Survey of Developments in North Carolina and the Fourth Circuit, 1993

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SURVEY OF DEVELOPMENTS IN NORTH CAROLINA AND THE FOURTH CIRCUIT, 1993

Making the Government Pay: The Application of the Equal Access to Justice Act in *EEOC v. Clay Printing Company*

In May 1990, the Equal Employment Opportunity Commission (EEOC) filed a complaint in the United States District Court for the Western District of North Carolina, charging Clay Printing Company, a family-owned business in Hickory, North Carolina, with twenty-three counts of age discrimination.[1] The EEOC alleged that Clay Printing officials had discharged five employees, and constructively discharged at least eighteen others, in violation of the Age Discrimination in Employment Act (ADEA).[2] In March 1993, the district court ordered that payment of $208,000 be made—not *by* Clay Printing, however, but *to* Clay Printing.[3] The district court found, and the appellate court later agreed, that the EEOC had not been "substantially justified"[4] in bringing the action against Clay Printing Company, and that under the Equal Access to Justice Act (EAJA)[5] the EEOC was therefore liable for Clay Printing's attorneys' fees and costs.[6]

This Note examines the basic terms and purposes of the EAJA;[7] how the EAJA had been construed by the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit prior to *Clay Printing*;[8] and whether the court of appeals in *Clay Printing* properly applied the EAJA in the context of the ADEA.[9] The Note concludes that the court correctly held that the EEOC is liable for attorneys' fees and costs under the EAJA when it brings ADEA actions that are not substantially justified.[10]

In July 1987, faced with a growing inventory and what they perceived to be an increasing number of listless employees, Clay Printing Company

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1. EEOC v. Clay Printing Co., 955 F.2d 936, 937 (4th Cir. 1992).
2. *Id.* The ADEA is codified at 29 U.S.C. §§ 621-34 (1988 & Supp. IV 1992).
3. EEOC v. Clay Printing Co., 13 F.3d 813, 814 (4th Cir. 1994). The opinion of the district court has not been published.
4. For a discussion of the requirement that the government be substantially justified in bringing or defending an action, see *infra* notes 57-74 and accompanying text.
5. 28 U.S.C. § 2412 (1988 & Supp. IV 1992).
6. *Clay Printing*, 13 F.3d at 814.
7. *See infra* notes 40-49 and accompanying text.
8. *See infra* notes 50-79 and accompanying text.
9. *See infra* notes 87-159 and accompanying text.
10. *See infra* notes 160-64 and accompanying text.

officials sought the advice of a management consultant, Ray L. Scott.[11] Scott proposed a number of changes, including reductions in personnel, the implementation of a compensation system based on commissions rather than salary, and a requirement that salespeople be made responsible for their own business expenses.[12] Many of Scott's recommendations were adopted by the company's directors; Scott himself soon became "an integral part of the management hierarchy at Clay."[13] During the course of subsequent management meetings, Scott remarked that "too many people have been here too long and make too much money," that there was not enough "young blood" in the company, and that "if employees had been there 10 years or more, they needed to move on."[14]

The five discharged claimants, on whose behalf the EEOC sought relief, ranged in age from forty to sixty years, and had a combined total of more than 100 years of working experience at Clay Printing.[15] In affidavits submitted to the district court, the five former employees testified that they believed they had been discharged because of their ages, though none claimed to have evidence to support that allegation.[16] Although none of the five had ever been reprimanded for poor performance, Clay Printing's directors alleged that the claimants had been discharged because they had made more money than the rest of the sales team, spent too much time in the break room, took too long to perform their assigned tasks, disclosed confidential information, lacked the necessary training, or had been caught sleeping on the job.[17]

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11. EEOC v. Clay Printing Co., 955 F.2d 936, 937 (4th Cir. 1992).

12. *Id.* at 937-38.

13. *Id.* at 938.

14. *Id.*

15. *Id.* at 938-39. The five discharged employees were replaced by persons ranging in age from 35 to 53 years old. *Id.* Three of the five replacements were 35 years old. *Id.* Clay Printing produced evidence suggesting that, during the time in question, "the number of employees under age 40 and over age 40 who left the employment of Clay was about equal." *Id.* at 939-40. For a discussion of the elements of a wrongful discharge claim under the ADEA, see *infra* notes 81-86 and accompanying text.

16. *Clay Printing*, 955 F.2d at 939. Each claimant stated that he or she had neither heard any statement nor seen any document suggesting age was a basis for his or her discharge. *Id.* The court of appeals found that the claimants' "beliefs were based upon their own personal feelings without evidentiary support." *Id.*

17. *Id.* at 938-39. The EEOC further alleged that at least 18 persons had been constructively discharged because of their ages. *Id.* at 937; for a discussion of the elements of a constructive discharge claim see note 86. On appeal to the Fourth Circuit, however, the EEOC reduced that number to four. *Clay Printing*, 955 F.2d at 937. Three of the four, who had been salespersons, claimed they felt compelled to resign after Clay Printing announced that they would be paid solely by commission, that they would be responsible for paying their own expenses, and that their company cars would be taken away. *Id.* at 940. The fourth employee claimed he resigned after a dispute with management over his employment contract. *Id.*

In an unpublished opinion, the district court granted Clay Printing's motion for summary judgment on all of the EEOC's claims.[18] The Court of Appeals for the Fourth Circuit affirmed, finding that "the EEOC has failed . . . to marshall enough evidence evincing age discrimination,"[19] that a "fair-minded jury simply could not return a verdict for the EEOC on the evidence presented,"[20] and that "[a]fter a long, litigious process, what is really before this court, is a vain attempt by the EEOC to create a triable issue of age discrimination out of little more than thin air."[21]

Soon thereafter, Clay Printing filed a claim for attorneys' fees and expenses under the Equal Access to Justice Act.[22] In an unpublished opinion, the district court ruled that, under the EAJA, the government was required to prove its litigating position was "substantially justified," and that the EEOC had failed to carry that burden.[23] The court therefore awarded Clay Printing $192,792.50 in attorneys' fees and $15,348.92 in expenses.[24]

A unanimous panel of the Fourth Circuit Court of Appeals affirmed.[25] Reviewing the lower court's decision under an "abuse of discretion" standard,[26] the court held that "objective indicia provide ample support for our ruling that the fee award did not constitute an abuse of the district court's discretion."[27] To support its holding, the court stated that, despite a thirty-month investigation and ten months of discovery, the EEOC had failed to make even a prima facie case in three of the five discharge claims, and that "[a]ll in all, EEOC's case failed quickly and completely."[28] The court held that a single judge's dissent in the Fourth Circuit's affirmance of summary judgment in the merits action "is not enough to convince us that the district court's assessment of the case constituted an abuse of its discretion."[29] Finally, the court observed that the ADEA does not expressly preclude an

18. *Clay Printing*, 955 F.2d at 937.

19. *Id.* at 941.

20. *Id.* at 942-43.

21. *Id.* at 944. Judge Restani of the United States Court of International Trade, sitting on the Fourth Circuit Court of Appeals by designation, dissented, finding the EEOC "has produced sufficient direct evidence of age discrimination to defeat summary judgment." *Id.* at 946 (Restani, J., dissenting).

22. *Clay Printing*, 13 F.3d at 814. The EAJA is codified at 28 U.S.C. § 2412 (1988 & Supp. IV 1992).

23. *Clay Printing*, 13 F.3d at 814.

24. *Id.*; *see also infra* note 45 and accompanying text. The sum awarded to Clay Printing was much larger than other EAJA awards. For a discussion of the frequency and average size of EAJA awards, see *infra* note 46.

25. *Clay Printing*, 13 F.3d at 815.

26. For a discussion of the appropriate standard of review, see *infra* notes 55-56 and accompanying text.

27. *Clay Printing*, 13 F.3d at 815. For a discussion of the significance of "objective indicia," see *infra* notes 65-66 and accompanying text.

28. *Clay Printing*, 13 F.3d at 815-16; *see also infra* notes 93-108 and accompanying text.

29. *Clay Printing*, 13 F.3d at 816; *see also infra* notes 109-14 and accompanying text.

award of fees and costs under the EAJA, and that the EAJA's "plain language" suggests the statute is fully applicable to "civil actions involving anti-discrimination statutes."[30]

The EAJA was enacted as a partial response[31] to the United States Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.[32] In *Alyeska*, the Court observed that, under the "American Rule" governing attorneys' fees, a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[33] Well-established common-law exceptions to the American Rule aside,[34] the Court held that Congress's occasional employment of the "private attorney general" concept[35] cannot "be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award."[36] Rather, only Congress should be allowed to select those federal statutes for which fee-shifting is appropriate.[37]

Rising to the challenge, the 94th, 95th, and 96th Congresses conducted public hearings on broad fee-shifting measures.[38] Congress particularly feared that "certain individuals, partnerships, corporations and labor and

30. *Clay Printing*, 13 F.3d at 816-18; *see also infra* notes 134-35 and accompanying text.

31. *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 6-7 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4984-86; H.R. REP. No. 120, 99th Cong., 1st Sess., pt. I, at 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 133.

32. 421 U.S. 240 (1975).

33. *Id.* at 247.

34. The Court noted that courts may order a litigant to pay an opponent's reasonable attorneys' fees for "'willful disobedience of a court order,'" or "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 258-59 (quoting Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923) and F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974), respectively).

35. The notion of the "private attorney general" refers to instances in which "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." *Id.* at 263. The Court cited provisions of the antitrust laws and Title II of the Civil Rights Act of 1964 as examples. *Id.*

36. *Id.*

37. *Id.* at 263-64. It should also be noted that, prior to the enactment of the EAJA, "the United States' sovereign and general statutory immunity to fee awards" generally barred courts from awarding attorneys' fees to private parties who prevailed in litigation against the government. *See* Pierce v. Underwood, 487 U.S. 552, 575 (1988) (Brennan, J., concurring in part and concurring in the judgment).

38. H.R. REP. No. 120, *supra* note 31, at pt. I, 5, *reprinted in* 1985 U.S.C.C.A.N. at 133. As a result of those hearings, the 94th Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1988 & Supp. III 1991)), which "expanded the liability of losing parties for attorneys' fees in certain civil rights cases, and in some tax proceedings . . . as well." H.R. REP. No. 1418, *supra* note 31, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984-85. For more detailed descriptions of the Congressional response to *Alyeska*, see Dwayne R. McClure & Mark T. Steele, Note, *Liability for Attorneys' Fees Under the Equal Access to Justice Act*—Raton Gas Transmission Co. v. FERC, 11 ENERGY L.J. 297, 301-02

other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights."[39] To address that perceived problem, the 96th Congress enacted the EAJA.[40] The primary purpose of the Act is

> to reduce the deterrents and disparity [between the resources of the government and those of individuals and organizations] by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States . . . [and to ensure] that the United States will be subject to the common law and statutory exceptions to the American rule . . . .[41]

The heart of the Act, and the portion at issue in *Clay Printing*, provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to [an-

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(1990); John P. Stern, Note, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1461-62 (1988).

39. H.R. REP. No. 1418, *supra* note 31, at 5, *reprinted in* 1980 U.S.C.C.A.N. at 4984. The courts have acknowledged this fear as one of the principal reasons Congress passed the EAJA. *See, e.g.*, United States v. Paisley, 957 F.2d 1161, 1164 (4th Cir. 1992) (stating that the EAJA provides for fee-shifting in order "to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government"), *cert. denied sub nom.* Crandon v. United States, 113 S. Ct. 73 (1992). The courts have sometimes stated the matter even more forcefully. *See, e.g.*, Pullen v. Bowen, 820 F.2d 105, 107 (4th Cir. 1987) (concluding that the EAJA was enacted in order to "*penalize* unreasonable behavior on the part of the government without impairing the vigor and flexibility of its litigating position") (emphasis added).

The House Judiciary Committee cited two additional concerns motivating the enactment of the EAJA: the growing resources and power of the federal bureaucracy, and the suspicion that federal agencies were targeting small businesses that agency officials knew lacked the resources fully to litigate the issues in order more easily to establish lines of cases for future precedential value. H.R. REP. No. 1418, *supra* note 31, at 9-10, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

40. H.R. REP. No. 1418, *supra* note 31, at 6-8, *reprinted in* 1980 U.S.C.C.A.N. at 4985-86. The EAJA was initially adopted as a three-year experiment. *See* Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325, 2329 (codified at 5 U.S.C. § 504; 28 U.S.C. § 2412 (1982)) (repealed 1984). The Act was permanently adopted by the 99th Congress in 1985. *See* Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 183 (codified at 28 U.S.C. § 2412 (1988 & Supp. IV 1992)). For a brief history of the EAJA's enactment, see James B. Nobile, Note, *Determining Fees for Fees Under the Equal Access to Justice Act: Accomplishing the Act's Goals*, 9 CARDOZO L. REV. 1091, 1091-92 n.2, 1098-103 (1988).

41. H.R. REP. No. 1418, *supra* note 31, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984. For a more detailed discussion of the EAJA's goals, see Nobile, *supra* note 40, at 1103-06; Stern, *supra* note 38, at 1462.

One student author has argued that "the government has vexatiously and unreasonably contested fee issues to discourage litigation in a manner that is contrary to the purpose and scope of the Act." Stephen E. Blackman, Comment, *Bad Faith and the EAJA: A Proposal for Strict Scrutiny of Government Fee Litigation Under the EAJA*, 20 ENVTL. L. 975, 975 (1990).

> other portion of the Act], incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.[42]

The statutory term "position" refers both to an "agency's prelitigation conduct" and to the government's "subsequent litigation positions."[43] The phrase "fees and other expenses" encompasses "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees."[44] Attorneys' fees are limited to $75 per hour, "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."[45] In recognizing a "special circumstances" exception, Congress intended to give courts "discretion to deny awards where equitable considerations dictate an award should not be made."[46]

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42. 28 U.S.C. § 2412(d)(1)(A) (1988). The Act also waives the traditional governmental immunity from awards of attorneys' fees and costs:

> Unless expressly prohibited by statute, . . . [t]he United States shall be liable for [reasonable attorneys'] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b) (1988); *see also supra* note 37.

43. INS v. Jean, 496 U.S. 154, 159 (1990). The Fourth Circuit Court of Appeals has held that administrative agencies must follow the law of the circuit in which they are litigating; nonacquiescence may be grounds for a later EAJA award. Crawford v. Sullivan, 935 F.2d 655, 658 (4th Cir. 1991).

44. 28 U.S.C. § 2412(d)(2)(A) (1988 & Supp. IV 1992).

45. *Id.* In *Clay Printing*, the district court increased the hourly fee from $75 to $150. *Clay Printing*, 13 F.3d at 814 n.2. Because the EEOC did not specifically appeal the lower court's decision to exceed the statutory cap, the court did not address the issue. *Id.*

46. H.R. REP. NO. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990. *See generally* Ralph V. Seep, Annotation, *What Constitutes "Special Circumstances" Precluding Award of Attorneys' Fees Under Equal Access to Justice Act*, 106 A.L.R. FED. 191 (1992) (providing a general discussion and case annotations concerning the "special circumstances" exception).

The House Judiciary Committee expressed particular concern that any fee-shifting legislation Congress passed not unduly chill government enforcement of federal laws. In a 1985 report on the EAJA, the Committee wrote:

> Concerns have been expressed before the Committee that the provision for awards of attorneys [*sic*] fees could chill public officials charged with enforcing the law from vigorously discharging their responsibilities. That is not the Committee's intent. The Committee recognizes [and] reaffirms the importance of federal enforcement of federal law, especially where a federal statute creates rights which cannot be privately enforced so that those to whom the rights have been extended are entirely dependent upon the enforcement agency to assure that their rights are protected.

As reflected in the language of the statute itself,[47] Congress intended to make both plaintiffs and defendants eligible for an EAJA award.[48] However, only those individuals with net worth not exceeding $2 million, and only those companies, partnerships, and organizations with fewer than 500 employees and net worth not exceeding $7 million, are eligible for an award under the Act.[49]

The United States Supreme Court first addressed the application of the EAJA in *Pierce v. Underwood*.[50] In *Pierce*, tenants of government-subsidized apartment buildings filed a class-action suit against the Secretary of Housing and Urban Development.[51] The tenants claimed the Secretary had wrongfully decided not to implement a congressional program through which the tenants were to receive federal payments to offset rising property taxes and utility costs.[52] Although the agency quickly settled most tenants'

H.R. REP. No. 120, *supra* note 31, at pt. I, 10, *reprinted in* 1985 U.S.C.C.A.N. at 139. When Congress initially proposed the EAJA, the Departments of Justice and the Treasury strongly opposed the legislation, fearing it would chill the government's attempt to prosecute violations of federal law and would be prohibitively expensive. *See* H.R. REP. No. 1418, *supra* note 31, at 7, *reprinted in* 1980 U.S.C.C.A.N. at 4986.

Since the Act was passed, it has become apparent that EAJA litigation, far from rising to a frequency likely to have a chilling effect, is considerably more rare than many expected it would be. When the legislation was enacted in 1980, both the Congressional Budget Office (CBO) and the Office of Management and Budget (OMB) had forecast daunting costs: The CBO had predicted that EAJA costs to the federal government would total $69 million in the Act's inaugural year, $115 million in its second year, and $126 million in its third year. H.R. REP. No. 1418, *supra* note 31, at 21, *reprinted in* 1980 U.S.C.C.A.N. at 5000. The OMB estimated annual costs of $205 million. *Id.* at 23, *reprinted in* 1980 U.S.C.C.A.N. at 5003. The OMB's forecasts exceeded those of the CBO due in part to a belief that the government would be forced to hire additional attorneys to litigate EAJA claims. *Id.* The Department of Justice had predicted costs of $125 million per year. *Id.* at 20, *reprinted in* 1980 U.S.C.C.A.N. at 4999.

Those predictions proved to be vastly overstated. During the first three years of the Act—between October 1, 1981, and October 1, 1984—a *cumulative* total of only $3.9 million was awarded under the EAJA. H.R. REP. No. 120, *supra* note 31, at pt. I, 8, *reprinted in* 1985 U.S.C.C.A.N. at 137. In 1993, EAJA awards totaled a mere $1,001,181, less than in any previous reporting year. 1993 DEPT. OF JUSTICE EQUAL ACCESS TO JUSTICE ACT ANN. REP. at Table 1. In that same year, there were 263 applications for attorneys' fees and other expenses; 88 percent (232) of those applications were granted, for an average award of $4,315. *Id.* The vast majority of EAJA awards (227, totaling $781,555) were made against the Department of Health and Human Services. *Id.* at Table 2.

47. *See* 28 U.S.C. § 2412(d)(1)(A) (1988); *see also supra* note 42 and accompanying text.

48. H.R. REP. No. 1418, *supra* note 31, at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4989.

49. 28 U.S.C. § 2412(d)(2)(B) (1988 & Supp. IV 1992). Net worth is determined at the time a party files its EAJA claim. The Act makes an exception to those net-worth requirements for organizations qualifying for treatment under section 501(c)(3) of the Internal Revenue Code. *Id.*

50. 487 U.S. 552 (1988).

51. *Id.* at 555.

52. *Id.*

claims,[53] the tenants filed a claim for attorneys' fees and costs under the EAJA.[54]

The Court in *Pierce* reached two conclusions that have continuing significance for all EAJA litigation. First, the Court held that lower courts' decisions to award fees under the EAJA must be reviewed under an "abuse of discretion" standard.[55] While the statute itself does not expressly identify the appropriate standard of review, a majority of the Court found that "the text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA."[56]

Second, the *Pierce* Court addressed the meaning of the statutory phrase "substantially justified."[57] The legislative history makes clear that, by requiring the government to assume only substantially justified litigating

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53. *Id.* at 556.

54. *Id.* at 557. The District Court granted the motion. *Id.* The Supreme Court agreed an EAJA award was proper, *id.* at 570-71, but remanded for a recalculation of the appropriate amount, *id.* at 574. For a general discussion of the Court's holding in *Pierce*, see Sharon G. Cheney & Cecilia S. Howard, Note, Pierce v. Underwood: *Equal Access to Justice Act—Standards Defined by the High Court*, 40 MERCER L. REV. 1001 (1989).

55. *Pierce*, 487 U.S. at 559. Justice Scalia expressed concern about requiring that deference be given to lower courts' decisions to award potentially enormous sums of money, but took some comfort in the fact that the median EAJA award at that time was only $3,000. *Id.* at 563. For a discussion of the frequency and average size of EAJA awards, see *supra* note 46.

