the disqualification in the same sentence may have contributed to the confusion of the two doctrines. Reference to the disqualification first appeared in North Carolina in the case of Beatty's Heirs v. [*sic*], 1 N.C. (Tay.) 104 (1799).

30. 21 Eng. Rep. at 50.

entity.[31]

The privilege for communications between husband and wife did not appear until the middle of the nineteenth century.[32] This privilege was unnecessary until the statutory modification of the rules concerning marital disqualification and privilege against adverse testimony, and this modification explains its delayed recognition.[33] The motivation for the privilege was to instill confidence between marital partners[34] by encouraging open communications.

The court in *Freeman* was confronted with only the first of these doctrines, the privilege against adverse marital testimony. In its analysis of the reasons for the privilege, however, it introduced aspects of all three rules and, not surprisingly, mingled the relevant issues. The court adopted as the historical origin of the privilege against adverse testimony the original justification for the disqualification of favorable testimony—the disqualification of the spouse based upon the defendant's interest in the outcome coupled with the marital unity concept of medieval law.[35] After summarily dismissing this justification as anachronistic, the court turned to the modern reason for the rule: to encourage interspousal communication[36]—the very motivation for the separate privilege for confidential communications[37]—and concluded that this

31. 2 J. Wigmore, Evidence § 601 (3d ed. 1940). The disqualification in criminal actions was abolished by N.C. Gen. Stat. § 8-57 (1981), which reads in pertinent part, "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant . . . ." Disqualification was the rule in federal courts until it was abolished in Frank v. United States, 290 U.S. 371 (1933).

32. See, e.g., State v. Jolly, 20 N.C. (3 & 4 Dev. & Bat.) 108 (1838); Hester v. Hester, 15 N.C. (4 Dev.) 228 (1833).

33. Note, supra note 22, at 283 n.2.

34. State v. Jolly, 20 N.C. (3 & 4 Dev. & Bat.) 108 (1838). Professor Wigmore argues that the policy that should lie at the foundation of every rule of privileged communications (i.e., attorney-client, doctor-patient, priest-penitent, husband-wife) can be broken down into four requirements: (1) the communications originate in confidence; (2) the confidence is essential to the relationship; (3) the relation is a proper object of encouragement by the state; and (4) the injury that would result by its disclosure is probably greater than the resulting benefit to the fact-finding process. 8 J. Wigmore, Evidence § 2332 (McNaughton rev. 1961). He suggests that the fourth condition is the only one subject to debate. Id.

The privilege for confidential marital communications is codified at N.C. Gen. Stat. § 8-57 (1981). See note 20 supra.

35. 302 N.C. at 594, 276 S.E.2d at 452. The North Carolina court is not alone in confusing the origins of these two separate, exclusionary rules. The United States Supreme Court in Trammel v. United States, 445 U.S. 40 (1980), made a similar mistake. The *Trammel* court did, however, recognize that it was dealing with two distinct rules, one a privilege vested in the defendant-spouse and the other an outright disqualification for incompetent testimony. The North Carolina court erroneously refers to both as rules of disqualification. See 302 N.C. at 594-95, 276 S.E.2d at 452.

36. 302 N.C. at 595, 276 S.E.2d at 452-53.

37. Why the court confused the justifications for these two privileges is a mystery. The supreme court clearly distinguished between the two in State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968). Professor Wigmore treats the two as separate privileges, each having an entirely distinct justification. 8 J. Wigmore, Evidence § 2334 (McNaughton rev. 1961). Likewise, the Supreme Court in *Trammel v. United States*, which ostensibly was relied upon heavily in *Freeman*, expressly stated that its decision did not affect the "independent rule protecting confidential marital communications." 445 U.S. at 51. What is clear is that by citing the confidentiality justification as supporting the privilege against adverse marital testimony in general, the court avoided any independent analysis of the reasons for retaining the latter privilege.

purpose could be served by the narrower rule, which recognized only a privilege arising out of marital communications. This was not a very startling conclusion, given the assumed justification for the privilege. Had the court focused its inquiry on other accepted justifications for the privilege against adverse marital testimony, however, it might have reached a different result.

Since the genesis of the privilege against adverse marital testimony in the sixteenth century, two theories in favor of retaining the common-law rule frequently have been advanced by judges and commentators. The first and most often employed of the modern justifications for the privilege is the preservation of peace and harmony in the marriage relationship.[38] It is thought that condemning one's spouse might cause some discord between marriage partners.[39] The peace-and-harmony argument was given considerable attention by the United States Supreme Court in *Hawkins v. United States*[40] and more recently in *Trammel v. United States*.[41]

In *Hawkins* defendant was convicted and sentenced to five years' imprisonment by a United States district court for violating the Mann Act[42] by transporting a girl across state lines for immoral purposes. Over defendant's objection, the district court permitted the government to use his wife as a witness against him. In reversing the conviction the court deferred to the public policy of promoting marital harmony:

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. . . . The wide-spread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in a criminal proceeding would, we think, be likely to destroy almost any marriage.[43]

The rule laid down in *Hawkins* was later modified in *Trammel* when the Court held that the government could use defendant's spouse as a witness, but only if the testifying spouse consented. Thus, the spouse's testimony is compe-

38. The first recorded statement of this policy reason probably was Coke's pronouncement in note 24 supra. For other early statements of the justification, see Barker v. Dixie, 95 Eng. Rep. 171 (1736); F. Buller, Introduction to the Law Relative to Trials at Nisi Prius (1767), at 286(a) (7th ed. R. Bridgman 1817) (1st ed. Dublin 1768).

39. Preservation of peace and harmony in the marriage, together with the marital identity concept, was also the rationale behind the common-law rule prohibiting one spouse from suing the other in tort. Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923). In 1951 the legislature provided that husband and wife could sue each other in all tort actions. Note, Survey of Statutory Changes: Torts Between Husband and Wife, 29 N.C.L. Rev. 395 (1951). That legislative change is now codified at N.C. Gen. Stat. § 52-5 (1976).

40. 358 U.S. 74 (1958).