Until the Supreme Court's decision in *Pierce*, the Court of Appeals for the Fourth Circuit had reviewed questions of law arising with respect to EAJA awards under a de novo standard of review. *See* Hicks v. Heckler, 756 F.2d 1022, 1024 (4th Cir. 1985) ("When the component of the [government's] *legal* position is assayed on appeal, the scope and standard of review are a de novo determination. . . . [W]hen the reasonableness of the [government's] *factual* position is at issue, the authorities are in disarray.") (emphasis added). The *Hicks* court's findings followed a period during which the Fourth Circuit simply avoided the issue. *See* Smith v. Heckler, 739 F.2d 144, 147 n.7 (4th Cir. 1984) ("We reach this conclusion without deciding the question of which appellate standard of review is appropriate in [EAJA] cases."). The Court of Appeals has acknowledged that *Pierce* requires an "abuse of discretion" standard. *See* Lively v. Bowen, 858 F.2d 177, 180 n.1 (4th Cir. 1988) ("*Pierce* alters our standard of review of EAJA fee decisions. We have in the past reviewed such decisions *de novo*.").

56. *Pierce*, 487 U.S. at 563. Justice White had urged the Court to adopt a de novo standard of review. *Id.* at 583-86 (White, J., concurring in part and dissenting in part). He noted that the text of the EAJA does not require a deferential standard of review, *id.* at 583-84 (White, J. concurring in part and dissenting in part), then argued that the issue of whether government action was substantially justified is a question of law and so should be reviewed de novo, *id.* at 584 (White, J., concurring in part and dissenting in part). Justice White further contended that a de novo standard would promote "consistency and predictability in EAJA litigation." *Id.* at 585 (White, J., concurring in part and dissenting in part).

57. *Id.* at 563-68. The pertinent text of the statute appears at 28 U.S.C. § 2412(d)(1)(A) (1988); *see also supra* note 42 and accompanying text. *See generally* Kevin W. Brown, Annotation, *What Constitutes Substantial Justification of Government's Position so as to Prohibit Awards of Attorneys' Fees Against Government Under Equal Access to Justice Act*, 69 A.L.R. FED. 130 (1984) (providing a general discussion and case annotations concerning the issue of substantial justification).

positions, Congress intended to balance delicately "the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights."[58] In light of that intent, the Court considered two alternative meanings of the phrase "substantially justified"—"justified to a high degree" and "justified in substance or in the main"[59]—and settled upon the latter.[60] The Court stated that its reading of the statute was "no different from the 'reasonable basis both in law and fact' formulation adopted by . . . the vast majority of . . . Courts of Appeals that have addressed this issue," including that of the Fourth Circuit.[61] To be "substantially justified," the Court held, the government's position must be "more than merely undeserving of sanctions for frivolousness;"[62] rather, it must be "justified to a degree that could satisfy a reasonable person."[63]

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58. H.R. REP. No. 1418, *supra* note 31, at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4989; *see also infra* note 62. The Court of Appeals for the Fourth Circuit has declared itself bound to consider this balance when determining whether the government's position was substantially justified in a given case. *See* United States v. B & M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988); Pullen v. Bowen, 820 F.2d 105, 107 (4th Cir. 1987).

59. *Pierce*, 487 U.S. at 565.

60. *Id.*

61. *Id.* The Court cited Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985), as a Fourth Circuit decision reaching the same conclusion. *Pierce*, 487 U.S. at 565; *see also* Smith v. Heckler, 739 F.2d 144, 146 (4th Cir. 1984) (stating the same proposition).

62. *Pierce*, 487 U.S. at 566. The Department of Justice had proposed in 1980 that fees be awarded "only where the government action was 'arbitrary, frivolous, unreasonable, or groundless.'" H.R. REP. No. 1418, *supra* note 31, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 4993. The Senate, on the other hand, had proposed that fees be awarded automatically to the prevailing party. H.R. REP. No. 1418, *supra* note 31, at 13, *reprinted in* 1980 U.S.C.C.A.N. at 4992. By adopting a standard that requires substantial justification, Congress sought to strike a compromise between the two proposals. H.R. REP. No. 1418, *supra* note 31, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 4993. Congress intended thereby "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous," while also ensuring that the government is protected from an award of fees "when its case, though not prevailing, has a reasonable basis in law and fact." H.R. REP. No. 1418, *supra* note 31, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 4993.

Long before *Pierce*, the Court of Appeals for the Fourth Circuit proved cognizant of Congress's intent to strike a careful balance. *See* Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982) ("The legislative history discloses that this standard is intended to be between an automatic award of fees to a successful party and an award of fees only when the government's position is arbitrary or frivolous."). The court remains sensitive to the issue. *See* Evans v. Sullivan, 928 F.2d 109, 111 (4th Cir. 1991) ("Although by no means automatic, the 'substantially justified' standard . . . requires that the government must do more than merely avoid frivolity for it to escape liability for fees under the Act.").

63. *Pierce*, 487 U.S. at 565. The Court rejected language from a 1985 House Judiciary Committee report which suggested that the standard requires "'more than mere reasonableness.'" *Id.* at 566-68 (quoting H.R. REP. No. 120, *supra* note 31, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 138). The Court rejected the House's 1985 interpretation for three reasons: (1) the House in 1985 played no role in drafting the statute (the statute was originally adopted in 1980 as a three-year experiment; Congress in 1985 merely made its provisions permanent, *see supra* note 40), *id.* at 566-67; (2) in a 1980 report, the House advocated a "reasonableness in law and fact" standard, *id.* at 567 (citing H.R. REP. No. 1418, *supra* note 31, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 4993);

In *United States v. Paisley*,[64] the Court of Appeals for the Fourth Circuit described how appellate review for substantial justification is to be conducted. The *Paisley* court held that an appellate court must first look "at the available 'objective indicia' of the strength of the Government's position."[65] The terms of any settlement agreement, the stage of the litigation at which the merits were decided, and "the views of other courts on the strength, hence reasonableness, of the Government's position" are examples of the kinds of "objective indicia" that the reviewing court should consider.[66] If an analysis of such factors is not sufficient to determine whether the district court abused its discretion, the court must then conduct "an independent assessment of the merits of the Government's position."[67]

The Fourth Circuit Court of Appeals has also discussed the impact that the decision on the merits both should and should not have on subsequent EAJA litigation. In *Tyler Business Services v. NLRB*,[68] the court held that a government loss on the merits in no way gives rise to a presumption that the government's position was not substantially justified.[69] Conversely, a

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and (3) "[o]nly the District of Columbia Circuit had adopted the position that the Government had to show something 'slightly more' than reasonableness," *id.* at 567 (quoting Spencer v. NLRB, 712 F.2d 539, 558 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)).

For a discussion of Justice Scalia's use of legislative history in resolving the issue, see the recent article by Stephen Breyer (who since has been appointed to the United States Supreme Court), *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 852-53 (1992).

Justice Brennan argued that more than mere reasonableness should be required if the government is to avoid an award of fees, and that "[f]ar from occupying the middle ground, 'the test of reasonableness' is firmly encamped near the position espoused by the Justice Department." *Id.* at 577-78 (Brennan, J., concurring in part and concurring in the judgment); *see also supra* note 62. For an argument that the Court's interpretation of the phrase "substantially justified" has limited the EAJA's effectiveness, see Stern, *supra* note 38, at 1463 n.32.

64. 957 F.2d 1161 (4th Cir. 1992), *cert. denied sub nom.* Crandon v. United States, 113 S. Ct. 73 (1992).

65. *Id.* at 1166 (quoting *Pierce*, 487 U.S. at 568).

66. *Id.*

67. *Id.* The *Paisley* court also suggested that this analysis is essentially a determination of whether the government's attorneys had made "a reasonable legal decision" that a violation of federal law had occurred. *Id.* at 1165.

68. 695 F.2d 73 (4th Cir. 1982).

69. *Id.* at 75 (citing H.R. REP. No. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990; *accord Paisley*, 957 F.2d at 1167 ("Although the impulse to equate ultimate judicial rejection of the Government's merits position—at whatever level—with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate . . . ."); Evans v. Sullivan, 928 F.2d 109, 110 (4th Cir. 1991) ("It would be a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified."); United States v. B & M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988) ("The fact that the government failed to [prevail on the merits] raises no presumption that its position was not substantially justified."); Smith v. Heckler, 739 F.2d 144, 147 (4th Cir. 1984) ("Our holding [against the Secretary of Health and Human Services] of course does not mean that the Secretary is automatically liable for attorney's fees every time she loses a case."); Guthrie v. Schweiker, 718 F.2d

judge's approval of the government's litigating position at some stage of the merits decision does not conclusively establish that the government's position *was* substantially justified.[70] In short, "the substantial justification issue cannot be transformed into an up-or-down judgment on the relative reasoning powers of Article III judges who may have disagreed on the merits of a Government litigation position."[71]

Although a court's holding on the merits is not itself dispositive of any subsequent EAJA claim, the merits decision does carry significant weight. Congress itself suggested that a decisive government loss on the merits may indicate that the government had taken a substantially unjustified position.[72] In addition, the Supreme Court has observed that a "string of losses" or a "string of successes" on a given issue might be indicative of the reasonableness of the government's position on that issue.[73] The Court of Appeals for the Fourth Circuit has stated the matter even more forcefully:

> [M]erits decisions in a litigation, whether intermediate or final, cannot, standing alone, determine the substantial justification issue. But of course they—and more critically their rationales—are the *most powerful available indicators* of the strength, hence reasonableness, of the ultimately rejected position. As such, they *obviously must* be taken into account both by a district court in deciding whether the Government's position, though ultimately rejected on the merits, was substantially justified, and by a court of appeals in later reviewing that decision for abuse of discretion.[74]

104, 108 (4th Cir. 1983) ("[E]ntry of summary judgment for the [private party] raises no presumption that the government's position was not substantially justified.").

The *Tyler* court stated what the Supreme Court would later confirm. *See* Pierce v. Underwood, 487 U.S. 552, 568-69 (1988) (holding that neither the government's willingness to settle on unfavorable terms nor a government loss at the pleadings stage commands the conclusion that the government's position was substantially unjustified).

70. *Paisley*, 957 F.2d at 1167 (arguing that it is "unacceptable . . . to find in an intermediate judicial determination of merit in the Government's position proof that the position was at least one that 'could satisfy a reasonable person'").

71. *Id.*

72. H.R. REP. No. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4989-90. The report states that

> [c]ertain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim has been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

Id.

73. *Pierce*, 487 U.S. at 569.

74. *Paisley*, 957 F.2d at 1167 (emphasis added).

When the government fails to demonstrate that its position was substantially justified,[75] an award of fees under the EAJA is mandatory.[76] Moreover, attorneys' fees incurred to prepare the EAJA claim may themselves be recovered.[77] The Supreme Court confirmed that reading of the law in *INS v. Jean*,[78] and further held that the government's decision to contest the EAJA award need not itself be substantially unjustified for those fees to be awarded.[79]

Courts can never apply the EAJA, of course, without reference to the statutory or common-law causes of action that were at issue in the merits litigation.[80] In order to appreciate the court's holding in *Clay Printing*, it is necessary to understand the basic elements of an ADEA claim. The ADEA makes it illegal for an employer, *inter alia*,

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
> (2) to limit, segregate, or classify [one's] employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .[81]

To state a claim of discharge in violation of the ADEA, a person has two alternatives. First, she may show that she is protected by the Act, and that but for her employer's desire to discriminate against her on the basis of her age, she would not have been discharged.[82] Alternatively, she may pro-

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75. The burden of proof does rest on the government to demonstrate that its position was substantially justified. Lively v. Bowen, 858 F.2d 177, 180 (4th Cir. 1988). In part, the *Lively* court reached this conclusion by reviewing the pertinent legislative history. *Id.*; *see also* H.R. REP. No. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4989 (stating that the burden of proof rests with the government, because "it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable").

76. Tyler Business Services v. NLRB, 695 F.2d 73, 74-75 (4th Cir. 1982) (observing that the statute "*requires* an award of attorney's fees" when the government's position was substantially unjustified and no special circumstances make such an award of fees unjust) (emphasis added).

77. *Id.* at 77 ("The amount of recovery may include the time spent preparing and prosecuting the motion for attorney's fees.").

78. 496 U.S. 154, 161-62 (1990).

79. *Id.* at 162-66.

80. As the Fourth Circuit Court of Appeals has noted, "[w]hether the government's decision to initiate and to pursue [an action against a party] was reasonable must be examined in light of its burden under the appropriate statute." United States v. B & M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988). It is nevertheless beyond the scope of this Note to conduct a full analysis of the law governing employment discrimination.

81. 29 U.S.C. § 623(a) (1988). To find protection under the ADEA, one must be at least 40 years of age. 29 U.S.C. § 631(a) (1988 & Supp. IV 1992).

82. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1111-12 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981).

ceed under the standards of proof laid out by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[83] Briefly stated, the *McDonnell Douglas* Court held that a plaintiff may state a prima facie claim of employment discrimination by showing that she belongs to a protected minority class, and that she suffered adverse employment treatment despite her qualifications.[84] The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's [treatment]."[85] The plaintiff must then be given an opportunity to show that the employer's explanation is a mere pretext for discrimination.[86]

In *EEOC v. Clay Printing Company*,[87] the EEOC asked the Court of Appeals for the Fourth Circuit to review a district court's decision to award more than $208,000 in attorneys' fees and costs to Clay Printing Company under the EAJA.[88] Having observed that it must review the district court's actions under an "abuse of discretion" standard,[89] the court turned to the issue of whether the EEOC had been substantially justified[90] in bringing the age discrimination actions against Clay Printing.[91] The court found it unnecessary to engage in a thorough reevaluation of the evidence; instead, following *United States v. Paisley*,[92] the court found it sufficient to examine

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83. 411 U.S. 792 (1973). The Court of Appeals for the Fourth Circuit adapted the *McDonnell Douglas* test to ADEA claims in Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239-40 (4th Cir. 1982).

84. *McDonnell Douglas*, 411 U.S. at 802.

85. *Id.*

86. *Id.* at 804; *see also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (restating the *McDonnell Douglas* test, and clarifying the allocation of burdens under that analysis).

Several Clay Printing employees alleged that they had been constructively discharged. EEOC v. Clay Printing Co., 955 F.2d 936, 937 (4th Cir. 1992); *see also supra* note 17. The Fourth Circuit Court of Appeals outlined the essential elements of a constructive discharge claim in Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986): "A constructive discharge occurs when 'an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job.'" *Id.* at 1255 (quoting Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985)). An employer is said to have acted deliberately only when he intended to force the employee to quit. *Bristow*, 770 F.2d at 1255. Difficult working conditions cannot be taken as circumstantial evidence of such intent when all employees were treated identically. *Id.* Whether the plaintiff's working conditions were intolerable is determined "by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign." *Id.*

87. 13 F.3d 813 (4th Cir. 1994).

88. *Id.* at 814; *see also supra* notes 22-24 and accompanying text.

89. *Clay Printing*, 13 F.3d at 815; *see also supra* notes 55-56 and accompanying text.

90. *See* 28 U.S.C. § 2412(d)(1)(A) (1988); *see also supra* note 42 and accompanying text.

91. *Clay Printing*, 13 F.3d at 815-16.

92. 957 F.2d 1161, 1166 (4th Cir. 1992); *see also supra* notes 64-67 and accompanying text.

" 'objective indicia' of the weakness of the government's case,"[93] including the outcome of the merits litigation.[94]

The court first noted the lower court's grant of summary judgment in the merits action.[95] Although a grant of summary judgment based on questions of law may not be particularly pertinent in subsequent EAJA litigation,[96] a grant of summary judgment based on an "inadequate factual showing" is highly relevant to the substantial justification question.[97] In *Clay Printing*, the EEOC had conducted a lengthy investigation and engaged in ten months of discovery; even then, the court observed, the EEOC had proved unable to make the minimal factual showing required to overcome a motion for summary judgment.[98]

The court also reiterated its reasoning in *Paisley*: Decisions on the merits and the rationales underlying them "are the most powerful available indicators of the strength, hence reasonableness, of the ultimately rejected position."[99] The court noted that the district court had found that the EEOC's claims were, "to say the least, simply implausible" and had "no tenable basis whatsoever."[100] "All in all," the court of appeals summarized, "the unmistakable tenor of the [district court's] opinion is that EEOC wasted everybody's time and was grasping at evidentiary straws."[101]

The court then observed that, when the district court's grant of summary judgment was appealed, the court of appeals reached conclusions similar to those of the trial judge.[102] In the merits action, the court of appeals had stated that "[a]fter a long, litigious process, what is really before this court, is a vain attempt by the EEOC to create a triable issue of age discrimination out of little more than thin air."[103] In the subsequent EAJA litigation, the appellate court noted its earlier "thin air" comment,[104] and further observed that the EEOC had failed to make a prima facie case in three of

93. *Clay Printing*, 13 F.3d at 815 (quoting Pierce v. Underwood, 487 U.S. 552, 568 (1988)).

94. For a discussion of the significance of the merits outcome in subsequent EAJA litigation, see *supra* notes 68-74 and accompanying text.

95. *Clay Printing*, 13 F.3d at 815.

96. *Id.* (citing Pierce v. Underwood, 487 U.S. 552, 569 (1988)). The *Pierce* majority believed that "where . . . the dispute centers upon questions of law rather than fact, summary disposition proves only that the district judge was efficient." *Pierce*, 487 U.S. at 569.

97. *Clay Printing*, 13 F.3d at 815.

98. *Id.*

99. United States v. Paisley, 957 F.2d 1161, 1167 (4th Cir. 1992), *cert. denied sub nom.* Crandon v. United States, 113 S. Ct. 73 (1992); *accord Clay Printing*, 13 F.3d at 815; *see also supra* note 74 and accompanying text.

100. *Clay Printing*, 13 F.3d at 816 (quoting the unreported opinion of the district court) (internal quotations omitted).

101. *Id.*

102. *Id.*

103. EEOC v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992).

104. *Clay Printing*, 13 F.3d at 816; *see also supra* note 21 and accompanying text.

the five discharge claims,[105] had made no showing that Clay Printing's explanations of the discharges were pretextual,[106] and had fallen "'woefully short'" of producing the evidence necessary to sustain its constructive discharge claims.[107] In short, the court said, "EEOC's case failed quickly and completely."[108]

The court next considered the significance of Judge Restani's dissent in the merits action.[109] In its appeal of the district court's EAJA decision, the EEOC had acknowledged that the dissent was "not legally controlling on the fees issue."[110] The EEOC nevertheless thought the dissent was significant:

> [Judge Restani's] dissent drives a stake through the heart of Clay's argument. If this were truly a case where the Commission proceeded "in the absence of any probative evidence supporting an inference of age discrimination," where the Commission based its case on an "empty" record, or where the Commission relied solely on the "naked assertions of discrimination in the complaint," as Clay contends, then how did this case elicit such a strongly worded dissent on the very issue of the evidentiary sufficiency of the Commission's case? Unless this court is willing to say that Judge Restani's view of the evidence was not a permissible one, her opinion provides strong support for the view that the Commission's case, at its core, was substantially justified.[111]

The court of appeals responded by balancing the strength of the dissent against the fact that the district court's decision to award costs and attorneys' fees had to be reviewed under an "abuse of discretion" standard.[112] "We agree [with the EEOC] that the dissenting judge's views should be considered," the court reasoned, "but this factor alone (and it is alone) is not enough to convince us that the district court's assessment of the case constituted an abuse of its discretion."[113] Moreover, the court observed, a major-

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105. *Id.*

106. *Id.*; *see also supra* note 86 and accompanying text.

107. *Clay Printing*, 13 F.3d at 816 (quoting *Clay Printing*, 955 F.2d at 945). More specifically, the court observed that the EEOC had failed to show that Clay Printing officials had *deliberately* made the complainants' working conditions *intolerable*. *Id.*; *see also supra* note 86.

108. *Clay Printing*, 13 F.3d at 816.

109. *Id.*; *see Clay Printing*, 955 F.2d at 946-50 (Restani, J., dissenting); *see also supra* note 21.

110. Reply Brief of Appellant at 18, EEOC v. Clay Printing Co., 13 F.3d 813 (4th Cir. 1994) (No. 93-1605).

111. *Id.* at 18-19 (citations to Clay Printing Company's brief omitted).

112. *Clay Printing*, 13 F.3d at 816. For a discussion of the "abuse of discretion" standard, see *supra* notes 55-56 and accompanying text.

113. *Clay Printing*, 13 F.3d at 816. Though the court gave absolutely no indication that its treatment of Judge Restani's dissent was colored by this fact, perhaps it should be noted that Judge Restani is not a permanent member of the Fourth Circuit Court of Appeals, but was sitting on the Fourth Circuit by designation. *Clay Printing*, 955 F.2d at 937.

ity of the Fourth Circuit panel deciding the merits had indeed concluded that "of the twenty-three 'cases' involved in EEOC's action . . . not one approached what might be considered a close case."[114]

The EEOC also argued on appeal that, even if its position were not substantially justified, "the Commission's enforcement actions [under the ADEA] should not be subject to the 'substantially justified' standard [of the EAJA]."[115] In support of this contention, the EEOC advanced two arguments. First, the agency pointed to the law governing the award of attorneys' fees to parties engaged in Title VII litigation.[116] The language of Title VII, the EEOC observed, states that the "prevailing party"—whether the plaintiff or the defendant—may be awarded attorneys' fees.[117] Despite that clear language, however, the Supreme Court, in its 1978 decision in *Christiansburg Garment Co. v. EEOC*,[118] held that "equitable considerations" required that there be a dual standard for awarding attorneys' fees to plaintiffs and defendants in Title VII actions.[119] While a plaintiff must simply prevail in order to become eligible for an award of attorneys' fees, a defendant must not only prevail, but must also demonstrate that the plaintiff's action was "frivolous, unreasonable, or groundless."[120] The primary "equitable consideration" that the Court believed dictated this result was the fact that Title VII plaintiffs were the instruments by which Congress had elected to enforce important civil rights laws.[121]

The EEOC argued that because the fee-shifting language of the ADEA is more stringent than that of Title VII, allowing only plaintiffs to be awarded fees,[122] Congress's drafting of the ADEA "reflects an even stronger policy choice against the award of fees to prevailing defendants than that reflected in Title VII."[123] If "equitable considerations" militated

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114. *Clay Printing*, 13 F.3d at 816.

115. Brief of Appellant at 47, EEOC v. Clay Printing Co., 13 F.3d 813 (4th Cir. 1994) (No. 93-1605). Instead, the EEOC argued that it should only be subject to the "bad-faith" exception to the American Rule governing attorneys' fees, which applies to the government under 28 U.S.C. § 2412(b) (1988). *Id.* at 48 n.19.

116. *Id.* at 44-48 (citing 42 U.S.C. § 2000e-5(k) (1988)). Title VII, under which Congress created the EEOC and delegated the agency its fundamental powers, broadly prohibits employment discrimination. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. III 1991).

117. Brief of Appellant at 44 (citing 42 U.S.C. § 2000e-5(k) (1988)).

118. 434 U.S. 412 (1978).

119. *Id.* at 418, 422.

120. *Id.* at 422.

121. *Id.* at 418. In this respect, the Court appears to have employed its own "private attorney general" notion; *see supra* note 35 and accompanying text.

122. Brief of Appellant at 45, EEOC v. Clay Printing Co., 13 F.3d 813 (4th Cir. 1994) (No. 93-1605) (citing 29 U.S.C. § 216(b) (1988), as incorporated by reference in 29 U.S.C. § 626(b) (1988), which provides that a court may "allow a reasonable attorney's fee to be paid by the defendant"; the statute is silent with respect to attorneys' fees to be paid by the plaintiff).

123. *Id.* at 47-48.

in favor of a heightened standard for defendants' receipt of fees under Title VII, the EEOC argued, then surely "equitable considerations" should prompt the court to bar Clay Printing, a prevailing defendant, from being awarded fees in an action brought under a statute in which Congress elected to exclude defendants from the benefits of a fee-shifting provision altogether.[124]

As examples of the "equitable considerations" it hoped the court would consider, the EEOC cited the public importance of allowing the EEOC to take aggressive measures toward eliminating discrimination and the difficulty of proving intentional discrimination.[125] The EEOC argued that Congress had left the door open for courts to contemplate such matters when it provided in the EAJA that fees were not to be awarded to a prevailing party if "'special circumstances' militate against the award of fees."[126]

The EEOC made a second, related argument in support of its contention that it "should not be subject to the EAJA's 'substantially justified' standard."[127] The EAJA provides that the federal government is liable for attorneys' fees and costs when its position was not substantially justified, "[e]xcept as otherwise specifically provided by statute."[128] The EEOC pointed out that, in its 1980 report on the EAJA,[129] the House Judiciary Committee emphasized that the Act was "not intended to replace or supersede any existing fee-shifting statutes . . . *in which Congress has indicated a specific intent to encourage vigorous enforcement.*"[130] By making only defendants liable for attorneys' fees under the ADEA, the EEOC argued,

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124. *Id.* at 48. Because *Christiansburg* was decided two years before the EAJA was enacted, the Court did not then have occasion to discuss the Act's impact on such issues.

125. Brief of Appellant at 48. "The Commission must be given some leeway," the EEOC argued, "in seeking to push for aggressive enforcement of the anti-discrimination statutes under its administrative charge." *Id.* at 48-49. In its Reply Brief, the EEOC reiterated its point, arguing that "[t]here is no logical reason for subjecting the Commission's ADEA actions to a more onerous fee-shifting standard [than that which applies to Title VII plaintiffs], particularly since the ADEA, on its face, reflects an even stronger policy against the award of fees to prevailing defendants." Reply Brief of Appellant at 24-25, EEOC v. Clay Printing Co., 13 F.3d 813 (4th Cir. 1994) (No. 93-1605).

126. Brief of Appellant at 49 (citing 28 U.S.C. § 2412(d)(1)(A) (1988)). The Commission also noted that the House Judiciary Committee had characterized the cited provision as giving courts "discretion to deny awards where 'equitable considerations dictate an award should not be made.'" *Id.* (citing H.R. REP. No. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990).

127. *Id.* at 47.

128. 28 U.S.C. § 2412(d)(1)(A) (1988).

129. H.R. REP. No. 1418, *supra* note 31, *reprinted in* 1980 U.S.C.C.A.N. at 4984.

130. Brief of Appellant at 46 (citing H.R. REP. No. 1418, *supra* note 31, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997). The cited passage of legislative history also reiterates that the given subsection of the EAJA was not intended to apply to those civil actions "already covered by existing fee-shifting statutes." H.R. REP. No. 1418, *supra* note 31, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997.

Congress demonstrated a desire to "encourage vigorous enforcement"; consequently, the agency should not be held liable for attorneys' fees in the ADEA actions it brings.[131]

The court of appeals responded to the EEOC's arguments[132] by stating that the EEOC had "ma[de] too much" of the ADEA's failure expressly to allow defendants to recover attorneys' fees.[133] The court resolved the issue by relying on the plain language of the EAJA and on the fact that the ADEA does not expressly prohibit defendants from receiving an award of attorneys' fees:

> The [EAJA] seems clear enough—in *any* civil action, if the United States is a party and loses, the other party gets attorney's fees *unless* some other statute *specifically* says otherwise. . . . EAJA makes no distinction between civil actions involving anti-discrimination statutes and those involving other areas of the law . . . . Until another statute "specifically provide[s]" that ADEA defendants cannot get such fees from the United States, the plain language of EAJA will continue to control.[134]

Consequently, the court held, the EEOC was fully liable for attorneys' fees under the substantially justified standard of the EAJA.[135]

The court's rejection of the EEOC's second argument for exclusion from the EAJA's substantially justified standard[136]—the argument based on the EAJA's conditional phrase, "[e]xcept as otherwise specifically provided by statute"[137]—appears well founded. The House Judiciary Committee made it clear that by employing that phrase, Congress intended to spare from the EAJA's reach only those statutes that already allowed awards of

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131. Brief of Appellant at 46, 49. Clay Printing Company opposed the EEOC's request for exclusion from the EAJA's substantially justified provision by trying to focus the court's attention, not on the language of the ADEA, but on that of the EAJA. Clay Printing argued that Congress enacted the EAJA with knowledge of the dual standard established in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); *see also supra* notes 119-21 and accompanying text, and chose instead to place plaintiffs and defendants on equal footing, Brief of Appellee at 41-42, EEOC v. Clay Printing Co., 13 F.3d 813 (4th Cir. 1994) (No. 93-1605). Clay Printing also argued that

> all of the Commission's policy notions overlook the principle that Congress is the ultimate policy-maker and that the policies manifested in the EAJA must be given full meaning and context. Accordingly, this Court need not search through off-point Supreme Court decisions to discern applicable policy when Congressional intent is clear and codified.

Id. at 41. This case, Clay Printing contended, presented a prime example of the kind of "egregious" government behavior that "propelled the passage of the EAJA." *Id.* at 42.

132. *See supra* notes 115-31 and accompanying text.

133. *Clay Printing*, 13 F.3d at 817.

134. *Id.* at 817-18 (quoting 28 U.S.C. § 2412 (d)(1)(A) (1988)).

135. *Id.* at 818.

136. 28 U.S.C. § 2412(d)(1)(A) (1988).

137. *Id.*; *see also supra* notes 127-31 and accompanying text.

fees against the government, under standards that Congress or the courts had already carefully tailored to the policy objectives of the specific statute. The Committee made this point in two ways. First, the Committee listed three statutes as examples of the kind of legislation that the EAJA was not intended to supersede; all three authorize awards of attorneys' fees against the government, under standards at considerable variance with the EAJA's substantially justified standard.[138] Second, the Committee explained that the EAJA's conditional phrase was intended to make clear that the Act "is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized."[139] It therefore appears clear that, by making an exception for statutes that "otherwise specifically provide," Congress did not intend to place the government's litigating positions under statutes like the ADEA—statutes that make no mention of fee awards against the government—beyond the reach of the EAJA's substantially justified standard.

The court's decision finds additional support in Congress's articulation of one of the reasons for enacting the broad fee-shifting measures of the EAJA: "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous."[140] If the district and appellate courts' evaluations of the merits of the EEOC's case in *Clay Printing*[141] are indeed fair assessments, then there can be no doubt that the EEOC is in as much need of "caution" against prosecuting "weak or tenuous" cases[142] as any other governmental unit. In the face of what the court appeared to

138. H.R. REP. No. 1418, *supra* note 31, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997 (citing the Freedom of Information Act, 5 U.S.C. § 552a(g)(2)(B), (3)(B) (1988) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed."); the Civil Rights Acts, 42 U.S.C. § 2000a-3(b) (1988) ("In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."); *id.* § 1988 (1988) ("In any action or proceeding to enforce" select statutory provisions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."); and the Voting Rights Act, 42 U.S.C. § 1971(c) (1988) ("In any proceeding hereunder the United States shall be liable for costs the same as a private person.")).

139. H.R. REP. No. 1418, *supra* note 31, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997. Several courts have expressly adopted the cited proposition in their holdings. *See* Huey v. Sullivan, 971 F.2d 1362, 1366-67 (8th Cir. 1992); Escobar Ruiz v. INS, 787 F.2d 1294, 1296-97 (9th Cir. 1986), *reh'g denied*, 813 F.2d 283 (9th Cir. 1987); Gavette v. Office of Personnel Management, 808 F.2d 1456, 1464 (Fed. Cir. 1986); EEOC v. Kimbrough Inv. Co., 703 F.2d 98, 103 (5th Cir. 1983), *reh'g denied*, 715 F.2d 577 (5th Cir. 1983); Howard v. Heckler, 581 F. Supp. 1231, 1232-33 (S.D. Ohio 1984).

140. H.R. REP. No. 1418, *supra* note 31, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 4993; *see also supra* note 62.

141. *See supra* notes 19-21, 28, 100-08 and accompanying text.

142. H.R. REP. No. 1418, *supra* note 31, at 14, *reprinted in* 1980 U.S.C.C.A.N. at 4993; *see also supra* note 62.

regard as a flagrant abuse of prosecutorial power,[143] it is perhaps not surprising that the court would be unpersuaded by an argument founded on a mere statutory omission, and would instead require a firm expression of congressional will in order to reach the conclusion urged by the EEOC.[144]

The court's rejection of the EEOC's first argument for exclusion from the substantially justified standard of the EAJA is somewhat more problematic. The EEOC had argued that "equitable considerations" weighed against holding the EEOC subject to that standard in actions it brings under the ADEA.[145] Congress did indeed suggest that courts had "discretion to deny awards where equitable considerations dictate an award should not be made," under the "special exceptions" clause of the EAJA.[146]

The court of appeals stated that the tension between equitable concerns and the EAJA's language posed no real difficulty: "The question of which policy was foremost in the collective mind of Congress is irrelevant . . . when the words [of the EAJA] point in only one direction."[147] Even though the EEOC had urged the court to follow the example set by the Supreme Court in *Christiansburg Garment Co. v. EEOC*[148] and add a judicial gloss to the fee-shifting standards set out by Congress,[149] the court of appeals apparently regarded equitable concerns as matters entirely for the legislature's consideration. The court wrote, "EEOC does not disclose another *statute* that might keep us from turning to EAJA when EEOC loses an age discrimination suit. . . . Until another *statute* 'specifically provide[s]' that ADEA defendants cannot get such fees from the United States, the plain language of EAJA will continue to control."[150]

If the court's handling of the *Clay Printing* case is to be faulted, it is for laying a broader foundation for its holding on this issue than was required. Rather than holding that "equitable considerations" were not sufficiently weighty to justify exempting the EEOC from the EAJA's substantially justified standard in the case at bar—a holding clearly warranted by the relevant legislative history[151]—the court held that another statute must specifically state that ADEA defendants are barred from col-

143. *See supra* notes 19-21, 28, 100-08 and accompanying text.

144. *See supra* note 134 and accompanying text.

145. *See supra* notes 116-26 and accompanying text.

146. H.R. REP. No. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990; *see* 28 U.S.C. § 2412(d)(1)(A) (1988); *see also supra* note 42 and accompanying text.

147. *Clay Printing*, 13 F.3d at 817.

148. 434 U.S. 412 (1978).

149. *See supra* notes 116-26 and accompanying text.

150. *Clay Printing*, 13 F.3d at 817-18 (emphasis added) (quoting 28 U.S.C. § 2412(d)(1)(A) (1988)).

151. H.R. REP. No. 1418, *supra* note 31, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990; *see also supra* note 126 and accompanying text.

lecting attorneys' fees from the government before the EEOC will be able to make a valid claim for exemption.[152]

At least two points, however, may be made in defense of the court's resolution of this issue. First, it seems clear that, if the court of appeals were ever to regard "equitable considerations" as relevant to its analysis of the EAJA's application in ADEA suits brought by the EEOC,[153] this was not the case that would inspire it to so hold. It is apparent that the court did not believe Clay Printing had been granted summary judgment due to the inherent difficulty of proving intentional discrimination, one of the primary equitable concerns cited by the EEOC.[154] Rather, the court was persuaded that the EEOC's case was entirely devoid of merit—the agency had not prevailed because it had tried to build a case out of "thin air."[155] It therefore remains possible that, if presented with a more compelling set of facts, the court will find it useful to pursue an analysis of "equitable considerations" in ADEA litigation, as it is permitted to do under the "special circumstances" clause of the EAJA.[156]

Second, by declaring "equitable considerations" irrelevant to its analysis, the court appears not to have foreclosed entirely a line of analysis useful in cases such as *Clay Printing*. Suppose, for example, that the EEOC were correct in arguing that one of the primary equitable concerns that should be considered is the difficulty of proving intentional discrimination.[157] The statutory term "substantially justified," as construed by the Supreme Court in *Pierce* to mean "justified to a degree that could satisfy a reasonable person,"[158] might well be sufficiently inclusive to allow consideration of such difficulties: the issue would simply be whether, given the difficulty of proof, the EEOC had reasonable grounds for proceeding with the litigation. The Fourth Circuit Court of Appeals has suggested just such an analysis: "Whether the government's decision to initiate and to pursue [an action against a party] was reasonable must be examined in light of its burden under the appropriate statute."[159] Consequently, even if matters such as difficulties of proof are not considered by a court as "equitable considerations," per se, they might still influence a court's analysis insofar as they appear relevant to the question of substantial justification.

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152. *Clay Printing*, 13 F.3d at 817-18; *see also supra* note 150 and accompanying text.

153. *See supra* notes 116-26 and accompanying text.

154. Brief of Appellant at 48, EEOC v. Clay Printing Co., 13 F.3d 813 (4th Cir. 1994) (No. 93-1605); *see also supra* note 125 and accompanying text.

155. EEOC v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992).

156. *See* 28 U.S.C. § 2412(d)(1)(A) (1988); *see also supra* notes 42, 126 and accompanying text.

157. *See supra* note 125 and accompanying text.

158. Pierce v. Underwood, 487 U.S. 552, 565 (1988); *see also supra* notes 57-63 and accompanying text.

159. United States v. B & M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988).

The court of appeals correctly construed precedent and the pertinent statutory language when it held that the EEOC is liable for costs and attorneys' fees under the EAJA when it is not substantially justified in prosecuting an ADEA claim, yet prosecutes that claim nonetheless.[160] The only fault that might be found with the court's application of the EAJA in *Clay Printing* is its refusal to weigh "equitable considerations"; in so holding, the court deprived itself of one of the tools of analysis that Congress intended to place at its disposal.[161] That particular quibble aside, the court's holding comports with the straightforward language of the EAJA,[162] with much of the pertinent legislative history,[163] and with Congress's overriding desire to reduce the financial disincentives individuals and organizations often face when deciding whether to contest unwarranted government action against them.[164]

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160. *See Clay Printing*, 13 F.3d at 818; *see also supra* notes 25-30 and accompanying text.

161. *See supra* notes 122-26, 145-50 and accompanying text.

162. *See* 28 U.S.C. § 2412(d)(1)(A) (1988); *see also supra* note 42 and accompanying text.

163. *See* H.R. REP. No. 1418, *supra* note 31, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997; *see also supra* notes 138-40 and accompanying text.

164. *See* H.R. REP. No. 1418, *supra* note 31, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984; *see also supra* notes 39-41 and accompanying text.

Civil Procedure—Choice of Law—*Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 436 S.E.2d 243 (1993)

In *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*,[1] the North Carolina Supreme Court considered choice of law rules with respect to an insurance contract made in California. Departing from the state's long-standing rule of *lex loci contractus*,[2] the court held that section 58-3-1 of the North Carolina General Statutes[3] mandated the application of North Carolina law to the insurance contract. Because it promotes North Carolina's interest in the dispute, the decision approximates a modern choice of law result.[4] The court, however, did not use modern analysis, but chose instead to rely wholly on the insurance choice of law statute, thereby limiting the effect of the decision to insurance contracts.

Collins & Aikman involved the interpretation of a liability insurance policy issued by Hartford Accident & Indemnity (Hartford) to Collins & Aikman Corporation (C&A),[5] a Delaware corporation headquartered in New York City.[6] After unsuccessfully attempting to negotiate a policy through Marsh & McLennan, an independent broker in North Carolina, C&A's parent corporation suggested that C&A use Marsh & McLennan's California office.[7] After Marsh & McLennan successfully negotiated the policy with Hartford in California, Hartford sent the policy to Marsh & McLennan's California office where it remained during the entire coverage period.[8] The policy provided $5,000,000 of coverage for any liability

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1. 335 N.C. 91, 436 S.E.2d 243 (1993).

2. The rule of *lex loci contractus* provides that "the substantive law of the state where the last act to make a binding contract takes place controls all aspects of the interpretation" of the contract. *Id.* at 99, 436 S.E.2d at 248 (Meyer, J., dissenting) (citing Tanglewood Land Co. v. Byrd, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980); Bundy v. Commercial Credit Co., 200 N.C. 511, 516, 157 S.E. 860, 863 (1931)).

3. For the full text of N.C. GEN. STAT. § 58-3-1 (1991), see *infra* note 21.

4. *See infra* notes 52-57 and accompanying text.

5. 335 N.C. at 92, 436 S.E.2d at 244.

6. *Id.* at 98, 436 S.E.2d at 247 (Meyer, J., dissenting). C&A has sixteen subsidiaries and operates thirty-four manufacturing plants located in seven states and two Canadian provinces. *Id.* The sixteen subsidiaries do business in twenty-eight states and several foreign countries. *Id.* Moreover, C&A has administrative offices, warehouses, and sales offices throughout the nation. *Id.* (Meyer, J., dissenting).

7. *Id.* (Meyer, J., dissenting). C&A is a fully owned subsidiary of Wickes Company, a Delaware corporation operating primarily in California. *Id.* at 92, 436 S.E.2d at 244.