41. 445 U.S. 40 (1980).

42. 18 U.S.C. § 2421 (1970).

43. 358 U.S. at 77-78.

tent, but not compellable.[44] In so holding, however, the Court did not suggest that the preservation of marital harmony was no longer a viable justification for the privilege. On the contrary, in vesting the privilege in the testifying spouse, the Court reaffirmed its policy of furthering the "important public interest in marital harmony."[45] The Court overruled *Hawkins* only because it felt that when one spouse chooses to testify against the other there is little, if any, marital harmony to protect.[46]

The other argument supporting the privilege for adverse spousal testimony approaches the issue as a simple value judgment: because the marital relationship is based upon a deep and enduring trust between husband and wife unequalled in any other human bond, the gains to society in nurturing that trust and in avoiding the torment inherent in compelling a betrayal of that trust outweigh the burdens placed upon the fact-finding process.

One application of this principle is stated by Professor Wigmore as a "natural repugnance" in all fair-minded persons toward compelling a wife or husband to be "the means of the other's condemnation," and toward compelling the defendant to suffer "the humiliation of being condemned by the words of his intimate life partner."[47] Other commentators have emphasized the torment of the testifying spouse.[48] The argument is that the testifying spouse is presented with a painful moral dilemma—a choice between remaining loyal through perjury or betraying the marital trust by telling the truth.

Whether to ensure the emotional stability of the testifying spouse or that

---

44. This is currently the rule in all federal criminal proceedings. See Labbe v. Berman, 621 F.2d 26 (1st Cir. 1980).

45. 445 U.S. at 53.

46. Id. at 52. The Court cited two contemporary reports as support for its view that marital harmony deserves less protection when the spouse volunteers testimony. In 1965, California terminated the privilege in the defendant-spouse, but vested it in the witness-spouse, accepting a study commission recommendation that the "latter [was] more likely than the former to determine whether or not to claim the privilege on the basis of the probable effect on the marital relationship." Id. at 49-50 n.10 (citing Cal. Evid. Code Ann. § § 970-973 (West 1966) and 1 California Law Revision Comm'n, Recommendation and Study Relating to the Marital "For or Against" Testimonial Privilege, at F-5 (1956)).

In 1972 a study group in England proposed vesting the privilege in the testifying spouse alone, on the ground that "if [the wife] is willing to give evidence . . . the law would be showing excessive concern for the preservation of marital harmony if it were to say she must not do so." 445 U.S. at 50 n.10 (citing (British) Criminal Law Rev., Eleventh Report Evidence (General) (1972) at 93.)

Professor Wigmore would take the argument even further, postulating that it is absurd to assume that a normal, harmonious marriage is endangered solely by the obligation to testify unfavorably. He continues, "[It is] a curious piece of policy by which the wrongdoer's own interests are consulted in determining whether justice shall have its course against him." 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961).

47. 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961). Because Professor Wigmore finds the marital harmony argument unpersuasive, this value judgment is for him the sole strength of the opposition to abolishing the privilege. For other statements of the natural repugnance to condemning a man by the words of his spouse, see Mills v. United States, 1 Pin. 73 (Wis. 1839) ("indelible disgrace . . . and he may be the subject of the deepest mortification which a sensitive being can endure."); Knowles v. People, 15 Mich. 408 (1867) ("out of respect for the better feelings of humanity").

48. See 2 Abbott, The Trial of Henry Ward Beecher [Tilton v. Beecher, City of Brooklyn, N.Y.] (1875), cited in 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961).

of the defendant, the argument is in essence that society's interest in ascertaining the truth does not outweigh the suffering inflicted upon the spouse. Professor Wigmore, after acknowledging that there is indeed a natural repugnance to condemning a man by the testimony of his intimate life-partner, concludes that the balance comes out in favor of admitting the testimony. He views the argument as nothing more than idle sentiment.[49] When a man has been accused of committing a crime, it is the "solemn business" of the law to find out whether he is guilty, and in this inquiry there is no room for sentiment.[50]

Jeremy Bentham, when presented with the dilemma of the suffering testifying spouse, took an even more dispassionate view when he proposed that inflicting such punishment upon the spouse should act as a deterrent to the prospective criminal.[51] According to Bentham, not only is the torment of the spouse an insufficient reason to impede our search for truth, it is also a potentially effective method of crime prevention.[52]

The positions taken by these two legal scholars may indeed reflect a proper value judgment—perhaps the emotional distress to either spouse is so insignificant that it is not worth protecting. On the other hand, if we assume that there is *some* psychic trauma that can be prevented by a rule excluding adverse spousal testimony, it may be that Wigmore, Bentham and others who disparage the moral reprehensibility justification place too great an emphasis on society's need to discover the truth and not enough on other equally valid objectives of a system of justice. Privilege always excludes some testimony that could aid in discovering the truth.[53] If courts could coerce confessions in violation of the fifth amendment, no doubt more guilty defendants would be convicted, yet our system of justice does not tolerate such inhumane violations of the human personality.[54] Truth-at-all-costs never has been the rule. The administration of justice was created for society, not society for the administration of justice.[55] If it is accepted that the trust reposed in the marriage relationship is unequalled elsewhere, reasonable persons may determine that our morals do not tolerate adverse marital testimony. Betrayal of this trust indeed may be naturally repugnant and morally reprehensible.[56] Dismissing

49. 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961).

50. Id.

51. 5 J. Bentham, Rationale of Judicial Evidence 344 (London 1827). Bentham contends that the privilege turns a man's home into a "den of thieves." Id. at 340.

52. Bentham's position is difficult to take seriously. Two of the argument's more obvious defects are its obliviousness to the difficult position of the witness-spouse and the rule's almost certainly negligible effect as a deterrent.

53. See Note, Evidence: Federal Courts: Adverse Testimony by Spouse of Accused in a Criminal Prosecution, 24 Calif. L. Rev. 472, 474 (1936), which suggests that the basis of criticism of the privilege is that the accused is thought to be guilty, while the presumption of law is that he is innocent. The damage to marital harmony and suffering of a man wrongfully accused and properly acquitted also must be considered.