8. *Id.* at 93, 436 S.E.2d at 244. The policy covered C&A from March 1, 1987 through February 29, 1988. *Id.* However, the policy was not sent to C&A's North Carolina office until March 8, 1988. *Id.*

above the $2,000,000 limit of C&A's primary policy issued by Aetna Casualty and Surety.[9]

The incident triggering application of the liability policy occurred in North Carolina.[10] In a wrongful death action brought against C&A in North Carolina, a jury awarded $2,500,000 in compensatory damages and $4,000,000 in punitive damages.[11] Hartford denied liability for the punitive damages.[12] Consequently, C&A sued on the policy in North Carolina.[13] The superior court held that Hartford was not liable for the recovery of punitive damages.[14] In a unanimous decision, the North Carolina Court of Appeals reversed, holding Hartford liable.[15] The North Carolina Supreme Court granted discretionary review.[16]

The court addressed two issues. First, it considered which state's law should govern the interpretation of the insurance contract. Hartford contended that North Carolina's long-standing rule of *lex loci contractus* governed the case.[17] Under that rule, "the substantive law of the state where the last act to make a binding contract takes place controls all aspects of the interpretation" of the contract.[18] Because the last act to form the contract—the delivery—took place in California, Hartford argued that California law should be applied.[19] The majority rejected this argument and relied instead on section 58-3-1 of the North Carolina General Statutes,[20] which directs application of North Carolina law to certain insurance contract cases.[21]

Concluding that North Carolina law governed the dispute,[22] the court then examined whether the insurance policy covered punitive dam-

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9. *Id.*

10. *Id.* The accident, which occurred on February 29, 1988, involved one of C&A's trucks from its transportation division in Albemarle, North Carolina. *Id.* Ninety-seven of the company's 102 trucks, including the one involved in the accident, were titled in North Carolina. *Id.* The accident killed two people and prompted a wrongful death action against C&A. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Collins & Aikman Corp. v. Hartford Accident & Indem. Co., 106 N.C. App. 357, 364, 416 S.E.2d 591, 595 (1992), *aff'd*, 335 N.C. 91, 436 S.E.2d 243 (1993).

16. *Collins & Aikman*, 335 N.C. at 93, 436 S.E.2d at 244.

17. *Id.* at 94, 436 S.E.2d at 245.

18. *Id.* at 99, 436 S.E.2d at 248 (Meyer, J., dissenting).

19. *Id.* at 94, 436 S.E.2d at 245.

20. *Id.*

21. N.C. GEN. STAT. § 58-3-1 (1991). The statute provides:

> All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

Id.

22. *Collins & Aikman*, 335 N.C. at 94, 436 S.E.2d at 245.

ages.[23] Although the policy expressly excluded coverage for "fines and penalties," the court found those terms ambiguous.[24] Construing the policy against the drafter, the court held that the policy covered punitive damages.[25] Three justices dissented on this issue; they argued that the provision excluding fines and penalties was not ambiguous and required the exclusion of punitive damages.[26]

When states devise choice of law rules, they are limited only by the Constitution of the United States.[27] From 1866 to 1935, the United States Supreme Court often invalidated choice of law rules that exceeded constitutional limits.[28] During this time, the Supreme Court employed a very rigid and structured analysis.[29] In the contracts area, the Court followed the rule

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23. *Id.* at 97, 436 S.E.2d at 246. If California law had applied, the punitive damages would not have been covered by the insurance contract because punitive damages are uninsurable as a matter of policy in California. *Id.* at 100, 436 S.E.2d at 248-49 (Meyer, J., dissenting) (citing State Farm Fire & Casualty Co. v. Superior Court, 236 Cal. Rptr. 216, 219 (Cal. Ct. App. 1987)). In North Carolina, however, public policy does not prohibit insurance coverage of punitive damages. *Id.* at 102, 436 S.E.2d at 249-50 (Meyer, J., dissenting) (citing Mazza v. Medical Mut. Ins. Co., 311 N.C. 621, 623, 319 S.E.2d 217, 219 (1984)).

24. *Id.* at 97, 436 S.E.2d at 246-47.

25. *Id.* at 96, 436 S.E.2d at 246.

26. *Id.* at 103-04, 436 S.E.2d at 250-51 (Meyer, J., dissenting).

27. *See* W. Müller-Freienfels, *Conflicts of Law and Constitutional Law*, 45 U. CHI. L. REV. 598, 598 (1978).

28. James R. Pielemeier, *Why We Should Worry About Full Faith and Credit To Laws*, 60 S. CAL. L. REV. 1299, 1303 (1987). Courts have differed on which provisions of the Constitution govern state choice of law limits—the Full Faith and Credit Clause or the Due Process Clause. Article IV of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. The Fourteenth Amendment, on the other hand, prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Choice of law has usually been addressed through the Due Process Clause. *See* Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 95 (1984). Many commentators, however, have argued that due process analysis as a basis for conflict of laws analysis is inadequate and should be replaced by Full Faith and Credit Clause analysis. *See, e.g.*, James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 229 (1976) (arguing that the Full Faith and Credit Clause provides a better "theoretical basis for limiting a state's choice of law"). The Due Process Clause prevents a state from "overreaching" through application of its laws to the exclusion of another state's laws. Brilmayer, *supra*, at 96. Professor Brilmayer points out that the Supreme Court's decision in Nevada v. Hall, 440 U.S. 410 (1979), "stands for the proposition that if there are sufficient contacts to justify application of local law under the due process clause, then application of local law also satisfies full faith and credit." Brilmayer, *supra*, at 108. For conflict of law purposes, therefore, there may be no difference between due process and full faith and credit treatment.

29. Pielemeier, *supra* note 28, at 1304. Adhering to a very formal view of state boundaries and choice of law rules, the United States Supreme Court, in Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934), invalidated the application of a Mississippi choice of law statute that was virtually identical to section 58-3-1 of the North Carolina General Statutes. A Connecticut insurance company insured a Mississippi corporation against loss from the dishonesty of any of its employees. *Delta & Pine*, 292 U.S. at 144-45. Because the loss occurred in Missis-

of *lex loci contractus*, under which it strictly applied the law of the state in which a contract was formed.[30]

When interstate business and travel increased in the mid-twentieth century, an increasing number of cases arose in which more than one state had legitimate interests.[31] In response, the Supreme Court shifted its position.[32] At present, the Court employs a "significant contacts" approach: As long as a state has significant contacts with a dispute, application of its own law will not violate the Constitution.[33]

The Court recently discussed the significant contacts approach in *Allstate Insurance Co. v. Hague*[34] and *Phillips Petroleum Co. v.*

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sippi, the Mississippi Supreme Court applied Mississippi law even though the contract was formed in Tennessee. *Id.* at 147-48. The United States Supreme Court found this action contravened the Fourteenth Amendment's Due Process Clause. *Id.* at 149-50. Although the Court spoke strongly against application of the Mississippi statute, it stated that the statute may not be unconstitutional under all circumstances. *Id.* at 149. Under some circumstances, Mississippi could have a strong enough connection with a contract to justify application of its own law. *Id.* Under the circumstances in *Delta & Pine*, however, Mississippi had only a slight connection to the contract; thus, the statute was unconstitutional. *Id.* at 149. The decision in *Delta & Pine* was clearly a product of early formalistic thinking and there is evidence that the United States Supreme Court may no longer consider it good law. *See* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 181-82 (1964); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 71 (1955); *see also* Frederic L. Kirgis, Jr., *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 110 n.59 (1976) (suggesting that the statute in *Delta & Pine* would satisfy present due process standards).

30. Pielemeier, *supra* note 28, at 1304.

31. *Id.*

32. Müller-Freienfels, *supra* note 27, at 599. In 1981, the Supreme Court reviewed a state choice of law decision for the first time in eighteen years. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); *see also* Gene R. Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 327 (1982) (noting that *Hague* was the first case in eighteen years in which the Supreme Court had reviewed a state choice of law decision). In 1985, the Court invalidated a state's choice of law rules for the first time in thirty-eight years. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985); *see also* Pielemeier, *supra* note 28, at 1299 ("[*Shutts*] ended the longstanding Supreme Court acquiescence to a growing trend among state courts to apply forum law in cases involving people and events in other states."). For a discussion of the Court's recent choice of law decisions, see *infra* notes 34-39 and accompanying text.

33. Pielemeier, *supra* note 28, at 1307.

34. 449 U.S. 302 (1981). The dispute in *Hague* stemmed from an automobile accident that occurred in Wisconsin between two Wisconsin residents. *Id.* at 305. The dispute involved insurance policies that were issued in Wisconsin and covered Wisconsin vehicles. *Id.* at 305. Each of the three automobile policies provided a maximum of $15,000 in uninsured motorist coverage. *Id.* "Stacking" the policies would allow a recovery of $45,000. *Id.* The choice of law issue arose in determining whether to apply Minnesota law, which allowed "stacking," or Wisconsin law, which did not. *Id.* at 306. The Minnesota Supreme Court affirmed the district court's choice of Minnesota "stacking" law, finding no constitutional problems. Hague v. Allstate Ins. Co., 289 N.W.2d 43, 49 (Minn. 1979).

In a plurality opinion, the United States Supreme Court affirmed Minnesota's choice of law decision. *Hague*, 449 U.S. at 320; *see also* Shreve, *supra* note 32, at 328-31 (explaining the Court's decision in *Hague*). Justice Brennan wrote the opinion and was joined by Justices White,

Shutts.[35] The Court refused to impose national choice of law standards and instead left the states relatively free to fashion their own choice of law rules.[36] The full Court could agree only that there must be a legitimate state interest in the controversy if the state is to apply its own laws.[37] That the Court declined to bring greater uniformity to the area of choice of law disappointed some commentators.[38] Legal analysts have since called upon the Court to define more specifically the standards for determining the constitutionality of particular choice of law applications;[39] thus far the Court has not done so.

Marshall, and Blackmun. *Hague*, 449 U.S. at 302. Because Justice Stevens concurred on the constitutionality of the decision, five justices agreed that the choice of law decision did not violate the full faith and credit or due process clauses of the Constitution. *Id.* at 331-32 (Stevens, J., concurring). The Court considered three notable contacts with Minnesota: the deceased had worked in Minnesota and had commuted there daily; Allstate Insurance did business within Minnesota; and Mrs. Hague had become a resident of Minnesota, administering her husband's estate from there. *Id.* at 313-19. By aggregating these contacts, the Court held that Minnesota's interest in applying its stacking rule was sufficient. *Id.* at 320.

35. 472 U.S. 797 (1985). *Shutts* involved a class action by 28,000 royalty owners with rights to certain leases Phillips Petroleum used to produce gas. *Id.* at 799. The royalty owners filed suit in Kansas to recover interest on royalty payments owed by Phillips. *Id.* Although the class action involved plaintiffs from many different states, *id.*, the Kansas Supreme Court upheld application of Kansas law to the dispute, *id.* at 803. It stated that, in a class action, "generally the law of the forum controlled all claims unless 'compelling reasons' existed to apply a different law." *Id.* Actually, ninety-seven percent of the plaintiffs and ninety-nine percent of the gas leases had no connection to Kansas. *Id.* at 815.

The United States Supreme Court noted the differences in Kansas law and other potentially applicable laws, stating that no harm could be asserted unless the substantive laws of the states were different. *Id.* at 816. In its discussion of the applicable test of constitutionality, the Court reiterated that a state must have "'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Id.* at 818 (quoting *Hague*, 449 U.S. at 312-13). Applying this test, the Court found that application of Kansas law to all of the claims was "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822.

36. *Hague*, 449 U.S. at 307. Justice Stevens, in his concurring opinion, expressly stated that it was not within the Court's function to pursue a federal body of choice of law rules. *Id.* at 332 (Stevens, J., concurring). Shreve argues, however, that such a national system could promote uniformity and free federal courts from the difficulties of applying local choice of law rules when they hear cases in diversity jurisdiction. Shreve, *supra* note 32, at 339. Although Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 489 (1941), stated that federal choice of law rules would fall under the impermissible exercise of general federal common law prohibited by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), commentators criticized the result as unnecessary. *See* William F. Baxter, *Choice of Law and Federal System*, 16 STAN. L. REV. 1, 41 (1963); Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 241 (1964). The Supreme Court, however, subsequently expressed approval of the *Klaxon* decision. *See* Day & Zimmerman v. Challoner, 423 U.S. 3, 4 (1975).

37. *See supra* notes 34-35.

38. *E.g.*, Shreve, *supra* note 32, at 331.

39. *Id.* at 345-50. Shreve proposed that courts consider the need to prevent unfair surprise to litigants and to require demonstrable state interests. *Id.*

Free to fashion their own choice of law rules limited only by the Constitution,[40] states have primarily followed one of two types of contractual choice of law rules. One group of states follows the Restatement (First) of Conflict of Laws.[41] Under the Restatement (First), the validity and construction of a contract are governed by the law of the place where the contract was made.[42] Performance of a contract, however, is governed by the law of the place where performance is to occur.[43] A second group of states follows the rules reflected in the Restatement (Second) of Conflict of Laws. The Restatement (Second) adopted the "most significant relationship" test,[44] under which a court applies the law of the state with the closest relationship to the parties and issues involved in the dispute.[45] While other choice of law rules are used in the United States,[46] the two Restatement tests remain the most prevalent.[47]

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40. As the discussion *supra* notes 27-39 and accompanying text described, determinations of whether a particular choice of law violates the Constitution are unclear. Since the Supreme Court has chosen to offer only minimal guidance on constitutionality, only the most egregious violations are likely to be overturned. Unless the Court takes a firmer stand in the future, states will remain relatively free from constitutional second-guessing of their decisions.

41. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311-47 (1934).

42. *Id.* § 311.

43. *Id.* §§ 355-72.

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

45. *Id.* § 188. RESTATEMENT (SECOND) § 6 provides seven relevant factors to be considered in choice of law decisions:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Id. § 6. RESTATEMENT (SECOND) § 188 provides that courts should apply the law of the state with "the *most significant relationship* to the transaction and the parties under the principles stated in § 6." *Id.* § 188 (emphasis added). The RESTATEMENT (SECOND) allows consideration of the place of contracting, negotiation, and performance, the location of the subject matter of the contract, *id.* § 188(3), and "the domicil, residence, nationality, place of incorporation and place of business of the parties." *Id.* § 188(2)(e).

46. These other tests are not relevant to the focus of this Note but include the following: the center of gravity test, the government interest analysis, Leflar's rule (or the better rule of law test), Cavers rule, Fuld's rule, and *lex fori*. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1046-50 (1987). For a full discussion of the states using any of these approaches, *see generally id.* (surveying the choice of law rules in the fifty states and the District of Columbia).

47. According to a 1987 compilation of state choice of law rules by Gregory Smith, the following twenty-three states use the RESTATEMENT (FIRST) rules for contract disputes: Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Maryland, Michigan, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. Smith, *supra* note 46, at 1050-1171.

North Carolina long has endorsed the Restatement (First)'s "place of making" or *lex loci contractus* test.[48] The North Carolina Supreme Court has stated that "[i]n interpreting a contract made outside of this State our courts long ago established the principle that the law of the country where the contract is made is the rule by which the validity of it, its exposition, and consequences are to be determined."[49] Applying that test to the *Collins & Aikman* case would lead to a result different from that reached by the

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The following fifteen states follow the RESTATEMENT (SECOND)'s most significant relationship rule for contract disputes: Arizona, Colorado, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, and Washington. *Id.*

More recent articles suggest that only a dozen states still adhere to the RESTATEMENT (FIRST). *See* Michael E. Solimine, *Choice of Law in the American Courts in 1991*, 40 AM. J. COMP. L. 951, 951 (1992); *see also* Larry Kramer, *Choice of Law In The American Courts In 1990: Trends And Developments*, 39 AM. J. COMP. L. 465, 486 (1991) (stating that the most widely used choice of law approach is that of the RESTATEMENT (SECOND)).

California and New York, at least in the torts area, have abandoned the "most significant relationship" test for the "government interest analysis" test. *See* Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967); Schultz v. Boy Scouts of America, 480 N.E.2d 679, 686-87 (N.Y. 1985); *see also* Smith, *supra* note 46, at 1055-58, 1105-16 (discussing *Reich* and *Schultz*).

48. *See* Smith, *supra* note 46, at 1116-18; Seymour W. Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C. L. REV. 243, 275 (1970). *But see infra* note 63. In Tanglewood Land Co. v. Byrd, 299 N.C. 260, 261 S.E.2d 655 (1980), the North Carolina Supreme Court reaffirmed the rule that the law of the place where a contract is made governs its interpretation. *Id.* at 262, 261 S.E.2d at 656. *Byrd* involved a contract for the sale of land, but in the past the court also has applied the rule of *lex loci contractus* to insurance contracts. *See* Connor v. State Farm Mut. Auto. Ins. Co., 265 N.C. 188, 190, 143 S.E.2d 98, 100 (1965) (applying the rule of *lex loci contractus* to an insurance policy issued in Virginia to a Virginia resident covering a vehicle titled in Virginia); Roomy v. Allstate Ins. Co., 256 N.C. 318, 323, 123 S.E.2d 817, 820 (1962) (applying the rule of *lex loci contractus* to interpret an automobile insurance policy issued in New York even though the accident occurred in North Carolina); Keasler v. Mutual Benefit Life Ins. Co., 177 N.C. 394, 99 S.E. 97 (1919) (applying the rule of *lex loci contractus* to an insurance policy issued in Georgia to a Georgia resident).

One notable insurance case involved the applicability of the predecessor statute to § 58-3-1 of the North Carolina General Statutes. In Turner v. Liberty Mut. Ins. Co., 105 F. Supp. 723 (E.D.N.C. 1952), a federal district court considered the appropriate choice of law with respect to an automotive policy issued in New Jersey to a resident of New Jersey covering a New Jersey vehicle that was involved in an accident in North Carolina while leased to a North Carolina resident. *Id.* at 724. The federal district court refused to apply the predecessor statute to § 58-3-1 based on the United States Supreme Court decision in Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934). *Turner*, 105 F. Supp. at 726. For a discussion of the *Delta & Pine* case, see *supra* note 29.

49. Fast v. Gulley, 271 N.C. 208, 211, 155 S.E.2d 507, 509 (1967) (citing Hall v. Western Union Tel. Co., 139 N.C. 369, 373, 52 S.E. 50, 51 (1905); Williams, Black & Co. v. Carr, 80 N.C. 294, 299 (1879); Anderson v. Doak, 32 N.C. (10 Ired.) 295, 297 (1849); Watson v. Orr, 14 N.C. (3 Dev.) 161, 163 (1831)); *see also* Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 863 (1931) ("The general principle recognized in all jurisdictions is that ordinarily the execution, interpretation and validity of a contract is [sic] to be determined by the law of the State or country in which it is made."); Cannaday v. Atlantic Coast Line R.R., 143 N.C. 439, 442, 55 S.E. 836, 837 (1906) ("Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it was made.").

North Carolina Supreme Court. There was no disagreement among the justices that the last act to make the contract (the delivery) occurred in California.[50] Under the traditional test, California law would have governed, so the dissenters argued vigorously for the application of California law.[51]

The majority, however, applied section 58-3-1 of the North Carolina General Statutes, which states that insurance contracts covering property in North Carolina are governed by North Carolina law.[52] Though the North Carolina Supreme Court upheld the constitutionality of the statute,[53] a similar Mississippi statute was found unconstitutional by the United States Supreme Court in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*[54] The *Collins & Aikman* majority found a greater connection between North Carolina and the insurance contract than was present in *Delta & Pine*; therefore, they held that application of the statute would not violate the United States Constitution.[55]

Because the facts of *Collins & Aikman* were unusual, comparing the North Carolina Supreme Court's opinion with past North Carolina contract choice of law cases does not produce clear results. Without questioning the validity of past cases espousing the *lex loci contractus* rule, the court distinguished many of them because they did not involve insurance contracts or the application of section 58-3-1.[56] Previous insurance contract cases that

50. *See Collins & Aikman*, 335 N.C. at 93, 436 S.E.2d at 245; *id.* at 98-99, 436 S.E.2d at 247 (Meyer, J., dissenting).

51. *Id.* at 97-100, 436 S.E.2d at 247-49 (1993) (Meyer, J., dissenting).

52. N.C. GEN. STAT. § 58-3-1 (1993). For the full text of the statute, see *supra* note 21.

53. *Collins & Aikman*, 335 N.C. at 95, 436 S.E.2d at 246; *see* Williams v. Mutual Reserve Fund Life Ass'n, 145 N.C. 92, 94-95, 58 S.E. 802, 803 (1907). *See generally* D.W. Markham, Note, *Conflict of Laws—Insurance—Validity of Statutes Localizing Insurance Contracts*, 13 N.C. L. REV. 213 (1935) (discussing the effect of the United States Supreme Court decision in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* on the predecessor statute to N.C. GEN. STAT. § 58-3-1).

54. 292 U.S. 143 (1934). For a discussion of *Delta & Pine*, see *supra* note 29.

55. *Collins & Aikman*, 335 N.C. at 95, 436 S.E.2d at 246. North Carolina also had sufficient contacts with the controversy and the parties to satisfy the significant contacts test, under which the United States Supreme Court has reviewed choice of law decisions at least since Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). *See supra* notes 33-35 and accompanying text. Application of North Carolina law was neither arbitrary nor unfair to the litigants. The policy covered liability arising from property titled in North Carolina, the insured's transportation division resides in North Carolina, and both the accident and the wrongful death suit which prompted the liability at issue in the case occurred in North Carolina. *Collins & Aikman*, 335 N.C. at 93, 436 S.E.2d at 244.

56. *Id.* at 94, 436 S.E.2d at 245 (distinguishing Keasler v. Mutual Benefit Life Ins. Co., 177 N.C. 394, 99 S.E. 97 (1919) and Roomy v. Allstate Ins. Co., 256 N.C. 318, 123 S.E.2d 817 (1962)). The only case remotely similar to *Collins & Aikman* was Turner v. Liberty Mutual Insurance Co., 105 F. Supp. 723 (E.D.N.C. 1952), the case in which a federal district court refused to apply the predecessor to N.C. GEN. STAT. § 58-3-1 to a New Jersey insurance contract. *See supra* note 48. The majority in *Collins & Aikman* distinguished the cases by the respective degree of connection with North Carolina. *Collins & Aikman*, 335 N.C. at 95, 436 S.E.2d at 245. The

applied the law of other states did not involve property, lives, or interests in North Carolina.[57]

The dissenting justices, although agreeing that North Carolina had more contacts with C&A's policy than with the policies at issue in prior cases,[58] took a broader view of the situation.[59] Considering that the policy had nationwide coverage, the dissenters argued that these contacts were insufficient to apply North Carolina law.[60] The dissenters also noted that the North Carolina Supreme Court had never before held that the number of contacts with the state was determinative for choice of law purposes.[61]

Section 58-3-1 of the North Carolina General Statutes establishes that certain contacts in connection with insurance contracts will always justify applying North Carolina law. Although the application of this statute is constitutional, the court could have reached the same result through modern contractual choice of law analysis, such as the Restatement (Second)'s most significant relationship test.[62] Instead, the court merely carved out an insurance contract exception to the *lex loci contractus* rule.[63]

There is some justification for evaluating insurance contracts differently.[64] Mechanical application of the *lex loci contractus* rule may thwart a state's legitimate interest in a dispute that involves sufficient contacts. For example, state interests may be magnified in the area of insurance; the orig-

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court found the connection with North Carolina more significant in *Collins & Aikman* because the vehicles were actually titled in the state, whereas in *Turner* the vehicle was registered in New Jersey and only leased to a North Carolina resident. *Id.*

57. Turner v. Liberty Mut. Ins. Co., 105 F. Supp. 723, 724-26 (E.D.N.C. 1952); Connor v. State Farm Mut. Auto. Ins. Co., 265 N.C. 188, 190, 143 S.E.2d 98, 100 (1965); Roomy v. Allstate Ins. Co., 256 N.C. 318, 323, 123 S.E.2d 817, 820 (1962); Keasler v. Mutual Benefit Life Insurance Co., 177 N.C. 394, 99 S.E. 97 (1919).

58. *Collins & Aikman*, 335 N.C. at 100, 436 S.E.2d at 248.

59. *Id.* at 99-100, 436 S.E.2d at 248 (Meyer, J., dissenting).

60. *Id.* at 100, 436 S.E.2d at 248 (Meyer, J., dissenting).

61. *Id.* (Meyer, J., dissenting). The court may have applied, *sub silentio*, a modified version of the RESTATEMENT (SECOND) "significant relationship" rule. For a discussion of the "significant relationship" test used by a majority of states for choice of law purposes, see *supra* notes 44-45 and accompanying text.

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

63. Commentators have noted that states that purport to follow traditional choice of law rules do not always adhere to those standards. *E.g.*, Solimine, *supra* note 47, at 966. Instead, these states seem willing to apply modern theories "in discrete contexts." *Id.* North Carolina has done this in one other context: the Uniform Commercial Code. *See* Burnick v. Jurden, 306 N.C. 435, 442-43, 293 S.E.2d 405, 410-11 (1982) (holding that the traditional *lex loci contractus* rule is inapplicable when an action is brought under North Carolina's version of the Uniform Commercial Code); *see also* P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 603 (1990) (noting that *Burnick* creates an exception to North Carolina's general adherence to the *lex loci contractus* rule); Smith, *supra* note 46, at 1118 (same).

64. *See* Michael W. Mengis, Note, *Conflict of Laws: Insurance*, 47 LA. L. REV. 1213, 1214 (1987).

inal dispute often involves tortious conduct, such as an automobile accident, which may involve residents or property within the state. Insurance, a combination of tort and contract, thus requires special rules.

The realities of insurance suggest that choice of law decisions such as *Collins & Aikman* do not work any hardship on insurance companies. Choice of law questions often arise with insurance contracts, because the state in which liability arises is often different from the state in which the contract was formed.[65] If an insurance company insures property or interests in a state, it is foreseeable that the law of that state might later govern a dispute. Given the sophistication of the modern insurance community, insurance companies should not be surprised when a state chooses to apply its own law to a dispute arising within its borders.[66]

Indeed, Professor Kirgis noted that insurers who issue national insurance coverage obtain a benefit from each state where a loss might occur.[67] According to Professor Kirgis, "[s]ince the increased geographic scope of coverage raise[s] the value of the policy to the insured, the insurer could charge a higher premium or secure a more competitive position against other insurers."[68] Through the costs of insurance, therefore, the economics of the marketplace account for increased risk to insurers caused by uncertainty in choice of law rules.[69] Insurers are further protected by their freedom to insert choice of law provisions into their contracts; many states honor these provisions.[70]

Choice of law decisions like *Collins & Aikman* may also prompt insurance companies to be more explicit in their coverage provisions instead of relying on local law to fill in contract details. Express provisions would benefit the insured, who may be unaware of state law at the place of contracting. Moreover, explicit language would benefit unsophisticated buyers who may be less likely to recognize ambiguities in the policy.[71]

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65. *See id.* at 1213.

66. *See id.* at 1232-33.

67. Kirgis, *supra* note 29, at 110.

68. *Id.*

69. *See id.*

70. *See id.*

71. In *Collins & Aikman*, the insurance contract contained an exception for fines and penalties. 335 N.C. at 97, 436 S.E.2d at 246. The majority found this provision ambiguous with respect to punitive damages. *Id.* at 97, 436 S.E.2d at 247. While there is no suggestion that C&A was unsophisticated, such a provision could be read to be directed primarily at government-imposed fines on the business. The potential imposition of punitive damages would be apparent to Hartford in issuing a national liability insurance policy. Such an important exception should be stated expressly and clearly. Hartford Accident & Indemnity possibly preferred to rely on California law which as a matter of policy prohibited the insuring of punitive damages. In this case, construing such a provision against the drafter may promote more explicit provisions in future policies. With such disclosure, the then informed potential buyers could knowingly accept or decline the policy.

In *Collins & Aikman*, the North Carolina Supreme Court reached a sensible conclusion with respect to insurance contracts. By relying on a statute that affects only insurance contracts, it avoided the need to reevaluate its choice of law rules. The court may be forced to consider broader change, though, when next confronted with a case where application of the *lex loci contractus* rule would disserve strong state interests.

MARY EVELYN THORNTON

Civil Procedure—Forum Selection—N.C. Gen. Stat. § 22B-3 (1994)

A forum selection clause is a provision by which contracting parties preselect a particular place in which to resolve controversies.[1] By agreeing to a forum selection clause, parties consent to the personal jurisdiction of a forum[2] and agree not to sue in any other forum.[3] Should a party to a forum selection clause ignore the clause and sue in a forum other than the one preselected, a court is bound either to dismiss the lawsuit or to transfer it to the preselected forum.[4]

In recent years, courts and commentators have recognized the utility of forum selection clauses.[5] By preselecting a forum, parties reduce the uncertainty of where plaintiffs will file lawsuits and of how various jurisdictions will decide the lawsuits. Parties also can better control litigation costs and

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1. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 360-61 (2d ed. 1992).

2. *Id.* at 361. Personal jurisdiction is a court's power to render a binding judgment on a person and to compel compliance with that judgment. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 53 (4th ed. 1992).

3. SCOLES & HAY, *supra* note 1, at 361.

4. *Id.* Federal courts enjoy the power to transfer actions from one federal district or division to another federal district or division. 28 U.S.C. § 1404 (1988 and Supp. XX 1993). State courts do not enjoy transfer powers. They must, instead, dismiss actions should they decide to enforce forum selection clauses. *E.g.*, N.C. GEN. STAT. § 1A-1, Rule 12(b) (1990). Federal courts cannot transfer actions to state courts or to foreign courts. Therefore, under these circumstances, they too must dismiss actions.

5. *See, e.g.*, GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 172 (1989) (pointing out that enforcement of forum selection clauses reduces the possibility of parallel lawsuits in different forums); James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 2-3 (1976) (noting that enforcement of forum selection clauses promotes certainty in contractual relations and encourages trade by negating the fear of the vagaries of unfamiliar and fortuitous foreign forums); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 51-52 (1992) (stating that enforcement of forum selection clauses allows contracting parties to choose a neutral forum, advances predictability in contractual relations, and reduces the possibility of parallel lawsuits in different forums); Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 422-23 (1991) (writing that enforcement of forum selection clauses promotes certainty in contractual relations, helps control litigation costs, minimizes tactical advantages gained through forum shopping, respects freedom of contract, encourages trade, and conserves judicial resources). *But see, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 156-57 (3d ed. 1986) (arguing that enforcement of forum selection clauses often works unfairness because many of these clauses appear in adhesion contracts); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716-30 (1992) (pointing out that enforcement of forum selection clauses often shifts contractual risk to those persons least able to bear these risks); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296-97, 362 (1988) (noting that enforcement of forum selection clauses sacrifices due process of law to freedom of contract).

minimize the tactical advantages forum shopping affords plaintiffs.[6] Forum selection clauses also further numerous public interests. As one commentator has noted, "[t]he enforcement of reasonable forum-selection clauses . . . respects freedom of contract, encourages trade, and conserves judicial resources by limiting pretrial struggles over where to litigate."[7]

With recent passage of a statute declaring forum selection clauses unenforceable,[8] North Carolina's policy on forum selection clauses now stands in contrast to the policies of the overwhelming majority of jurisdictions that enforce these clauses.[9] This forum selection statute provides, with one exception, that forum selection provisions in contracts entered into in North Carolina are void as against public policy.

This Note describes North Carolina's forum selection statute.[10] The Note next traces the background law leading up to passage of the statute and the General Assembly's reason for enacting it.[11] The Note then analyzes how the statute affects the enforceability of forum selection clauses under North Carolina law.[12] Finally, the Note concludes that passage of the statute created more problems than it solved and that the General Assembly should act to remedy these problems.[13]

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6. Lederman, *supra* note 5, at 422-23. An example of the advantages plaintiffs gain by forum shopping is that the plaintiff may select a forum that he knows will pose a great inconvenience to the defendant.

7. *Id.* at 424 (citations omitted).

8. 1993 N.C. Sess. Laws 436 (codified at N.C. GEN. STAT. § 22B-3 (1994)).

9. *See* Volkswagenwerk, A.G. v. Klippan, GmbH, 611 P.2d 498, 503-04 (Alaska), *cert. denied*, 449 U.S. 974 (1980); Societe Jean Nicolas v. Mousseux, 597 P.2d 541, 542-43 (Ariz. 1979); Nelms v. Morgan Portable Bldg. Corp., 808 S.W.2d 314, 316-18 (Ark. 1991); Smith, Valentino & Smith v. Superior Court of Los Angeles County, 551 P.2d 1206, 1208-09 (Cal. 1976); Vessels Oil & Gas Co. v. Coastal Ref. & Marketing, 764 P.2d 391, 393 (Colo. App. 1988); United States Trust Co. v. Bohart, 495 A.2d 1034, 1040 (Conn. 1985); Elia Corp. v. Paul N. Howard Co., 391 A.2d 214, 216 (Del. Super. 1978); Manrique v. Fabbri, 493 So. 2d 437, 438-40 (Fla. 1986); Calanca v. D&S Mfg. Co., 510 N.E.2d 21, 23-24 (Ill. App. 1987); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436-37 (Iowa 1982); Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97, 99 (Ky. App. 1979); Calzavara v. Biehl & Co., 181 So. 2d 809, 810 (La. App. 1966); Mech v. General Casualty Co., 410 N.W.2d 317, 321 (Minn. 1987); State *ex rel.* Marlo v. Hess, 669 S.W.2d 291, 293-94 (Mo. App. 1984); Air Economy Corp. v. Aero-Flow Dynamics, 300 A.2d 856, 856-57 (N.J. Super. 1973); Reeves v. Chem Indus. Co., 495 P.2d 729, 732 (Or. 1972); Central Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d 810, 815-16 (Pa. 1965); Green v. Clinic Masters, 272 N.W.2d 813, 814-15 (S.D. 1978); Dyersburg Mach. Works v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380 (Tenn. 1983); Exum v. Vantage Press, 563 P.2d 1314, 1315 (Wash. App. 1977). *But see* Redwing Carriers v. Foster, 382 So. 2d 554, 556 (Ala. 1980); Cartridge Rental Network v. Video Entertainment, 209 S.E.2d 132, 132 (Ga. App. 1974); Dowling v. NADW Mktg., 578 S.W.2d 475, 475-76 (Tex. Civ. App. 1979), *rev'd on other grounds*, 631 S.W.2d 726 (Tex. 1982).

10. *See infra* notes 14-15 and accompanying text.

11. *See infra* notes 16-30 and accompanying text.

12. *See infra* notes 31-43 and accompanying text.

13. *See infra* notes 44-52 and accompanying text.

The North Carolina forum selection statute amended section 22B of the General Statutes to read:

> Any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions.
>
> This act becomes effective October 1, 1993, and applies to any contract entered into on or after that date.[14]

Although the statute applies only to contracts entered into in North Carolina, its scope is very broad because, with the exception of nonconsumer loans, it applies to all types of contracts and to out-of-state arbitration.[15]

Prior to the United States Supreme Court's landmark forum selection decision, *The Bremen v. Zapata Off-Shore Co.*,[16] in which the Court held

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14. 1993 N.C. Sess. Laws 436 (codified at N.C. GEN. STAT. § 22B-3 (1994)).

15. This arbitration provision was added by floor amendment to Representative Joseph Hackney's original House Bill 1027. North Carolina General Assembly, 1993 Session, History of House Bill H1027. The provision excluding nonconsumer loans was also added by floor amendment to the original bill. *Id.* This arbitration provision reflects the General Assembly's determination to preserve inviolate North Carolina parties' rights to have their disputes heard in North Carolina, whether by a court of law or by an arbitration panel.

16. 407 U.S. 1, 10 (1972). Most commentators agree that *Bremen* marked a turning point in the U.S. Supreme Court's forum selection jurisprudence. *See, e.g.*, Solimine, *supra* note 5, at 55. *Bremen* suggests that a court may refuse to enforce a forum selection clause if it is shown that enforcement would be " 'unreasonable' under the circumstances." *Bremen*, 407 U.S. at 10 (footnote omitted). The following factors play a role in determining whether enforcement would be unreasonable: fraud, undue influence, overweening bargaining power, and serious inconvenience. *Id.* at 12, 16-18. Although the Supreme Court could have limited *Bremen* to its facts (an action in admiralty between international corporations), it continued to enforce forum selection clauses in other areas of federal jurisdiction. *See, e.g.*, Stewart Org. v. Ricoh Corp., 487 U.S. 22 (1988) (enforcing a forum selection clause in a lawsuit within diversity subject matter jurisdiction). Although the Supreme Court has not yet faced the enforceability of forum selection clauses under federal question subject matter jurisdiction, numerous federal district courts have found these clauses enforceable in this area. *See, e.g.*, Frontier Airlines, Inc. Retirement Plan for Pilots v. Security Pac. Nat'l Bank, 696 F. Supp. 1403, 1404-05 (D. Colo. 1988) (enforcing forum selection clause in action brought under Employee Retirement Income Security Act); Stewart v. Murlas Commodities, 684 F. Supp. 166, 167-68 (E.D. Mich. 1988) (enforcing forum selection clause in action brought under Racketeer Influenced and Corrupt Organizations Act); Marine Eng'rs Beneficial Ass'n v. Trinidad Corp., 583 F. Supp. 262, 266-68 (S.D.N.Y. 1984) (enforcing forum selection clause in action under federal collective bargaining laws). Recently, in a much criticized decision, Carnival Cruise Lines v. Shute, 111 S. Ct. 1522 (1991), the United States Supreme Court greatly expanded the enforceability of forum selection clauses. In *Shute*, a Washington state consumer, Eulala Shute, purchased tickets from a Florida-based cruise line company, Carnival Cruise Lines. *Shute*, 111 S. Ct. at 1524. The ticket admonished purchasers to read the conditions on the last page, and these conditions explicitly stated that the parties would have to litigate all disputes in Florida courts. *Id.* Ms. Shute was injured during her cruise, and despite the forum selection clause, she sued Carnival in federal court in the state of Washington. *Id.* at 1522. Arguing that the forum selection clause required Ms. Shute to file her lawsuit in Florida, Carnival moved for

that forum selection clauses are prima facie valid, most federal and state courts had refused to enforce forum selection clauses.[17] After *Bremen*,[18] numerous state courts revisited this issue, and many adopted rules favoring enforcement of forum selection clauses.[19] Only four state courts now refuse to enforce forum selection clauses,[20] and only two states other than North Carolina have statutes against enforcement of the clauses.[21]

For a brief period prior to passage of its forum selection statute, North Carolina joined the overwhelming majority of jurisdictions that enforce fo-

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summary judgment. Upholding the district court and reversing the Ninth Circuit, the Supreme Court found the forum selection clause reasonable, enforced it, and granted Carnival's motion. *Id.* at 1529. Many commentators have criticized *Shute* as supporting the enforcement of adhesion contracts that effectively deprive many of their day in court. *See, e.g.*, Goldman, *supra* note 5 (arguing that enforcement of forum selection clauses in consumer contracts is unfair and will likely result in many meritorious suits going unfiled); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992) (arguing that the Supreme Court ignored blatant unconscionability of the forum selection clause); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 U.C.L.A. L. REV. 423 (1992) (examining the burdens imposed on individual litigating in a distant forum and arguing that forum selection clauses unfairly prejudice consumers' substantive claims). *But see* Solimine, *supra* note 5, at 83-85 (1992) (arguing that *Shute* was correctly decided). By passing the forum selection statute, the North Carolina General Assembly joined this chorus of critics.

17. *See, e.g.*, Carbon Black Export v. The Monrosa, 254 F.2d 297, 300 (5th Cir. 1958); Wood & Selick v. Compagnie Generale Transatlantique, 43 F.2d 941, 942 (2d Cir. 1930); The Ciano, 58 F. Supp. 65, 66-67 (E.D. Pa. 1944); Kuhnhold v. Compagnie Generale Transatlantique, 251 F. 387, 388 (S.D.N.Y. 1918); Prince Steam Shipping Co. v. Lehman, 39 F. 704, 704 (S.D.N.Y. 1889); Parker, Peebles & Knox v. El Saieh, 141 A. 884, 889-90 (Conn. 1928); Cadillac Auto. Co. v. Engeian, 157 N.E.2d 657, 659-60 (Mass. 1959); Gaither v. Charlotte Motor Car Co., 109 S.E. 362, 363-64 (N.C. 1921); Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972). *But see* Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344-45 (3d Cir. 1966); Anastasiadis v. S.S. Little John, 346 F.2d 281, 284 (5th Cir. 1965); Wm. H. Muller & Co. v. Swedish Am. Line, 224 F.2d 806, 807-08 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990, 990-91 (2d Cir. 1951); Calzavara v. Biehl & Co., 181 So. 2d 809, 810 (La. App. 1966); Central Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d 810, 815-16 (Pa. 1965).

18. *Bremen* and other Supreme Court decisions enforcing forum selection clauses are not binding authority upon state courts. Solimine, *supra* note 5, at 56-57 n.32. The persuasive authority of these cases has nonetheless exercised great influence on state courts. *Id.* at 56.

19. *See supra* note 9.