54. See Miranda v. Arizona, 384 U.S. 436 (1966); Spano v. New York, 360 U.S. 315 (1959).

55. 2 Abbott, supra note 48, at 49-50.

56. For a defense of the privilege on moral grounds, see Note, The Search for "Reason and Experience" Under the *Funk* Doctrine, 17 U. Chi. L. Rev. 525 (1950).

this moral judgment as mere "sentiment" which must defer to the "solemn business" of ascertaining the truth misses the point.

Given that there is some public good to be gained, the question must be whether the moral reprehensibility of one spouse's condemnation of the other is sufficiently strong to overcome the burdens placed upon the fact-finding process.[57] The balance may not necessarily favor retention of the privilege. In the first place, if any public good is to be gained by allowing the privilege, it must be assumed that a husband and wife actually would be placed in a difficult moral dilemma when forced to testify about nonconfidential matters. Second, it is not necessarily true that the trust reposed in the marital bond is greater than that found in other close societal and familial relationships which enjoy no similar privilege.[58]

The strength of both the value-based moral reprehensibility argument and the marital harmony argument depends to some extent on whether or not the testifying spouse is compelled to testify. From the testifying spouse's viewpoint, the moral dilemma, real or not, is avoided by a rule that makes testimony competent, but not compellable, as in the federal rule after *Trammel.* If a spouse wishes to avoid the torment of betrayal under that rule, the alternative simply is to decline the invitation to testify.[59] Similarly, the state's interest in promoting marital harmony may be stronger in cases where a spouse refuses to testify. If the view of the Supreme Court in *Trammel* is accepted,[60] there is more harmony to protect when one spouse elects not to condemn the other.[61]

The *Freeman* decision has cast considerable doubt on the issue of the compellability of adverse marital testimony in North Carolina. If the court remains committed solely to the confidential communications justification for

57. See Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) and United States v. Nixon, 418 U.S. 683 (1974) for the proposition that because exclusionary rules and privileges contravene the fundamental principle that the public has a right to all evidence, they are permitted only in the limited circumstances of a transcendent public good.

58. See Anonymous, 123 Eng. Rep. 656 (1613) (son bound to testify against father, but wife is not).

59. The decision not to testify may not be so simple in cases like *Trammel*, where the wife is offered immunity in exchange for her testimony. This suggests that the Supreme Court's conclusion that Trammel's marriage probably was beyond repair may have been incorrect. It is possible that a reasonably happily married spouse would choose to testify rather than face an extended prison term.

60. See note 46 and accompanying text supra.

61. On the other hand, a rule making adverse spousal testimony competent but not compellable will not serve to lessen the humiliation of the defendant-spouse. In fact, assuming there is any humiliation at all, a defendant-spouse arguably would be more embarrassed when his partner chooses to testify than if the spouse were forced to do so.

Similarly, if any peace and harmony remain in the marriage of a cooperative spousal witness, it may be promoted more effectively by a rule that prohibits even noncompelled testimony. As the Court in *Hawkins* suggested, it seems probable that much more bitterness would be engendered by voluntary condemnation than by compelled testimony. 358 U.S. at 77. The Supreme Court in *Trammel* takes a contrary position. In a case where both spouses are potential defendants, the state is unlikely to offer one of them immunity and lenient treatment if it knows that the other can prevent the adverse testimony. Thus, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other. This situation, the Court argues, hardly seems conducive to preservation of marital harmony. 445 U.S. at 52-53.

the privilege, it would follow that a spouse's testimony about nonconfidential matters should be compellable as well as competent. The view that noncommunicative adverse spousal testimony may be compellable derives from the court's reasoning that the only modern justification for the privilege is to encourage open communication between marriage partners. The underlying rationale of the justification is that spouses will be less likely to confide in one another if they know that the confidant may someday reveal the substance of the conversation in court. Thus, in order to foster the policy, the privileged testimony must concern some communication between spouses. If the substance of the testimony is not a confidential communiction (e.g., an eyewitness account of a murder), then it makes little difference whether that testimony is compelled or not. Free communication will not be inhibited at all by the fear that one's spouse may someday be forced to testify about a noncommunicative observation.[62] Nor will it be encouraged by the knowledge that one's spouse cannot be required to testify to such an observation. Thus, on the facts of the *Freeman* case and in any other situation where the testimony at issue does not involve interspousal communications, an extension of the court's reasoning would permit the spouse's testimony to be compelled.

The *Freeman* court was driven to reach its conclusion mainly because of its failure to recognize the distinct policy reasons behind the general privilege preventing all spousal testimony and the privilege preventing testimony about confidential matters. In a future case that raises the compulsion issue, the court should address and evaluate the competing policy interests behind the general privilege and decide which are more legitimate. It may then decide to align itself with the *Trammel* decision.[63] However, because the court apparently was cognizant of the new federal rule and of the rule's status in nearly every other jurisdiction,[64] it might be assumed that the members of the court were aware of the policy reasons supporting retention of the privilege in the testifying spouse and simply were not persuaded by them. But the fact that the court did not address either of two longstanding justifications for the rule suggests that such an assumption may not be warranted.

Promoting marital harmony and preventing the testifying spouse's moral dilemma are legitimate goals of our judicial system. The court should recognize their validity as justifications for the privilege against adverse spousal testimony in criminal actions and, when the occasion arises, judiciously weigh their importance against society's interest in ascertaining truth. If the court

62. One's freedom to commit incriminating acts in the presence of one's spouse arguably will be inhibited by a rule that permits the state to compel testimony about those acts. It seems doubtful, however, that the state should have an interest in protecting such behavior. Unlike the protection of confidential discourse, which encourages trust between husband and wife, the protection of unlawful acts made in the presence of one's spouse appears to foster no legitimate state purpose.

63. Other jurisdictions are divided on the privilege. Seven states provide that spouses are completely incompetent to testify against each other in a criminal proceeding. Sixteen states provide a privilege against adverse spousal testimony and vest the privilege in both spouses or in the defendant-spouse alone. Nine states plus the District of Columbia vest a privilege in the witness-spouse alone. The remaining seventeen states have abolished the privilege altogether. For statutory citations, see Trammel v. United States, 445 U.S. 40, 48 n.9.