20. The four states that refuse to enforce forum selection clauses are Alabama, Georgia, Montana, and Texas. *See* Redwing Carriers v. Foster, 382 So. 2d 554, 556 (Ala. 1980); Cartridge Rental Network v. Video Entertainment, 209 S.E.2d 132, 132 (Ga. App. 1974); State *ex rel.* Polaris Indus. v. District Court, 695 P.2d 471, 471-72 (Mont. 1985); Dowling v. NADW Mktg., 578 S.W.2d 475, 475-76 (Tex. Civ. App. 1979), *rev'd on other grounds*, 631 S.W.2d 726 (Tex. 1982). Although only these four jurisdictions have affirmatively declared that they will not enforce forum selection clauses, numerous other jurisdictions have given mixed signals about the enforcement of the clauses. The policies of these jurisdictions are discussed in Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1096 & n.31 (1989), Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1980 n.216 (1991), and Robert A. de By, Note, *Forum-Selection Clauses: Substantive or Procedural for* Erie *Purposes*, 89 COLUM. L. REV. 1068, 1071 (1989).

21. IDAHO CODE § 29-110 (1993); MONT. CODE ANN. §§ 18-1-403 and 28-2-708 (1993).

rum selection clauses. In *Perkins v. CCH Computax*,[22] the state supreme court declared that enforcement of forum selection clauses was consistent with the public policy of North Carolina.[23] The *Perkins* court expressed approval of *The Bremen v. Zapata Off-Shore Co.*[24] and adopted a test similar to the *Bremen* test. The court explained this test in the following manner:

> A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable. . . . [T]he trial court retains the authority to hear the case when it determines that the forum selection clause was the product of fraud or unequal bargaining power or that the clause would be unfair or unreasonable.[25]

Although the *Perkins* test treats forum selection clauses as presumptively enforceable, it directs that under North Carolina law, courts should refuse to enforce these clauses if enforcement would be unfair or unreasonable.[26] Presumably, these safeguards would protect consumers and others with little bargaining power. Notwithstanding these safeguards, Justice Mitchell vigorously dissented and argued that the majority's rule would too often work to the disadvantage of those with little bargaining power.[27] He also found the majority's safeguards "entirely theoretical and illusory,"[28]

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22. 333 N.C. 140, 423 S.E.2d 780 (1992). In *Perkins*, a North Carolina accountant entered into a license and service agreement with a California computer software company. The agreement provided that if disputes arose between the licensor and licensee, California law would control the agreement and any action would be brought in the courts of Los Angeles County, California. *Id.* at 141-42, 423 S.E.2d at 781. A little over one year into the agreement, the accountant sued the software company in North Carolina state court, and the software company moved to dismiss. Relying on the terms of the forum selection clause in the agreement, the software company argued that the action had been brought in an improper venue. *Id.* at 142, 423 S.E.2d at 781-82. Affirming the trial court and reversing the North Carolina Court of Appeals, the North Carolina Supreme Court enforced the forum selection clause and dismissed the action. *Id.* at 146, 423 S.E.2d at 784.

23. *Id.*

24. 407 U.S. 1 (1972).

25. *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784. The court said it based its test on a decision of the Virginia Supreme Court, Paul Business Sys. v. Canon U.S.A., 397 S.E.2d 804, 807 (Va. 1990). *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784. Although the Virginia test uses the terms "unfair" and "unreasonable" instead of the *Bremen* terms "inconvenient" and "unreasonable," the two tests are substantially the same. Both tests make forum selection clauses unenforceable when there is evidence of inequitable conduct such as fraud or unequal bargaining power.

26. *See Perkins*, 333 N.C. at 146, 423 S.E.2d at 784.

27. *Id.* at 147, 423 S.E.2d at 784 (Mitchell, J., dissenting).

28. *Id.*, 423 S.E.2d at 785 (Mitchell, J., dissenting).

because persons with little bargaining power very often do not have the financial resources to fight a court battle.[29]

North Carolina's forum selection statute was passed to overrule *Perkins*.[30] The statute, like Justice Mitchell's *Perkins* dissent, reflects concern that enforcement of forum selection clauses will work to the general public's disadvantage. In order to correct this perceived disadvantage, the North Carolina General Assembly passed the forum selection statute—a statute broadly drafted to protect consumers and others with little bargaining power.

In light of its sweeping scope, the North Carolina forum selection statute will, of course, change contractual relations in North Carolina. These changes can be observed by considering how state and federal courts will apply the statute. North Carolina state courts follow the choice of law principles reflected in the Restatement (First) of Conflict of Laws.[31] Under these principles, the law of the state where a contract was entered controls disputes over enforcement and interpretation of a contract.[32] In contrast, the law of the state where performance took place controls disputes arising over performance of the contract.[33] Pursuant to Restatement (First) principles, when parties enter a contract containing a forum selection clause in North Carolina, state courts will look to the North Carolina forum selection statute and refuse to enforce the forum selection clause. When parties enter a contract containing a forum selection clause in a jurisdiction other than North Carolina, state courts will look to the law of the jurisdiction in which the contract was entered.[34]

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29. *Id.* (Mitchell, J., dissenting).

30. Telephone Interview with Joseph Hackney, Member, North Carolina House of Representatives (Sept. 3, 1993) [hereinafter Hackney Interview].

31. *See* Computer Sales Int'l v. Forsyth Memorial Hosp., 112 N.C. App. 633, 635, 436 S.E.2d 263, 265 (1993) (citing Tanglewood Land Co. v. Byrd, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980)). *But see* Collins & Aikman Corp. v. Hartford Accident & Indem. Co., 335 N.C. 91, 94, 436 S.E.2d 243, 245 (1993) (holding that N.C. GEN. STAT. § 58-3-1 displaces traditional choice-of-law rules in insurance contract cases); Bernick v. Jurden, 306 N.C. 435, 442, 293 S.E.2d 405, 410-11 (1982) (holding that traditional choice-of-law rules are inapplicable when an action is brought under North Carolina's version of the Uniform Commercial Code). In the present issue of the *North Carolina Law Review*, one commentator notes that although the North Carolina Supreme Court continues to adhere to the Restatement (First) position, the court has in recent years created exceptions to this position with decisions like *Collins & Aikman* and *Bernick*. Mary Evelyn Thornton, Note, *Modern Results Without Modern Choice of Law Rules: A Look at* Collins & Aikman Corp. v. Hartford Accident & Indemnity Co., 72 N.C. L. REV. 1501, 1510 n.63 (1994).

32. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

33. *Id.* § 358.

34. For example a North Carolina court would refuse to enforce a forum selection clause in a contract entered into in Alabama, because that state has held that forum selection clauses are *per se* unenforceable. Redwing Carriers v. Foster, 382 So. 2d 554, 556 (Ala. 1980). However, a North Carolina court would probably enforce a forum selection clause in a contract entered into in Virginia, because that state has held that forum selection clauses are enforceable except when

States other than North Carolina are split; some follow the choice of law principles reflected in the Restatement (First) of Conflict of Laws,[35] while others follow the choice of law principles reflected in the Restatement (Second) of Conflict of Laws.[36] In those states following the Restatement (First) principles, the analysis will be the same as that employed by North Carolina courts.[37]

In those states following the Restatement (Second) principles, the analysis will differ substantially. Under these principles, the law of the state with the "most significant relationship" to a transaction controls disputes over enforcement, interpretation, and performance of contracts.[38] Thus, in these jurisdictions, the North Carolina statute will be invoked only when a court determines that North Carolina had the most significant relationship to the transaction.[39]

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enforcement would be unfair or unreasonable. Paul Business Sys. v. Canon U.S.A., 397 S.E.2d 804, 807 (Va. 1990).

35. *See, e.g.*, Lyles v. Union Planters Nat'l Bank, 393 S.W.2d 867, 868-69 (Ark. 1965); Dworak v. Olson Constr. Co., 533 P.2d 946, 947 (Colo. App. 1975), *rev'd on other grounds*, 551 P.2d 198 (Colo. 1976); United States Leasing Corp. v. Keiler, 290 So. 2d 427, 430 (La. App. 1974); Traylor v. Grafton, 332 A.2d 651, 659 (Md. 1975); Dicker v. Klein, 277 N.E.2d 514, 515-16 (Mass. 1972); Jones v. Prudential Ins. Co., 42 S.E.2d 331, 333 (S.C. 1947); Padova v. Padova, 183 A.2d 227, 230 (Vt. 1962).

36. *See, e.g.*, W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 421 (Ind. 1945); Auten v. Auten, 124 N.E.2d 99, 101-02 (N.Y. 1954); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420-21 (Tex. 1984).

Two other important conflict of laws theories are the "governmental interest" theory and the "better law" theory. Under the "governmental interest" theory, it is believed that

> [e]very state . . . has a governmental interest in effectuating the policies underlying its own laws. Thus, when asked to apply the law of another forum, a court should first inquire into the policies expressed in the respective laws and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of these policies.

SCOLES & HAY, *supra* note 1, at 16 (citations omitted). Under the "better law" theory,

> a resolution [of a conflict of laws] is to be achieved by a principled *weighing* of conflicting policies. . . . These principles include (1) the choice of the state's law whose policies are most strongly held, (2) the choice of the law reflecting an 'emerging' policy over one embodying a 'regressive' policy, (3) the choice of a law expressing the more specific rather than general policy, (4) selection of the rule best designed to effectuate an underlying policy, and (5), in reverse, avoidance of a choice which would frustrate an underlying policy.

Id. at 24 (citations omitted).

37. *See supra* notes 31-34 and accompanying text. Whether these states will apply North Carolina's forum selection statute, and thus hold a forum selection clause unenforceable, will turn on whether the contract was entered into in North Carolina.

38. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186, 188 (1971).

39. In determining what jurisdiction has the most significant relationship to a transaction, courts look to the following factors: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation, and place of business of the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2). In addition, courts look at the following: the needs of interstate and international systems; the relevant policies of the forum; the relevant policies of

This Restatement (Second) analysis will in some instances defeat the intention of North Carolina's forum selection statute. Under the Restatement (Second) analysis, even if parties entered into a contract in North Carolina, a court could determine that North Carolina was not the state with the most significant relationship and refuse to apply the new statute.[40] Thus, not all forum selection clauses in contracts entered into in North Carolina will be declared unenforceable. In contrast to its effect on state court litigation, North Carolina's forum selection statute will have no effect on litigation in the federal courts. Federal courts look to federal law to determine the enforceability of forum selection clauses;[41] thus, federal courts will ignore North Carolina's forum selection statute.

The result is a form of forum shopping. Because the federal courts have repeatedly enforced forum selection clauses,[42] parties seeking to enforce these clauses will prefer federal courts.[43] In contrast, parties seeking to invalidate these clauses will prefer North Carolina courts (or courts that apply North Carolina law to contracts entered into in North Carolina). Ultimately, the enforceability of these clauses may turn on whether the parties end up in federal or state court.

The General Assembly passed the forum selection statute because it determined that the North Carolina Supreme Court's decision in *Perkins v. CCH Computax*[44] did not adequately safeguard the interests of consumers and others with little bargaining power.[45] However, the General Assembly may have erred in its low estimation of the amount of protection the *Perkins* test accords consumers. In jurisdictions applying a test similar to the *Perkins* test, consumers' rights have been protected.[46] For example, in *Williams v. Illinois State Scholarship Commission*,[47] a class of student borrowers signed loan agreements providing, among other things, that they

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other interested states and the relative interests of those states in the determination of a particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied. *Id.* § 6.

40. Numerous decisions illustrate this situation. *See, e.g.*, Rubin v. Rudolf Wolff Commodity Brokers, 636 F. Supp. 258, 259 (N.D. Ill. 1986) (applying Illinois law); Ryder Truck Rental v. St. Paul Fire & Marine, 540 F. Supp. 66, 68 (N.D. Ga. 1982) (applying Georgia law).

41. *See supra* note 16.

42. *See supra* note 16.

43. *See* Linda S. Mullenix, *Forum-Shoppers Should Discover A Wider Market*, NAT'L L.J., Aug. 19, 1991, at S12.

44. 333 N.C. 140, 423 S.E.2d 780 (1992).

45. Hackney Interview, *supra* note 30.

46. *See, e.g.*, Horning v. Sycom, 556 F. Supp. 819 (E.D. Ky. 1983); Carnival Cruise Lines v. Superior Court, 286 Cal. Rptr. 323 (Cal. App. 1991); Williams v. Illinois State Scholarship Comm'n, 563 N.E.2d 465 (Ill. 1990); Calzavara v. Biehl & Co., 181 So. 2d 809 (La. App. 1966); Eads v. Woodmen of the World Life Ins. Co., 785 P.2d 328 (Okla. 1989).

47. 563 N.E.2d 465 (Ill. 1990).

would resolve disputes only in Cook County, Illinois. When the borrowers defaulted on their loans, the Illinois State Scholarship Commission (ISSC) filed collection actions in Cook County and the borrowers moved to dismiss these actions claiming that the forum selection clause violated public policy.[48] The Illinois Supreme Court agreed. The court held that the forum selection clause deprived the borrowers of "their day in court."[49] Moreover, the court held that the loan agreement containing the forum selection clause amounted to an adhesion contract because it was a standard form agreement prepared by the ISSC.[50] Thus, if students wanted loans, they were forced to accept the agreement.[51]

Relying on due process and general contract principles, the Illinois Supreme Court protected the rights of persons with little bargaining power and simultaneously preserved Illinois's policy favoring enforcement of forum selection clauses. If the Illinois Supreme Court successfully balanced these two policies, the North Carolina Supreme Court could certainly do the same.

The General Assembly not only erred in its estimation of the protection provided by the *Perkins* test, but also framed the forum selection statute too broadly. By focusing narrowly on the issue of consumers' rights, the General Assembly framed a statute that applies equally to consumers and sophisticated commercial parties. The General Assembly has thus deprived commercial parties of the right to agree in advance about the place where they will resolve disputes. Commercial parties often find it advantageous to resolve disputes in a single forum;[52] in light of their sophistication, they should be provided such an option.

Because of the deficiencies existing in the forum selection statute, the North Carolina General Assembly should revisit the statute in its next session. The General Assembly could address the statute's deficiencies by taking one of two courses. First, the General Assembly could amend the statute so that it applies only to consumer transactions. This remedy would free commercial parties to enter into forum selection agreements and would simultaneously protect consumers' rights. Second, the General Assembly could repeal the forum selection statute and allow North Carolina courts to determine the enforceability of forum selection clauses according to the test articulated by the North Carolina Supreme Court in *Perkins*. These two courses of action would produce the same results: both would protect con-

48. *Id.* at 467-68.

49. *Id.* at 487.

50. *Id.*

51. *Id.*

52. For a discussion of the advantages of resolving disputes in a single forum, see *supra* notes 5-7 and accompanying text.

sumers' rights and grant commercial parties the freedom to enter forum selection agreements.

JOSEPH E. SMITH

Constitutional Law—Freedom of Speech—*State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993)

> Of course it is speech, but the question of breach
> Of a right is an issue to ponder:
> One may very well say, "We'll define it away,"
> But what's left of the right then, I wonder?[1]

A citizen learns that a political candidate he opposes has not informed the voters of the candidate's extremely unpopular stances on several critical issues. The citizen writes a letter relating and documenting the candidate's performance on those issues and sends it to several people whose votes he knows would change if they learned the truth. Fearing the social and political retaliation of the candidate and his supporters, the citizen sends the letter anonymously. Do the United States Constitution and the North Carolina Constitution permit that citizen to be criminally prosecuted for disseminating the truth? According to the North Carolina Supreme Court in *State v. Petersilie*,[2] the answer is yes.

In *Petersilie*, the North Carolina Supreme Court upheld section 163-274(7) of the North Carolina General Statutes, which prohibits the anonymous publication of "any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election."[3] The court found that the statute did not violate the First Amendment to the U.S. Constitution or Article 1, Section 14, of the North Carolina Constitution. The majority, in an opinion written by Chief Justice Exum, held that the state's interest in ensuring honest and fair elections outweighed the individual interest in anonymously distributing even true information about a candidate.[4]

In November 1989, Frank W. Petersilie, an unsuccessful candidate for a seat on the Town Council of Boone, North Carolina, obtained a copy of a letter that had been sent to his mother.[5] The letter discussed a commentary written for the *Washington Post* by Nan Chase.[6] Mrs. Chase was the wife of Saul Chase, who was then a candidate in a run-off election for the Boone Town Council.[7] Mrs. Chase's commentary discussed her discomfort with

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1. DAVID S. BOGEN, BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT 43 (1984).
2. 334 N.C. 169, 432 S.E.2d 832 (1993).
3. N.C. GEN. STAT. § 163-274(7) (1987).
4. *Petersilie*, 334 N.C. at 187, 432 S.E.2d at 842-43.
5. *Id.* at 173-74, 432 S.E.2d at 834-35.
6. *Id.*
7. *Id.* Mr. Chase lost in the run-off election. *Boone Landlord Faces Smear Charge in Town Council Election*, UPI wire report, Jan. 11, 1990, *available in* LEXIS, News Library, Wires File.

the "intimidating and self-perpetuating"[8] Christianity she discerned in the town of Boone, particularly in the schools; the letter writer felt these views expressed Mr. Chase's "goal to wipe out Christian influence from"[9] Boone. Mr. Petersilie photocopied the letter and mailed between thirty and seventy copies to people who had voted in the October election.[10]

A few days later, Mr. Petersilie received a copy of a flier referring to Mr. Chase and Ms. Louise Miller, another candidate in the run-off election, as the "'pro-liquor' candidates."[11] Mr. Petersilie photocopied the flier and sent it to approximately twenty to twenty-five voters.[12]

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8. Nan Chase, *The Bible Belt's Mixed Blessings; Our Schools Are Full of Religion—But I Still Love the Place*, WASH. POST, Oct. 2, 1988, at C5.

9. *Petersilie*, 334 N.C. at 173, 432 S.E.2d at 835. The full text of the letter reads as follows:

> Chase wants to take away aggressive Christian influence from public buildings and gathering places, such as our schools.
>
> In an article published in the Washington Post, Mrs. Saul Chase ridiculed the people of Boone for their support of Christianity stating that here "Christianity is . . . intimidating and self-perpetuating."
>
> Calling herself an "unbeliever (in Christianity) in the midst of the pious", Mrs. Saul Chase states that she is unable to openly criticize "religious paraphernalia displayed in public offices and on state owned vehicles" and she also says that if (anyone) speak(s) out forcefully against what may be an unconstitutional mixing of church and state, they will be unable to enter the political mainstream that has the power to separate the two spheres".—This thought has not been spoken to the people of Boone by Mrs. Chase, only to the Washington Post. Why keep it from us? Because her husband is on our Town Council, and was just put in the run off for re-election. If he wins, he will have the power to take away any Christian influence from the town employees, buildings, etc. It can be assumed that Chase allegedly has a goal to wipe out Christian influence from our town, take it away form [sic] the very God-fearing Christian people who helped put him in office. Candidates should be open about all of their feelings of [sic] all issues and it appears that Saul Chase has been deceptive to us by not supporting the good, wholesome beliefs of our people. A deception that is allegedly a deliberate attempt to gain power to take our Christian atmosphere from us. We, the town, should stop him, keep him out of our town government and hold fast to our Christian freedoms. Vote against Saul Chase!

Id. at 173-174, 432 S.E.2d at 834-835.

10. *Id.* at 174, 432 S.E.2d at 835.

11. *Id.*

12. *Id.* The full text of the flier reads as follows:

> VOTE LIQUOR BY THE DRINK FOR BOONE.
>
> FOUR YEARS AGO, WITH THE HELP OF SAUL CHASE, THE [APPALACHIAN STATE UNIVERSITY] STUDENTS BROUGHT BEER TO BOONE. NOW IS THE TIME TO COMPLETE THE PARTY!
>
> SUTTLE, DUGGER & MARSH REFUSE TO ENDORSE THIS ISSUE AND WOULD WORK TO DEFEAT THE REFERENDUM.
>
> VOTE SAUL CHASE AND LOUISE MILLER
>
> NOV. 7TH
>
> THE "PRO-LIQUOR" CANDIDATES

Id.