64. See 302 N.C. at 596 n.1, 276 S.E.2d at 453 n.1.

perceives the potential harm to the marriage and testifying spouse as particularly significant when the spouse is forced to testify, it should conclude that society is better served by a rule that makes adverse spousal testimony competent but not compellable.

JAMES P. NEHF

Landlord-Tenant—*Spinks v. Taylor* and G.S. 42-26: Abolition of Self-Help Evictions in North Carolina

The issue of a landlord's right to use self-help for evicting residential tenants was addressed during the summer of 1981 by both the North Carolina Supreme Court and the North Carolina General Assembly. The supreme court, in *Spinks v. Taylor*,[1] ruled that the existence of North Carolina's summary ejectment procedures[2] did not preclude a landlord's use of peaceful self-help measures in evicting tenants who are in default of rental payments. Ten days later, the General Assembly enacted "An Act to Clarify Landlord Eviction Remedies in Residential Tenancies."[3] This legislative action bars all use of landlord self-help, including peaceful measures. Thus, currently a landlord's only available eviction remedy against residential tenants is through the courts.[4]

The law of landlord self-help has had a long and confusing history although it has been subject to increasing clarification in recent years.[5] As with most property matters, the legal heritage of landlord-tenant relations is English, medieval and agrarian.[6] At early common law, a landlord (or any person entitled to possession of land) could forcibly evict a tenant not legally entitled to possession.[7] Subsequently, in 1381, Parliament made forcible dispossession

---

1. 303 N.C. 256, 278 S.E.2d 501 (1981). The case involved two separate actions brought on behalf of two separate tenants. The actions were consolidated by order of the District Court of Guilford County. Brief for Appellee at 1-2, *Spinks*. Only the Spinks action, based on a verified complaint, survived the supreme court's review of the trial court's grant of summary judgment on behalf of the defendant. 303 N.C. at 264, 278 S.E.2d at 504-05.

2. N.C. Gen. Stat. § 42-26 (1976). See notes 6-33 and accompanying text infra.

3. Law of June 12, 1981, ch. 566, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. §§ 42-25.1 to -25.4, 44A-2). See notes 39-47 and accompanying text infra.

4. "It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 of this Chapter [summary ejectment proceedings]." Id. at § 1 (to be codified at N.C. Gen. Stat. § 42-25.1). Section 1 of the Act also prohibits distress and distraint (seizure of personal property for rent past due). Id. (to be codified at N.C. Gen. Stat. § 42-25.2).

5. Appellate and statutory clarifications appear to result from the availability of legal services to the poor. One commentator noted in 1969 that little modern litigation on this issue existed at the appellate level. Because prosecuting an appeal is expensive, the impoverished evicted tenant could not afford to initiate legal action. On the other hand, tenants who located a new residence probably did not deem it worth the trouble to proceed with any legal remedy. This commentator, however, predicted that with the advent of the legal services program, such appellate sterility would be unlikely to continue. Note, Self-Help Eviction: Proposals for the Reform of Eviction Procedures in New Jersey, 1 Rut.-Cam. L.J. 314, 328 n.58 (1969). The *Spinks* case was initiated by Legal Services of Southern Piedmont, Inc.; the General Assembly's statutory response to the decision was also at the behest of legal services. Interview with State Senator Joseph Johnson, conducted by Martin L. Holton, III, in Raleigh, N.C., Oct. 1, 1981.

6. Most existing landlord-tenant law developed from a legal basis created when society was rural and agrarian. For an excellent discussion of how social changes in England and the United States since the eighteenth century have made the presumptions of agrarian landlord-tenant law inappropriate, see Model Residential Landlord-Tenant Code 5-10, General Introduction (American Bar Found. Tent. Draft 1969).

7. 1 F. Harper & F. James, The Law of Torts § 3.15 (1956).

a criminal offense.[8] Currently, almost all jurisdictions in the United States,[9] including North Carolina,[10] continue to adhere to the policy of designating forcible entry as a criminal offense.

A landlord's potential criminal liability for forcible entry generally does not provide a civil remedy for the tenant.[11] A minority of American jurisdictions hold that a landlord may use reasonable force to evict a wrongful tenant without incurring civil liability.[12] A sizeable number of states deem judicial proceedings in summary ejectment to be the landlord's sole remedy; self-help, either forcible or peaceful, renders available to the tenant a civil remedy.[13] Courts in a majority of jursidictions,[14] however, hold that a landlord may resort to self-help measures without civil liability provided the means employed are peaceful.[15]

---

8. 5 Rich. 2, 1 stat., ch. 8 (1381). The rationale for Parliamentary action appears to be preservation of the peace and not protection of either landlord or tenant rights. Jordan v. Talbot, 55 Cal. 2d 597, 603 n.2, 361 P.2d 20, 23 n.2, 12 Cal. Rptr. 488, 491 n.2 (1961).

9. Comment, Defects in the Current Forcible Entry and Detainer Laws of the United States and England, 25 U.C.L.A. L. Rev. 1067, 1076 n.44 (1978).

10. No one shall make entry into any lands and tenements, or term for years, but in cases where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor.

N.C. Gen. Stat. § 14-126 (1981). This language is essentially identical to the 1381 English statute.

11. Several isolated cases awarded the tenant damages for a landlord's use of force, see, e.g., Newton v. Harland, 133 Eng. Rep. 490 (1840); Hillary v. Gay, 172 Eng. Rep. 1243 (1833); but the law of England until 1965 held no civil cause of action maintainable. See, e.g., Hemmings v. Stoke Poges Golf Club, Ltd., [1920] 1 K.B. 720 (expressly overruling *Newton*); Pollen v. Brewer, 141 Eng. Rep. 860 (1859); Turner v. Maymott, 130 Eng. Rep. 64 (1823); Taunton v. Costar, 101 Eng. Rep. 1060 (1797). The *Hemmings* court reasoned that a criminal prohibition against a forcible entry hardly justifies making a civil award to a wrongdoer whose wrongdoing provoked the entry. Moreover, if a landlord cannot forcibly effect an eviction without being liable in damages to the wrongful tenant, it must follow that the law confers a civil right of occupancy on the tenant "the length of which is determined only by the law's delay." [1920] 1 K.B. at 737. See generally Barnett, When the Landlord Resorts to Self-Help: A Plea for Clarification of the Law in Florida, 19 U. Fla. L. Rev. 238, 278-79 (1966).

The Rent Act, 1965, ch. 75, pt. III, however, makes landlord self-help in any form a criminal offense. A landlord with a right of possession must instead obtain a court order and await restoration of the premises by the bailiff. Note, supra note 5, at 317-18.

12. See, e.g., Howe v. Firth, 43 Colo. 75, 95 P. 603 (1908); Gower v. Waters, 125 Me. 223, 132 A. 550 (1926); Stone v. Lahey, 133 Mass. 426 (1882); Paddock v. Clay, 138 Mont. 541, 357 P.2d 1 (1960); Whitney v. Sweet, 22 N.H. 10 (1850); Virginia Iron, Coal & Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 543 (1925); cf. Vissenberg v. Bresnahen, 65 Wyo. 367, 202 P.2d 663 (1949) (standard of landlord responsibility in connection with tenant's goods remaining on premises is reasonable conduct under the circumstances).

13. Prior to 1981, as a result of Mosseller v. Deaver, 106 N.C. 494, 11 S.E. 529 (1890), North Carolina was identified by one commentator as belonging to this group of states. Annot., 6 A.L.R.3d 177, 186-87 (1966). For the *Mosseller* facts, see text accompanying notes 27-29 infra.

For other states in this group, see, e.g., Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961); Malcolm v. Little, 295 A.2d 711 (Del. 1972); Mendes v. Johnson, 389 A.2d 781 (D.C. Ct. App. 1978); Weber v. McMillan, 285 So. 2d 349 (La. App. 1973); Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978); Polley v. Shoemaker, 201 Neb. 91, 266 N.W.2d 222 (1978); Edwards v. C.N. Inv. Co., 27 Ohio Misc. 57, 272 N.E.2d 652 (Shaker Heights Mun. Ct. 1971); Fla. Stat. Ann. § 83.59(3) (West 1976).

14. See generally 2 Restatement (Second) of Property, § 14.2 reporter's note 1 (1977). Other commentators, also relying on *Mosseller*, placed North Carolina within this group of jursidictions. See Boyer & Grable, Reform of Landlord-Tenant Statutes to Eliminate Self-Help in Evicting Tenants, 22 U. Miami L. Rev. 800, 801 n.4 (1968). But see Annot., supra note 13.

15. See, e.g., Krasner v. Gurley, 252 Ala. 235, 40 So. 2d 328 (1949); Mason v. Hawkes, 52

In *Spinks v. Taylor* the North Carolina Supreme Court addressed the legality of peaceful self-help in North Carolina. In *Spinks* the landlord padlocked plaintiff's apartment because of her failure to pay rent.[16] Since resort to judicial process was severely limited,[17] padlocking was the standard operating procedure for dealing with tenants in arrears on their rent. Up until Spinks' suit, the procedure had proven successful,[18] with beneficial results for

---

Conn. 12 (1884); Perry v. Evanston YMCA, 92 Ill. App. 3d 820, 416 N.E.2d 340 (1981); Calef v. Jesswein, 176 N.E. 632 (Ind. App. 1931); Whitney v. Brown, 75 Kan. 678, 90 P. 277 (1907); Stoll Oil Ref. Co. v. Pierce, 337 S.W.2d 263 (Ky. 1960); Pine Hill Assocs. v. Malveaux, 93 Misc. 2d 63, 403 N.Y.S.2d 398 (App. Term 1978); Simhiser v. Farber, 270 Wis. 420, 71 N.W.2d 412 (1955).

In jurisdictions that permit a landlord to resort to peaceful self-help without incurring civil liability, difficulty arises in defining which acts constitute force and which are merely "peaceful." In arriving at a definition for civil causes of action, courts may refer to the meaning of force as interpreted in relation to the criminal forcible entry and detainer statutes. See generally Note, Landlord-Tenant Law: Abolition of Self-Help in Minnesota, 63 Minn. L. Rev. 723, 727 n.26 (1979). Defendants in *Spinks* took this tack in proclaiming padlocking to be peaceful in reliance on State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904), in which the landlord's lockout of tenant did not subject him to criminal liability under N.C. Gen. Stat. § 14-126. See Brief for Appellee at 26-27, *Spinks*.

Actions short of actual violence may be deemed forcible. See, e.g., Karp v. Margolis, 159 Cal. App. 2d 69, 323 P.2d 557 (1958) (entry with help of locksmith; commercial tenants); McNeil v. Higgins, 86 Cal. App. 2d 723, 195 P.2d 470 (1948) (entry through an open window in tenant's absence); Adelhelm v. Dougherty, 129 Fla. 680, 176 So. 775 (1937) (procurement of keys and entry by landlord in tenant's absence); Walls v. Endel, 17 Fla. 478 (1880) (duress by frequent visits to emphasize hopelessness of tenant's situation); Ardell v. Milner, 166 So. 2d 714 (Fla. Dist. Ct. App. 1964) (changing locks); Schwartz v. McQuaid, 214 Ill. 357, 73 N.E. 582 (1905) (removing obstruction over opening in building); Pelavin v. Misner, 241 Mich. 209, 217 N.W. 36 (1928) (false pretenses; threat of force); Crossen v. Campbell, 102 Or. 666, 202 P. 745 (1921) (threats of force); Buchanan v. Crites, 106 Utah 428, 150 P.2d 100 (1944) (entrance with passkey and removal of door after entry); Simhiser v. Farber, 270 Wis. 420, 71 N.W.2d 412 (1955) (ruse or stratagem).