The trial court convicted Petersilie of eleven counts of publishing unsigned materials about a political candidate,[13] all of which were misdemeanor violations of section 163-274(7) of the North Carolina General Statutes.[14] On appeal, Petersilie challenged the statute as unconstitutionally vague[15] and overbroad[16] and in violation of the guarantees of freedom of speech found in the United States[17] and North Carolina constitutions.[18]

The majority first addressed Petersilie's claim that the statute was unconstitutionally vague.[19] Asserting the court's duty to adopt a constitutional construction when faced with two reasonable interpretations of a statute, the court found only the statute's use of the word "charge" to be problematic and in need of judicial interpretation.[20] Relying on several dictionaries and case law from other states, the court concluded that the "legislature intended the word 'charge' to mean an accusation of wrongdoing."[21]

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13. *Id.* at 172, 432 S.E.2d at 834. Mr. Petersilie also challenged the trial court's jury instruction, *id.* at 191, 432 S.E.2d at 845, and its rulings on two hearsay objections, *id.* at 193-94, 432 S.E.2d at 846. The North Carolina Court of Appeals dismissed the case on grounds that the superior court had lacked jurisdiction to hear this misdemeanor case. *Id.* at 175, 432 S.E.2d at 835. Although the North Carolina Supreme Court agreed with the court of appeals' ruling on jurisdiction, it exercised the authority established in State v. Felmet, 302 N.C. 173, 174, 273 S.E.2d 708, 709 (1981), to amend the trial record to show that the grand jury filed a presentment motion (the grand jury's written notice of indictment) with the superior court. *Petersilie*, 334 N.C. at 177-78, 432 S.E.2d at 837. Thus, the supreme court was able to reach the case's important constitutional questions. Then, Chief Justice Exum, writing for the majority, upheld the constitutionality of section 163-274(7), but reversed and remanded the case because of flaws in the jury instructions. *Id.* at 191-96, 432 S.E.2d at 845-46.

14. N.C. GEN. STAT. § 163-274(7) (1987). The relevant parts of § 163-274 read as follows:

> Any person who shall, in connection with any primary or election in this State, do any of the acts and things declared in this section to be unlawful, shall be guilty of a misdemeanor. It shall be unlawful:
>
> . . . .
>
> (7) For any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge . . . .

15. *Petersilie*, 334 N.C. at 180, 432 S.E.2d at 838.

16. *Id.* at 182, 432 S.E.2d at 839-40.

17. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

18. N.C. CONST. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.").

19. *Petersilie*, 334 N.C. at 180-82, 432 S.E.2d at 838-39.

20. *Id.* at 181, 432 S.E.2d at 839; *see also supra* note 14. The majority turned to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1976) to dispute Petersilie's assertion that the statute's use of the word "publish" was overly vague. *Petersilie*, 334 N.C. at 181, 432 S.E.2d at 839. The court adopted the following definition of "publish": " '1 A. to declare publicly: make generally known: DISCLOSE, CIRCULATE . . . B. to proclaim officially . . . C. to make public announcement of . . . D. PUBLICIZE . . . to give publication to . . . .' " *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1976)).

21. *Petersilie*, 334 N.C. at 182, 432 S.E.2d at 839-40.

With this explanation, the court considered the statute sufficiently clear to "avoid arbitrary and discriminatory enforcement."[22]

The court also rejected Petersilie's claim that the statute was overbroad.[23] Because the statute was content-based, in that it expressly regulated political speech, the majority conceded that it should be subjected to "exacting scrutiny."[24] However, the majority concluded that the state's interest in fair elections was compelling and that the statute could not be drawn more narrowly and still serve that interest.[25] The court asserted that the government's interest in fair and open elections would be best served by ensuring that voters know the source of information—even true information—so that they may assess its value.[26] Finally, the court surveyed comparable statutes that had been scrutinized in other jurisdictions and decided that North Carolina's statute falls within the guidelines of acceptability established by those jurisdictions.[27]

Justice Mitchell, writing in dissent, argued that the asserted state interest could not justify the statute's clear restriction on political speech.[28] Surveying the United States Supreme Court's First Amendment jurisprudence, Justice Mitchell concluded that the statute's restriction on political speech was directly inimical to "'the principle that debate on public issues should be uninhibited, robust and wide-open.'"[29] Justice Mitchell emphasized that anonymity can be essential to an individual expressing unpopular views in a "wide-open" debate, and concluded that criminalizing the anonymous dis-

22. *Id.*

23. *Id.* at 182-91, 432 S.E.2d at 839-45.

24. *Id.* at 183, 432 S.E.2d at 840.

25. *Id.* at 182, 432 S.E.2d at 840.

26. *Id.* at 187, 432 S.E.2d 842-43.

27. *Id.* at 187-90, 432 S.E.2d at 843-45; *see also infra* notes 46-54 and accompanying text. Although it upheld the statute, the supreme court reversed and remanded Petersilie's case because the trial judge erred in presenting the essential elements of the charge to the jury. *Petersilie*, 334 N.C. at 191, 432 S.E.2d at 845. N.C. GEN. STAT. § 163-274(7) declares unlawful the publication of "any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election." However, the trial judge instructed the jury that it must find beyond a reasonable doubt that Petersilie published "a charge *he intended* to be derogatory . . . or which he calculated would affect such candidate's chances for election." *Petersilie*, 334 N.C. at 191, 432 S.E.2d at 845 (emphasis added). The court stated that the "charge erroneously included a scienter requirement while no such requirement is present in the statute." *Id.* The court construed the statute to forbid either the anonymous publication of a derogatory charge or the anonymous publication of a charge "calculated" to affect a candidate's chances for election. *Id.* at 192-93, 432 S.E.2d at 845-46. Because Petersilie testified that when he mailed the fliers he did not believe Chase or Miller would win the election anyway, the court determined that the jury could have found that Petersilie did not intend to affect the outcome of the elections, and that the case would have been decided on whether the jury determined beyond a reasonable doubt that the charges were objectively derogatory. *Id.*

28. *Petersilie*, 334 N.C. at 197, 432 S.E.2d at 848 (Mitchell, J., dissenting).

29. *Id.* at 198, 432 S.E.2d at 848 (Mitchell, J., dissenting) (quoting Hustler v. Falwell, 485 U.S. 46, 56 (1988)).

tribution of campaign materials would have an unacceptable chilling effect on the freedoms of speech and of the press.[30]

The *Petersilie* decision and its reasoning may be somewhat surprising, but a close analysis of the case is important because fourteen other states have comparable laws.[31] Because the U.S. Supreme Court has not yet considered the question raised by *Petersilie*,[32] the North Carolina Supreme Court bolstered its decision with the case law and statutes of other states.[33] The court first addressed decisions of states that had struck down similar statutes as unconstitutional. It distinguished North Carolina's statute principally by asserting that other states' statutes are "considerably broader" than North Carolina's.[34] The court based this assertion on the fact that the comparable statutes rejected in other states either prohibited anonymous "statements" rather than "charges" or prohibited influencing *any* election, including referenda and other issues put to a vote, rather than the election of a candidate for office.[35]

Not only is the distinction between "charges" designed to influence an election and "statements" designed to influence an election an extremely nebulous one,[36] but judicial precedent does not clearly support upholding a

30. *Id.* at 199-201, 204-05, 432 S.E.2d at 849-51, 852-53 (Mitchell, J., dissenting).

31. *See infra* note 48 and accompanying text.

32. However, the Court's decision in Talley v. California, 362 U.S. 60 (1960), might be read broadly enough to have already decided the question. See *infra* notes 37-39 and accompanying text for a suggestion that *Talley* did in fact cover the *Petersilie* statute.

Although the North Carolina Supreme Court cited a number of cases dealing with very similar statutes in other states, *Petersilie*, 334 N.C. at 187-90, 432 S.E.2d at 843-45, no petitioner from any of these states has sought certiorari to the U.S. Supreme Court.

33. *Petersilie*, 334 N.C. at 180, 187-90, 432 S.E.2d at 838-39, 844-45.

34. *Id.* at 190, 432 S.E.2d at 844.

35. *Id.* (citing Zwickler v. Koota, 290 F. Supp. 244 (E.D.N.Y. 1968) (invalidating statute prohibiting distribution of any handbill with any statement about a candidate in connection with election); Schuster v. Imperial County Mun. Court, 167 Cal. Rptr. 447 (1980) (invalidating statute prohibiting all anonymous campaign literature by all persons); California v. Bongiorni, 23 Cal. Rptr. 565 (1962) (invalidating statute requiring signature of person publishing circulars or handbills designed to influence results of election); Illinois v. White, 506 N.E.2d 1284 (Ill. 1987) (invalidating statute requiring signature of any person publishing or distributing literature for or against any candidate or any public question submitted to a vote); Louisiana v. Fulton, 337 So. 2d 866 (La. 1976) (invalidating statute prohibiting unsigned statements about any candidate for election); Massachusetts v. Dennis, 329 N.E.2d 706 (Mass. 1975) (invalidating statute prohibiting anonymous circulars designed to aid or defeat a candidate or question submitted to voters); New York v. Duryea, 76 Misc. 2d 948 (invalidating statute criminalizing anonymous printing or distribution in quantity of any literature regarding any candidate or any issue on the ballot), *order aff'd*, 44 A.D.2d 663 (N.Y. Sup. Ct. 1974); North Dakota v. Education Ass'n, 262 N.W.2d 731 (N.D. 1978) (invalidating statute requiring all political advertisements to disclose name of sponsor); Pennsylvania v. Wadzinski, 422 A.2d 124 (Pa. 1980) (invalidating statute prohibiting publication of anonymous statements concerning a candidate for election)).

36. *See, e.g.*, Brief for Defendant-Appellant at 8-9, State v. Petersilie, 105 N.C. App. 233 (1992) (No. 9124SC313) (discussing the many possible definitions of "charges" and the legislature's options had it chosen to outlaw libellous or slanderous statements).

restriction on speech that hinges on such a minor distinction. When the U.S. Supreme Court rejected a statute similar to North Carolina's in *Talley v. California*,[37] it gave no indication that its decision would have been different had the statute referred only to "allegations of wrongdoing" focused upon a political candidate.[38] Indeed, the *Talley* Court deliberately compared its holding with holdings in other cases in which the right to anonymity was supported because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[39] One might argue that public awareness of truthful allegations of wrongdoing by someone running for office is indeed a matter of great importance to the citizenry. And it is in precisely this situation that the fear of reprisal becomes greatest because discreet revenge may be the only available response where public discourse about the allegations will merely bring them more attention and validity. Similarly, when the Court upheld the "campaign-free zone" challenged in *Burson v. Freeman*,[40] it emphasized that to forbid campaigning within 100 feet of a polling place would foreclose an extremely small amount of communication and acknowledged that other ave-

37. 362 U.S. 60, 65 (1960).

38. In *Talley*, the Court invalidated a statute strikingly similar to—and probably even narrower than—the statute at issue in *Petersilie*. *See id.* The Los Angeles city ordinance invalidated in *Talley* made it unlawful for a person to distribute a handbill unless it disclosed the names of the printer and of the individual responsible for the handbill's distribution. *Id.* at 60-61. The Court compared the statute to others that completely banned the distribution of pamphlets and leaflets, all of which had been invalidated by the Court, and asserted that this statute improperly restricted speech just as those statutes had. *Id.* at 62-63 (citing Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938)). The Court also compared the effect of the Los Angeles ordinance to that of other impermissible disclosure requirements, in which "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65 (citing Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958)). The Court suggested that the state might have a compelling interest in requiring identification if its law were more narrowly tailored to restrict the dissemination of pamphlets resulting in "fraud, false advertising and libel." *Id.* at 64. Although the Court did not expressly create a constitutional right to "freedom of anonymous speech," *id.* at 70 (Clark, J., dissenting), as Justice Clark suggested in his dissent in *Talley*, it did clearly recognize that anonymity can be critical to the uninhibited exchange of ideas, *id.* at XX.

39. *Id.* at 65.

40. 112 S. Ct. 1846 (1992). *Burson* illustrates how today's Supreme Court balances exacting scrutiny against the rationality of the electoral process. In *Burson*, the Court upheld a Tennessee statute that declared the area within the 100-foot perimeter around polling sites to be a "campaign-free zone" where no campaigning could take place. *Id.* at 1848-49. The Court first asserted that, because the statute restricts campaign speech, it is content-based and must, therefore, be subjected to strict scrutiny. *Id.* at 1850-51. The Court then defined the compelling state interest in the restriction by detailing the history of abuses of the electoral process that took place in the area around the polling booths. *Id.* at 1852-55. The Court concluded that the statute's actual infringement on the flow of ideas was insignificant compared to the government interest in free and effective voting, and the statute's means of achieving the state's interests were the least restrictive available. *Id.* at 1856-57. *Burson* is particularly instructive because it deals with a statute that actually survives exacting scrutiny.

nues to reach voters were still open.[41] The North Carolina Supreme Court made no similar effort in *Petersilie* to show that avenues of communication were still open. There is no reason to think that a speaker stripped of anonymity will find any other satisfactory way to spread his or her message without fear of reprisal.

When the U.S. Supreme Court rejected the ordinance at issue in *Talley*, it compared that ordinance to statutes banning completely the distribution of leaflets, all of which the Court had struck down as unconstitutional.[42] The Court asserted that the ordinance in *Talley* fell "precisely under the ban of [these] prior cases."[43] The fact that the Court directly equated banning anonymous pamphlets with banning pamphlets altogether makes clear that, under the First Amendment, a ban on anonymous speech is tantamount to a complete ban on speech. Correspondingly, North Carolina's prohibition of anonymous campaign literature is equivalent to a ban on all campaign literature. The *Talley* Court did indeed suggest that, in *Talley* and in the prior cases, the statutes might have survived constitutional challenge if they had banned more specific *types* of literature.[44] But the types specified in *Talley* were only those that were fraudulent, false, or libelous, not merely critical of a candidate.[45] The North Carolina Supreme Court's distinction of *Talley* is therefore tenuous at best.

The North Carolina Supreme Court's use of decisions and statutes from other states is also rather strained. The court began its decision in *Petersilie* with the unsupported assertion that forty-three other states have equivalent laws.[46] The source of this figure was apparently a 1975 *Harvard Law Review* article that the court cited in the same part of the decision.[47] However, a survey of state election laws reveals only fourteen states with comparable laws still on their books.[48] At least two statutes of the forty-three identified in the *Harvard* article have been found unconstitutional: The Pennsylvania Supreme Court declared a statute very similar to that in

41. *Id.* at 1856-57.

42. *Talley v. California*, 362 U.S. 60, 62-63 (1960) (citing Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938)).

43. *Id.* at 63.

44. *Id.* at 64.

45. *Id.*

46. *Petersilie*, 334 N.C. at 180, 432 S.E.2d at 838.

47. *Id.* (citing *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1286-87 (1975)).

48. ALA. CODE § 17-22A-13 (1988); ALASKA STAT. § 15.56.010 (1980); ARK. CODE ANN. § 7-1-103(8) (1991); FLA. STAT. ch. 106.143(1) (1991); LA. REV. STAT. ANN. § 1463 (West 1979 & 1993 Supp.); MD. ANN. CODE art. 33, § 26-16 (1991); MASS. GEN. L. ch. 56 § 41 (1976); MICH. COMP. LAWS § 168.931(1)(t)(3) (1982) (limited to false, deceptive, scurrilous or malicious claims); NEV. REV. STAT. § 294A.320 (1989); N.J. REV. STAT. § 19:34-38.1 (1963); OHIO REV. CODE ANN. § 3599.09 (Baldwin 1988); OKLA. STAT. tit. 21, § 1840 (1991); R.I. GEN. LAWS § 17-23-2 (1958); VT. STAT. ANN. tit. 17, § 2022 (1963).

Petersilie unconstitutional,[49] and the U.S. Court of Appeals for the Tenth Circuit has declared Oklahoma's statute unconstitutional.[50]

The state statutes that have been upheld under judicial scrutiny do not lend much support to North Carolina's statute. The Tennessee Supreme Court upheld a statute that is virtually identical to North Carolina's,[51] but that decision, which occupies only two reporter pages, glosses over all substantive constitutional claims and relies on the same outdated assertion that forty-three other states have the same statute.[52] Both the Tennessee and North Carolina courts cited for support the California Supreme Court decision in *Canon v. Justice Court*,[53] but the statute upheld in *Canon* was narrower than section 163-274(7) in that it blocked only anonymous attacks on the "personal character" of a candidate.[54] This restriction is arguably much different in scope from North Carolina's because it applies solely to nonpolitical speech—*personal* character attacks—while still permitting anonymous attacks on the candidate's public character and action. In short, although there is support for the constitutionality of North Carolina's section 163-274(7) in the law of other states, that support is neither unambiguous nor persuasive.

The democratic process depends upon a free market for ideas.[55] Such a market is inevitably restricted by statutes such as the one upheld in *Petersilie*. Modern scholars have brought a new immediacy to the "marketplace

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49. Pennsylvania v. Wadzinski, 422 A.2d 124, 126 (Pa. 1980).

50. Wilson v. Stocker, 819 F.2d 943, 950 (10th Cir. 1987). However, the state has not repealed the law.

51. Tennessee v. Acey, 633 S.W.2d 306, 307 (Tenn. 1982).

52. *Id.* at 307 (citing *Developments in the Law—Elections*, *supra* note 47, at 1286-87). The Illinois Supreme Court harshly criticized *Acey* in a decision that is also cited in *Petersilie*. Illinois v. White, 506 N.E.2d 1284, 1290 (Tenn. 1987) (accusing the *Acey* court of "ignor[ing] the teachings of *Talley*" and failing to "even mention the impact of the statute on first amendment rights, and conclud[ing] without analysis that there were no less restrictive means of furthering the State's interest.").

53. 393 P.2d 428 (Cal. 1964).

54. *Id.* at 452.

55. The Supreme Court's acceptance of the concept of a marketplace of ideas is commonly traced to Justice Holmes's dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., & Brandeis, J., dissenting), although the origin of the concept in Anglo-American thought can be traced at least as far back as John Milton's defense of the truth in John Milton, *Areopagitica—A Speech for the Liberty of Unlicensed Printing, to the Parliament of England, reprinted in* 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1404-05 (M.H. Abrams ed., Norton Publishing Co. 4th ed. 1979) (1644).

Justice Holmes's formulation of the theory will be most familiar to modern scholars: "[T]he ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of the truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams*, 250 U.S. at 230. In short, if communication is free and open, the greater value of the truth will always ensure that it rises to the top of the marketplace of ideas. For general discussions and critiques of theory, see C. EDWIN BAKER, HUMAN LIBERTY AND THE FREEDOM OF SPEECH 6-24 (1989), and LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-1, at 785-86 (2d ed. 1988).

of ideas" analogy by taking the analogy literally and subjecting it to economic analysis.[56] Professor Daniel A. Farber has argued that political expression deserves the highest of all protections because political speech, as a public good, is "undervalued by the market and the political system."[57] As a result of this undervaluation, governments and those in power are more likely to overregulate speech than other activities.[58] The public backlash from such overregulation will be insignificant, and the principal benefits will accrue to incumbents and special interest groups who exchange information as insiders.[59]

The *Petersilie* decision ignores this compelling perspective on the marketplace of ideas. Even if the truth does not always rise to the top in modern political campaigns, it seems clear that voters are more likely to discern the truth from a comparison of competing half-truths and exaggerations than from exposure to the half-truths and exaggerations on only one side of a debate. Since information is already likely to be underproduced, any statute that restricts the flow of information and exchange of ideas risks damage to the political process. Anonymous information, with its presumptive dubiousness,[60] is surely preferable to no information at all.

Commentators have suggested that election laws are based on a belief in voter rationality.[61] Faced with enough reliable information, the theory suggests, voters will vote for the best candidate.[62] Election laws are therefore, at least in part, efforts to maximize the amount of reliable information and minimize the amount of misleading, false, or inflammatory information, thus ensuring that the election takes place under "laboratory conditions"[63] and that the outcome of the election "reflect[s] the true, reasoned, and informed choice of the people."[64] Although voters are, in fact, rarely

56. *See, e.g.*, Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555-62 (1991); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 19-24, 36-39 (1986).

57. Farber, *supra* note 56, at 555. Professor Farber asserts that information produces significant external benefits to third parties and encourages free-riding—benefitting from the efforts of others without making any effort of one's own—so its producers will undervalue it and will produce less. *Id.* at 558-59. Similarly, since consumers of information can free-ride upon the efforts of others to produce it, consumers will have little incentive to organize as a political force. *Id.* at 560.

58. *Id.* at 561-62.

59. *Id.* at 564.

60. *See infra* notes 71-72 and accompanying text.

61. *See e,g.*, James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 892-93 (1984).

62. *Id.* at 897.

63. *Developments in the Law—Elections*, *supra* note 47, at 1234.

64. Gardner, *supra* note 61, at 892.

informed on the issues,[65] the courts and legislatures have recognized that the democratic state cannot function properly, or even survive, if voting decisions are made irrationally.[66] The state interest in section 163-274(7) can thus be judged against this goal of rationality. The supreme court asserted that section 163-274(7) allows voters to weigh the interests of the group making the statement,[67] which suggests that the court is protecting the rationality of elections. This assertion is made, however, in the court's defense of the statute's restriction on *true* speech. If electoral rationality is best served by exposing voters to true and useful information and insulating them from false information, then section 163-274(7) in no way aids the cause of rationality, but instead actually robs voters of the opportunity to weigh truthful information on its own merits, without being irrationally biased against the information just because it comes from an unpopular source.[68]

In a similar vein, because a group or person opposing an individual already in power—or at least with significant power in the community[69]—might fear retaliation enough to need anonymity, the statute protects the status quo from true, negative information that might not be revealed if the source must be named.[70] Those who have the power are likely to keep it;

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65. *Id.* at 899-900 & nn.40-42 (citing a number of surveys and studies showing the irrationality of voting decisions).