16. The lease entered into between the landlord and the plaintiff-tenant specifically provided for termination on default of rent and gave the landlord a right of reentry. Spinks v. Taylor, 303 N.C. at 258, 278 S.E.2d at 502. At common law a lease provision to this effect was essential and absent such an agreement, a tenancy was not terminated by the tenant's failure to pay rent. North Carolina has modified the common-law rule by conferring on the landlord the right to immediate possession whenever the tenant defaults in payment of rent subsequent to a ten-day demand. N.C. Gen. Stat. § 42-3 (1976).

17. In 1974, due to the burdensome number of summary eviction actions, personnel of the office of the clerk of superior court imposed a rule limiting the number of complaints in summary ejectment filed by any one landlord to ten per day and also limited the total number of complaints in summary ejectment that would be calendared on any given day to twenty-five. Affidavit of Ann Hackney, Deputy Clerk of Superior Court, Guilford County, Addendum to Record, at 2-4, *Spinks*.

By 1976, out of defendant's 825 apartments, approximately 400 units were in default seven days after rent was due. Because of the rule imposed in 1974, defendant was without adequate means to evict tenants defaulting during the month; he subsequently resorted to the padlocking procedure. Affidavit of John R. Taylor, Jr., Record at 45-46.

18. Empirical evidence from the period April 1977 to March 1978 revealed that the padlocking procedure accomplished the business purpose of prompting tenants to cure defaults. The average monthly number of defaults was 426 ($60,000-80,000 in rents). By padlocking day, the last Tuesday of the month, an average of 374 tenants had cured their delinquency, leaving 52 apartments to be padlocked. By the time the resident manager went to carry out the procedure, an average of six tenants had vacated. Of the remaining 46, an average of 36 paid their rent in full with an average of 9 more paying within 48 hours. This left an average of one tenant to be evicted.

In the pre-padlocking era, when summary ejectment procedures had been utilized, 600 tenants were evicted by the courts in 1974, and 650 in 1975. In contrast, during the interval when the padlocking procedure was used, 50 tenants were evicted in 1976, 75 in 1977, and 125 in 1978 (figures for the latter two years apparently include apartments acquired after 1976 as to which the self-help procedures were never used). Affidavit of John R. Taylor, Jr., Record at 49-50.

both the tenants and the landlord.[19]

In accordance with the landlord's procedure,[20] Spinks received warning that unless payment were made the apartment would be padlocked. Spinks failed to pay the rent, and her apartment was padlocked. Thereafter, Spinks filed a verified complaint alleging that the resident manager denied her access to the locked premises to retrieve certain items of clothing. Such refusal was in direct contradiction to the landlord's eviction procedure.[21] Plaintiff claimed damages for trespass to real and personal property, for breach of the covenant of quiet enjoyment, for conversion of personal property and for violation of the Unfair and Deceptive Trade Practices Act.[22] Both plaintiff-tenant and defendant-landlord stipulated plaintiff's failure to pay rent and moved for summary judgment. The trial court granted defendant's motion.[23]

The North Carolina Court of Appeals subsequently affirmed the trial court action and held that self-help is lawful when the means employed are peaceful.[24] The appeals court noted that self-help remedies are consistent with the modern policy of diverting conflicts away from the courts.[25] The appeals court relied heavily on the late nineteenth century case of *Mosseller v.*

---

19. Defendant-landlord alleged that because of the delays inherent in summary ejectment generally, coupled with those inherent in limitations imposed by the rules established in 1974 by court personnel, tenants ended up at least two months in arrears. These tenants were rarely, if ever, financially able to pay rent for two or more months. Defendant was also financially unable to risk allowing tenants two months behind to remain in possession upon a tenant's promise to pay promptly in the future. After initiation of self-help, however, tenants were more likely to make their accounts current. Less turnover resulted, and as defendant-landlord alleged, both he and the tenants appeared to appreciate the stability in the residential population. Id. at 51.

20. Defendant-landlord described the procedure established by his attorney and carried out by his resident managers as follows: Rent throughout the complex was due on the first of every month. Eight days later, the apartment manager issued notices to delinquent tenants—unless rent was received before the last Tuesday of the month, the apartment would be padlocked. On the day scheduled for padlocking, the apartment manager would go and knock loudly announcing the purpose of the visit. If the tenant paid the rent, or if the tenant protested, the manager ceased the padlocking procedure and informed the tenant that court proceedings would be initiated. If the tenant was absent, the manager first checked the apartment to insure no children or pets were present and then padlocked the door. Notice of padlocking was posted and the manager attempted to notify the tenant personally. If the tenant requested personal property, he was permitted to enter and remove it. Again, if at any time the tenant objected to the padlocking, the self-help procedure ceased and resort was to be made to the courts. 303 N.C. at 263, 278 S.E.2d at 505.

21. See id. at 263-64, 278 S.E.2d at 505-06.

22. The supreme court denied the applicability of the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 to -56 (1981). "We cannot say that defendant's padlocking procedures offend 'established public policy' or constitute a practice which is 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' " 303 N.C. at 265, 278 S.E.2d at 506.

23. 303 N.C. at 259-60, 278 S.E.2d at 503.

24. Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980), aff'd in part, rev'd in part, 303 N.C. 256, 278 S.E.2d 501 (1981).

25. In addition, the modern policy of diverting conflicts away from the courts supports lawful self-help remedies. This theory, utilizing arbitration, "citizen courts," . . . and other non-court methods of resolving disputes, recognizes that the courts cannot resolve every dispute between persons and the state. Proper and peaceful self-help remedies by landlords have a place in this scheme.

Id. at 76, 266 S.E.2d at 861.

The court went on to note that

[h]ere, plaintiffs do not deny that they were delinquent in their rent payments and that defendant was entitled to possession of the premises. They only insist defendant could

Deaver[26] in rendering its decision. In *Mosseller* the landlord entered the tenant's house while the tenant was present "under such circumstances as to constitute a forcible entry under the [forcible entry and detainer] statute."[27] The trial judge instructed the jury that the landlord "had the right to go there and put him out by force, if no more force was used than was necessary for that purpose."[28] The North Carolina Supreme Court held the instruction incorrect because public policy "required the owner to use peaceful means or resort to the courts in order to regain his possession."[29]

In *Spinks* the North Carolina Supreme Court approved the appeals court's determination of North Carolina law.[30] It refused, however, to permit any overreaching by the landlord, noting the contradiction between the proposed padlocking procedure and its actual implementation with respect to Spinks.[31] The court implicitly recognized and addressed the potential for violence by narrowly defining what constituted "peaceful" self-help measures. While a landlord was permitted to use peaceful means such as padlocking to reenter and take possession of leased premises subject to forfeiture, he could not do so against the tenant's will; an objection by the tenant elevated the landlord's reentry to a forcible one. At that time, the landlord's sole lawful recourse was formal judicial proceedings.[32] Based on this narrow holding the supreme court reversed the trial court's entry of summary judgment on behalf of defendant-landlord.[33]

The supreme court's narrow definition of peaceful self-help, which enhanced tenant security, followed the efforts of the General Assembly to improve the procedures by which residential tenants could protect their rights. In 1977 the legislature substantially changed North Carolina's residential landlord-tenant law by enacting two new articles in chapter 42 of the North Carolina General Statutes—article 5, Residential Rental Agreements,[34] and article 6, Tenant Security Deposit Act.[35] The more significant of these changes, arti-

---

not use peaceful self-help to regain possession of the premises and that he must resort to the courts for this purpose. Under the facts of this case, we reject plaintiff's argument.

Id.

26. 106 N.C. 494, 11 S.E. 529 (1890).

27. Id. at 495, 11 S.E. at 530.

28. Id.

29. Id.

30. "It seems clear to us, then, that this state recognizes the right of a lessor to enter peacefully and repossess leased premises which are subject to forfeiture due to nonpayment of rent." 303 N.C. at 262, 278 S.E.2d at 504.

31. Id. at 264, 278 S.E.2d at 506. The supreme court noted that plaintiff Spinks' allegation that she requested access to her apartment to retrieve clothing contradicted defendant's assertion that an ousted tenant requesting entrance to the apartment to obtain personal property would be allowed to enter. Id.

32. Id. at 263, 278 S.E.2d at 505.

33. Id. at 266, 278 S.E.2d at 506. "A refusal by the landlord to permit a tenant to enter the premises, for whatever purposes, would elevate the taking to a forceful taking and subject the landlord to damages." Id. at 254, 278 S.E.2d at 506.

34. Law of June 28, 1977, ch. 790, 1977 N.C. Sess. Laws, 1st Sess. 1006 (codified as amended at N.C. Gen. Stat. §§ 42-38 to -44 (Cum. Supp. 1981)).

35. Law of July 1, 1977, ch. 914, 1977 N.C. Sess. Laws, 1st Sess. 1237 (codified as amended at N.C. Gen. Stat. §§ 42-50 to -56 (Cum. Supp. 1981)).

cle 5, made it the legal duty of a residential landlord to provide a fit and habitable dwelling.[36] Subsequently, in 1979 the General Assembly declared that retaliatory eviction is an affirmative defense in summary ejectment actions because it is public policy "to protect tenants . . . who seek to exercise their rights to decent, safe, and sanitary housing."[37] In 1979 North Carolina legislators also created a new procedure for staying execution in summary ejectment actions.[38]

In 1981 the General Assembly enacted "An Act to Clarify Landlord Eviction Remedies in Residential Tenancies."[39] This Act abolished self-help evictions in residential tenancies and continues the evolutionary process toward greater tenant rights. The new law not only mandates judicial proceedings in every eviction situation, it also outlaws any lease or contract provision to the contrary as "void against public policy."[40] The North Carolina General Assembly expressly premised the new law on the public policy of maintaining the public peace.[41] Few things are more important to a person than his or her home; nothing short of a criminal act is more likely to provoke violence, anger and breaches of the peace than locking a person or family out of their home.[42]

The mandatory requirement that a landlord use a judicial proceeding for eviction of residential tenants also promotes the public policy of guaranteeing to all citizens a meaningful opportunity to defend themselves. The tenant receives notice and is ordinarily allowed to present his side at a hearing.[43]

---

36. N.C. Gen. Stat. § 42-42 (Cum. Supp. 1981).

37. Law of June 7, 1979, ch. 807, 1979 N.C. Sess. Laws, 1st Sess. 960 (codified at N.C. Gen. Stat. § 42-37.1(a) (Cum. Supp. 1981)).

38. Law of June 7, 1979, ch. 820, §§ 1-6, 1979 N.C. Sess. Laws, 1st Sess. 1032 (codified at N.C. Gen. Stat. § 42-34 (b)-(g) (Cum. Supp. 1981)).

39. Law of June 12, 1981, ch. 566, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. §§ 42-25.1 to -25.4, 44A-2). See notes 1-4 and accompanying text supra.

40. Id. § 1 (to be codified at N.C. Gen. Stat. § 42-25.3). When landlord self-help is outlawed by case law rather than by statute, this aspect is usually not directly addressed. Although assertable by implication, without direct prohibition of reentry clauses, problems can arise. For example, one Minnesota commentator noted that although the Minnesota Supreme Court implicitly invalidated reentry clauses

> reentry clauses may continue to be written into leases. If a tenant is unaware that a reentry clause included in his lease is un-enforceable, the clause may either deter him from challenging a self-help eviction by the landlord, or cause him to move if the landlord threatens a self-help eviction. Hence, to ensure that the effectiveness of the *Berg* rule [Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978)] is not diminished by any *in terrorem* effects of reentry clauses, the court or the legislature should specifically prohibit the inclusion of such clauses in leases.

Note, supra note 15, at 733.

41. Law of June 12, 1981, ch. 566, § 1, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. § 25.1).

42. Amicus Curiae Brief (State of North Carolina) at 10, *Spinks*. The Minnesota Supreme Court has also pointed out that "to approve [a] lockout . . . merely because in [the plaintiff's] absence no actual violence erupted when locks were being changed, would be to encourage all future tenants, in order to protect their possessions, to be vigilant and thereby set the stage for [every] kind of public disturbance." Berg v. Wiley, 264 N.W.2d 145, 150 (Minn. 1978).

43. One can question whether summary ejectment proceedings provide a meaningful opportunity for the tenant's presentation of a defense. Because the proceedings are summary, the range of issues litigated is limited. Legal title or ultimate right to possession will not be considered by the court. The landlord and tenant deal or compete on different levels. The landlord is generally a professional with knowledge of business and the resources to use the legal process for his own

An additional reason for requiring judicial process is that the need for housing, and any hardship resulting from its denial, are probably issues too vital to be adjusted outside the orderly process of law.

Although the 1981 Act seemingly continues the evolutionary process toward ensuring greater tenant rights, its effectiveness may be limited. This Act appears to be inapplicable when the residential tenant has already abandoned the premises.[44] Furthermore, the Act limits the tenant's recovery to actual damages and specifically excludes punitive damages, treble damages and damages for emotional distress.[45] In most instances of peaceful self-help, actual damages will be minimal. A tenant will probably view litigation as inappropriate because of the time and expense involved. The law's effectiveness is also undermined by its failure to provide any criminal sanctions against self-help.[46] Nonetheless the new law conceivably may lead to peaceful self-help action being deemed offensive to the state's forcible entry and detainer statute.

The 1981 Act is applicable only to residential tenancies.[47] Thus, the *Spinks* rule that peaceful self-help may be used continues as good law for commercial tenancies. In commercial situations, the potential for violence is less. Loss of one's home is more personally and psychologically threatening than loss of possession of commercial premises, and the need for immediate replacement of commercial space is less vital in terms of immediate survival needs. Moreover, in a business situation the parties are generally dealing at arms length; the potential for landlord overreaching is not as great.

In a practical sense, however, resort to the legal process in a commercial

---

purposes; the tenant is an amateur operating in a system that is alien if not hostile to him. The various summary ejectment statutes that provide a simple, inexpensive and expeditious procedure are pro-landlord statutes. See Haemmel, The North Carolina Small Claims Court—An Empirical Study, 9 Wake Forest L. Rev. 503, 508 (1973); Whitman, Defending the Low-Income Tenant in North Carolina, 2 N.C. Cent. L.J. 21 (1970).

44. See Martinez v. Steinbaum, — Colo. —, 623 P.2d 49 (1981); Bunel of New Orleans, Inc. v. Cigali, 348 So. 2d 993 (La. App.), cert. denied, 350 So. 2d 1210 (La. 1977); Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978).

At least one statutory scheme for the abolition of landlord self-help makes abandonment an express exception; in Florida, resort to judicial process is unnecessary

> [w]hen the tenant has abandoned the dwelling unit. In the absence of actual knowledge of abandonment, it shall be presumed that the tenant has abandoned the dwelling unit if he is absent from the premises for a period of time equal to one half the time for periodic rental payments. However, this presumption shall not apply if rent is current or tenant has notified the landlord of his intended absence.

Fla. Stat. Ann. § 83.59 (West 1976).

45. Law of June 12, 1981, ch. 566, § 1, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. § 42-25.4).

46. Subsequent to judicial abolition of landlord self-help, at least one state has expressly made use of self-help a criminal offense:

> A landlord, agent of the landlord or person acting under the landlord's direction or control who unlawfully and intentionally removes or excludes a tenant from lands or tenements or intentionally interrupts or causes the interruption of electricity, heat, gas, or water services to the tenant with the intent to unlawfully remove or exclude the tenant from lands or tenements is guilty of a misdemeanor.

Minn. Stat. Ann. § 504.25 (West Supp. 1981).

47. Law of June 12, 1981, ch. 566, § 1, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. § 42-25.1).

situation will probably always be the end result. The commercial tenant is more aware of his legal rights, and more likely to raise an objection to the self-help eviction. In accordance with the *Spinks* rule, any objection necessitates judicial action. However, since the *Spinks* decision did not expressly address the ability of the landlord and tenant to contract for self-help eviction even in the face of tenant objections, commercial landlords may still attempt to incorporate such contractual remedies in their lease agreements. However, tenants who lease premises for both commercial and residential purposes will probably be protected by the 1981 Act prohibiting self-help.[48]

Although the 1981 Act promotes tenants' rights, it imposes a substantial burden on the courts in terms of the volume of ejectment proceedings. In urban North Carolina areas, summary ejectment proceedings constitute the bulk of actions in small claims court.[49] Tactics by the local trial court in an effort to limit the number of actions per landlord apparently drove Spinks' landlord to establish a self-help procedure.[50]

When the statutory eviction remedy is limited or takes an unreasonable length of time, a landlord is unable to collect the rent due. Loss of profits and possible inability to meet the landlord's own credit obligations ensue. If unable to sustain a minimal level of profit, the landlord may be compelled either to withdraw housing units from the marketplace or to rent only to tenants certain not to fall delinquent.[51] These alternatives could have drastic effects on the availability of housing for poorer tenants—the very tenants sought to be protected by the statute.

Because of the limitations of the 1981 Act the State must now look for alternative solutions that will satisfy the judicial process requirement but will not over-burden the court system. The use of citizen and housing courts to divert landlord-tenant conflicts away from the formal legal system may be one such creative alternative.[52]

KATHLEEN PEPI SOUTHERN

48. Accord, Zankman v. Tireno Towers, 121 N.J. Super. 346, 297 A.2d 23 (1972) (tenant deemed to occupy his apartment solely as a resident within meaning of unlawful entry and distraint statute although he executed lease in his own name and also in name of his company and made some incidental use of apartment in his capacity as a salesman).

49. See Haemmel, supra note 43, at 505. For an excellent empirical examination of landlord-tenant justice in small claims courts, see J. Ruhnlea, Housing Justice in Small Claims Courts (1979).

50. See note 21 supra.

51. See Note, supra note 5, at 331.

52. See R. Scott, Specialized Courts: Housing Justice in the United States (1981).