66. *Id.* at 900.

67. *Petersilie*, 334 N.C. at 187, 432 S.E.2d at 843.

68. In fact, Robert C. Post suggests that even the *Talley* decision is founded on a desire to permit unpopular groups to distribute true and useful information without its being judged by the stigma associated with the group's name. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 640 (1990). Indeed, Professor Post goes even further by arguing that campaign speech should be treated like scientific studies, which are reviewed on an anonymous basis to ensure that the stature of the author does not influence the reviewers' assessments of the accuracy of his or her science. *Id.* at 640 n. 213.

69. Such power need not necessarily be political or economic power. It may simply be the power to bring opprobrium upon the speaker. For example, the only national notice of the *Petersilie* case was an article in U.S.A. TODAY, which suggested that Mr. Petersilie's criticisms of Mr. Chase were motivated by anti-Semitism. *North Carolina*, U.S.A. TODAY, Oct. 17, 1990, at 10A. Even if Mr. Chase had had no political or economic power in the community, Mr. Petersilie would have been reasonable to fear this type of negative scrutiny, as would any citizen contemplating a true but negative attack on a minority group for which the public and the press may have great sympathy.

70. The U.S. Supreme Court has, on numerous occasions, addressed the importance of anonymity to groups of dissidents with little political power. For a survey of the seminal cases dealing with the so-called "right to anonymity," see Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure, and the Devil*, 70 YALE L.J. 1084 (1961). Of particular interest in considering the ramifications of *Petersilie* are the cases in which the Court invalidated attempts to force the National Association for the Advancement of Colored People (NAACP) to disclose its membership rolls. The Court justified its decisions by citing the lack of a compelling state interest and the likelihood that the disclosure would have a chilling effect on the group's associational rights. Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 544-46 (1963); Louisiana *ex*

their critics will be silenced by their fear of that power and the retaliation it can bring.

Furthermore, the court simply assumed the value of a signature on campaign materials without grounding that value in realistic analysis.[71] As a practical matter, it is likely that a signature on derogatory material has much greater value to someone seeking revenge against the source than to a voter weighing the information in the message. It would certainly be possible to satisfy the requirements of *Petersilie* without giving the voters any useful information at all. For example, the name of a single individual (perhaps a member of an organization chosen for his low profile) may be meaningless to the average voter not privy to the insiders of the campaign, and names of groups are often extremely ambiguous, if not utterly misleading.[72] A recipient of anonymous "charges" against a candidate will already know the source of those charges is someone opposed to the candidate being criticized, and will assess the charges from that perspective. The added value of any more precise identification is doubtful at best.

On the other hand, consider the chilling effect that can be expected from requiring a signature.[73] While knowing the source of derogatory statements may have some limited value to voters, it clearly has great value

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rel. Gremillion v. NAACP, 366 U.S. 293, 295-97 (1961); Bates v. City of Little Rock, 361 U.S. 516, 523-24 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-66 (1958). A comparison with the Red Scare cases in which the Court upheld disclosure laws reveals the Court's concern with protecting minor groups from retaliation rather than hiding presumably powerful plots behind a cloak of secrecy. In Uphaus v. Wyman, 360 U.S. 72, 77-81 (1959), and Barenblatt v. United States, 360 U.S. 109, 125-34 (1959), the Court held that, when an investigation into organizational membership involves Communism, an overriding government interest justifies the infringement on First Amendment rights. Note, however, that in all of these cases, the Court recognized a right to hide one's identity from potential oppressors, even though this right could be balanced away by a compelling government interest.

71. *Contra* Anderson v. Celebrezze, 460 U.S. 780, 798 (1983) ("A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.").

72. *See, e.g.*, Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 703-04, 704 n. 249 (1992) (discussing television advertisements purchased by the "Coalition for Reliable Energy," which was, in fact, the utilities that control Massachusetts' Seabrook nuclear power plant, as examples of a group using its ambiguous name to mislead the public about the impartiality of the information presented).

Of course, it could be argued that the misleading nature of groups' names is more evidence of the need for disclosure of the *actual* source of information. If a group's name is misleading, then surely a voter must be told the individuals or institutions that actually compose the group. But this argument stumbles on *Petersilie*'s fatal flaw: If the information is true, then its source is irrelevant; the information must be assessed on its own merits. A voter who truly desires to assess the value of the information can do so with greater accuracy by conducting his own research or listening to the counter-arguments presented by the target of the information than by weighing his individual sympathies with the information's source.

73. *See Petersilie*, 334 N.C at 198-99, 432 S.E.2d at 849 (Mitchell, J., dissenting).

to the target of those statements who is seeking to retaliate, to subject the source to social or economic pressure, or simply to impeach the statements by means of a character attack rather than through direct rebuttal.

State v. Petersilie is the first case in which the validity of section 163-274(7) has been challenged. It is, therefore, an extremely important case in terms of the development of North Carolina's constitutional law and in its affirmation of a vehicle for election reform that apparently has been dormant since the statute was passed in 1931.[74] It is possible that the statute will become a new weapon for candidates who wish to bring pressure to bear on the mudslingers and muckrakers who are tempted to use the veil of anonymity to spread half-truths and innuendos.[75] One wonders, however, how frequently the statute will be invoked, and, when it is invoked, whether it will be used to achieve the purpose for which it was intended. First, since section 163-278.12 of the North Carolina General Statutes already requires the disclosure of the name of anyone who spends more than $100 on a campaign, "other than by contribution to a candidate, political committee, or referendum committee,"[76] an anonymous campaigner who prints a large volume of derogatory material will have violated that provision even before the material reaches the mailbox, regardless of its derogatory nature. Second, since section 163-274(8) of the North Carolina General Statutes currently prohibits the publication of false statements about a candidate,[77] an anonymous publisher of false charges will more likely be charged with violating that provision, because it ensures that the truth or falsehood of the statements will be thoroughly tested, and the defendant will not be charged merely with publishing "derogatory" statements (which may still be true) about the wronged candidate.

As a result, the only people subject to section 163-274(7) are those who publish—in quantities small enough to evade the reporting requirements of section 163-278.12—true, but derogatory, statements about a candidate.[78] However, unless the election is taking place in a pool of voters

74. Section 163-274(7), which has not been amended since 1931, was originally numbered Section 348 and was itself an almost exact copy of N.C. ANN. CODE § 4185-99(b) (1927). *See* Comment, *A Survey of Statutory Changes in North Carolina in 1931*, 9 N.C. L. REV. 347, 371-73 (1931).

75. *See, e.g.*, Robert M. O'Neil, *Regulating Speech to Cleanse Political Campaigns*, 21 CAP. U. L. REV. 575, 575-77 (1992) (discussing the deterioration of political advertising into smear campaigns that have disgusted even the advertising industry).

76. N.C. GEN. STAT. § 163-278.12 (1991).

77. *Id.* § 163-274(8).

78. Of course, N.C. GEN. STAT. § 163-274(7) (1991) charges could probably be tacked onto the other violations mentioned here, but such tacking is not relevant to an analysis of the impact of the statute. A person publishing false claims about a candidate or secretly publishing large volumes of anonymous materials is not likely to be deterred to any additional degree by the threat of prosecution for acting anonymously.

that is so small that a few well-placed fliers could destroy a campaign, a candidate may well decide that the campaign would be hurt more by a criminal action brought by the local prosecutor than by either ignoring the criticisms or directly confronting the charges made. An added advantage to refusing to seek prosecution is that the candidate will be able to capitalize on the anonymity of his or her critic. Ignoring the charges or directly confronting them would force the critic to either support them or allow them to fade in the doubt inevitably cast upon anonymous communications.[79]

The group of probable defendants under section 163-274(7) raises more serious concerns. Perhaps the most significant concern is whether a statute allowing the criminal prosecution and possible imprisonment[80] of individuals who provide *true* information to a fairly small group of voters chosen precisely because the information may be important to their voting decisions can be justified in a democratic system. Furthermore, this group may well be precisely the people who need and deserve the fullest protection of the First Amendment. A voting pool that is small enough to be significantly influenced by a small number of published "charges" will most likely occur in a community small enough to guarantee that the political, social, and economic fates of all the voters within it are inextricably intertwined. In such a community, if the sympathies of the local prosecutor lie with the candidate who has been criticized, section 163-274(7) will simply be another weapon of retaliation against a person who could not risk speaking without the protection of anonymity.[81]

Moreover, *Petersilie* sounds a depressing chord for the protection anonymity might afford to small, unpopular grass-roots organizations. Without *Petersilie*'s interpretation of section 163-274(7), a narrow window existed in which small groups or individuals whose opinions would likely bring upon them social, financial, or political persecution could still criticize opposing candidates on a limited scale without being forced to disclose their identities. With the court's decision in *Petersilie*, however, this window has been closed. These groups must choose between remaining silent, speaking openly and being persecuted, or speaking anonymously and facing criminal prosecution and possible imprisonment.

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79. *See Petersilie*, 334 N.C. at 206, 432 S.E.2d at 854 (Mitchell, J., dissenting) (arguing that "the fact that the author of a statement is unwilling to reveal his or her identity in itself serves to put every recipient of voting age on notice that the statement may be less believable than one which has been signed").

80. N.C. GEN. STAT. § 163-272.1 (1993) declares all violations of Chapter 163 to be Class 2 Misdemeanors. N.C. GEN STAT. § 14-3(a) (1991) states that a misdemeanor is "punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court."

81. *See Petersilie*, 334 N.C. at 204, 432 S.E.2d at 853 (Mitchell, J., dissenting).

Another concern raised by *Petersilie* is that, contrary to the court's assertion of specificity, the case gives the statute a rather startling breadth of applicability.[82] The facts of *Petersilie* read almost like a law school hypothetical designed to test, to the point of absurdity, the limits of the statute. Petersilie did not write or create the materials he sent, and the only clear evidence presented was that he had addressed envelopes, but had not copied or folded any of the fliers, or stuffed any envelopes;[83] the materials contained true (if somewhat distorted) statements concerning the candidates they criticized;[84] Petersilie himself was connected with only *eleven* of the fliers distributed;[85] and the fliers contained not personal attacks on the candidates, but substantive information about the candidates' anticipated performance in office.[86] Yet the court's actual construction of the statute suggests it would apply to individuals even less culpable than Petersilie.[87] As long as the statements are derogatory or designed to affect a candidate's performance in an election, they must be signed, regardless of the size of the publication, the targets of the publication, the proximity to election, or the true merit and value of the publication. Presumably, any one person who anonymously forwarded a newspaper opinion column to one other voter, or who mailed an anonymous tip to a newspaper or television station, would be subject to prosecution. Although the statute may be consistent with laws in other states, its breadth is still troubling and no other court has yet interpreted a similar statute to have such a sweeping effect.[88]

Petersilie has unreasonably upheld a statute that restricts political speech with no compelling government interest to justify that restriction. There are two paths of escape from the inequities of *Petersilie*. The first is for a defendant convicted under the statute to challenge its validity before the U.S. Supreme Court. The second is for the North Carolina General Assembly to repeal the law, as so many other states have done.[89] The first path will require time and money in quantities that few defendants are

82. *See supra* notes 19-22 and accompanying text.

83. *See Petersilie*, 334 N.C. at 173-74, 432 S.E.2d at 834-45; Brief for Defendant-Appellant, *supra* note 36, at 4.

84. *See Petersilie*, 334 N.C. at 173-74, 432 S.E.2d at 834-35; Brief for Defendant-Appellant, *supra* note 36, at 4.

85. *Petersilie*, 334 N.C. at 172, 432 S.E.2d at 834.

86. *Id.* at 173-74, 432 S.E.2d at 834-35. However, religion creates a significant subtext in *Petersilie*, and the fundamentalist Christianity and possible antisemitism evident in Petersilie's attacks on Chase may provide some insight into the outcome of the case. *See North Carolina*, U.S.A. TODAY, Oct. 17, 1990, at 10A: "BOONE—Trial began for defeated Town Council candidate Frank Petersilie, 50—charged with anonymous mailing of derogatory, anti-Semitic campaign fliers."

87. *See supra* notes 20-22 and accompanying text.

88. *See supra* notes 46-54 and accompanying text.

89. *See supra* notes 47-48 and accompanying text (showing that only 14 states still have such statutes, compared to the 43 counted in 1975).

likely to have. The second path will require a group of people already elected and in power to sacrifice an established advantage for the benefit of small, dissident groups.[90] In spite of the difficulties, either of the two paths would be superior to the place in which *Petersilie* has left the people of North Carolina.

STEVEN ROBERT DANIELS

90. *See supra* text accompanying notes 80-82.

Baltimore Teachers Union v. Mayor of Baltimore: Does the Contract Clause Have Any Vitality in the Fourth Circuit?

America's cities are in the midst of financial crises.[1] Within the past two years, many cities have aggressively attempted to reduce their deficits by enacting furlough plans.[2] These plans reduce payroll expenditures by requiring city employees, who often have public contracts establishing the terms of their employment, to take a fixed number of days of unpaid leave.[3] The enactment of furlough plans is often highly controversial because the desire of city officials to address fiscal shortfalls directly conflicts with the contractual expectations of city employees.[4]

In *Baltimore Teachers Union v. Mayor of Baltimore*,[5] the Fourth Circuit Court of Appeals addressed a furlough plan controversy. The City of Baltimore had furloughed its employees in response to cuts in state aid.[6] Aggrieved city workers brought suit arguing that the furlough plan impaired their labor agreements in violation of Article I, Section 10, Clause 1, of the United States Constitution.[7] Reversing the district court, the Fourth Circuit held that Baltimore's furlough plan did not violate the Contract Clause.[8] Satisfied that the city had made every effort to address the concerns of its

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1. *See* Randy Arndt, *Fiscal Tensions Tighten Around City Budgets for Third Year Running: NLC Leaders Urge National Focus on Local Economic Health*, NATION'S CITIES WKLY., July 12, 1993, at 2 (noting that over half of 688 cities responding to a 1993 survey are faced with budgetary shortfalls, that results from the preceding two years are similar, and that nearly 72% expect similar problems in 1994); Thomas McCarroll, *City on the Brink: Squeezed by Budgetary Woes and Urban Ailments, Philadelphia Teeters on the Edge of Bankruptcy*, TIME, Jan. 7, 1991, at 58 (noting that 29 of the nation's 50 largest cities faced budget deficits in 1991). *See generally* HELEN F. LADD & JOHN YINGER, AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY (1989).

2. *See e.g.*, Sari Horwitz & Marcia Slacum Greene, *D.C. Teachers Stage Sickout over Furlough*, WASH. POST, Jan. 22, 1993, at A1; Laura M. Litvan & Jim Keary, *Furlough Back Pay Sought*, THE WASH. TIMES, Sept. 25, 1992, at B1; Helain Olen, *City Hall Shuts As Furlough Plan Begins*, L.A. TIMES, Oct. 10, 1992 at B3; Thomas C. Palmer, Jr., *Carmen's Union Expresses Bitterness at T Furlough Plan*, BOSTON GLOBE, Jan. 20, 1994, at 18; Ron Sonenshine, *Sonoma County Closing For Holidays, Government Employees To Be Off Without Pay in Cost Cutting Moves*, S.F. CHRON., Dec. 12, 1992, at A1.

3. For example, Baltimore saved approximately two million dollars by placing all city employees except for firefighters on five days of unpaid leave. Baltimore City Lodge No. 3 v. Mayor of Baltimore, 801 F. Supp. 1506, 1508 (D. Md. 1992), *rev'd sub nom.*, Baltimore Teachers Union v. Mayor of Baltimore, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994).

4. *See* Horwitz & Greene, *supra* note 2, at A1 (describing protests by furloughed teachers as well as parents and students who supported them); Palmer, *supra* note 2, at 18 (describing anger of furloughed carmen).

5. 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1127 (1994).

6. *Id.* at 1014.

7. *Id.* U.S. CONST. art. I, § 10, cl. 1, commonly known as the Contract Clause, states in relevant part: "No state shall . . . pass any . . . law impairing the obligation of contracts."

8. 6 F.3d at 1022.

employees, the court found that the plan was a reasonable and necessary means of reducing the city's deficit.[9]

This Note first details the Fourth Circuit's opinion in *Baltimore Teachers Union*.[10] After examining the United States Supreme Court's long-standing effort to reconcile the Contract Clause with state sovereignty[11] and reviewing lower courts' application of the Supreme Court standard,[12] the Note then argues that *Baltimore Teachers Union* is inconsistent with the position taken by the Supreme Court and at least one other circuit.[13] The Note contends that the Fourth Circuit's position will destabilize public contractual relationships and allow public contract holders to be unfairly disadvantaged throughout the political process.[14] In conclusion, the Note urges the Supreme Court to clarify the extent to which the Contract Clause protects public contracts.[15]

The dispute in *Baltimore Teachers Union* centered on labor agreements that established the terms of employment for city police and teachers for the fiscal year 1992.[16] The police concluded the negotiation of their salaries on November 19, 1991, while the teachers relied on salary terms agreed upon in 1989.[17] After the terms were agreed upon, the City Council enacted them into law as part of an Ordinance of Estimates, which included various 1992 budgetary obligations.[18]

During the negotiation period, the city began to experience significant financial difficulties. By October 1991, it had lost approximately $24.2 million in state aid.[19] To offset the loss, the city responded with nonsalary reductions in its payroll expenditures.[20] On January 16, 1992, the city's

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9. *Id.* at 1019-22. Only two other courts have addressed Contract Clause challenges to furlough plans. In District of Columbia v. American Fed'n of Gov't Employees, 619 A.2d 77 (D.C. 1993), the District of Columbia Court of Appeals upheld Washington's furlough plan by finding that the Contract Clause limits only state action, not laws enacted by Congress for the District of Columbia. *Id.* at 81. In Opinion of the Justices (Furlough), 609 A.2d 1204 (N.H. 1992), the Supreme Court of New Hampshire held that a state furlough plan proposed by the state legislature violated the Contract Clause. *Id.* at 1210-12. The court found that the bill was neither reasonable nor necessary because the state could address its financial need with other policy alternatives. *Id.*

10. *See infra* notes 16-40 and accompanying text.

11. *See infra* notes 41-86 and accompanying text.

12. *See infra* notes 87-99 and accompanying text.

13. *See infra* notes 100-37 and accompanying text.

14. *See infra* notes 138-54 and accompanying text.

15. *See infra* notes 155-58 and accompanying text.

16. *Baltimore Teachers Union*, 6 F.3d at 1014.

17. *Id.* at 1024 n.3 (Widener, J., concurring).

18. *Id.* at 1014. It should be noted that the salary terms were developed through labor negotiations and that courts have recognized that a statute may create contractual rights. *Id.* at 1014-15.

19. *Id.* at 1014.

20. *Id.* The city laid off employees, encouraged early retirements, and eliminated some positions. *Id.*

financial difficulties appeared to reach a critical point when the Governor announced forthcoming additional cuts of approximately $13.3 million.[21] In response, the city implemented a "furlough plan," which was designed to reduce payroll expenditures further.[22] The plan applied to all full-time employees except firefighters and saved approximately two million dollars.[23]

The police and teachers brought suit, alleging that the furlough plan violated the Contract Clause by impairing their respective labor agreements.[24] The United States District Court for the District of Maryland found that the city failed to prove that the furlough plan was a reasonable and necessary means of addressing its budgetary problems.[25] Based on this finding the court held the furlough plan to be an unconstitutional impairment of the labor agreements.[26]

On appeal, the Fourth Circuit reversed, concluding that the furlough plan's impairment of the labor agreements was constitutionally permissible.[27] Judge Luttig, writing for the panel's majority, applied a Contract Clause analysis developed by the Supreme Court.[28] Under that test, the Contract Clause is violated only if: 1) state action impairs a contract; 2) the impairment is substantial; and 3) the impairing state action is not a reasonable and necessary means of serving a significant and legitimate public purpose.[29] Moreover, the test requires courts grant less deference to legislative judgments of reasonableness and necessity in public contract cases than in private contract cases.[30]

The Fourth Circuit easily concluded that the city had entered contracts with its employees upon enacting the Ordinance of Estimates,[31] and that the

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21. *Id.*

22. *Id.*

23. *Id.*

24. Baltimore City Lodge 3 FOP v. Mayor of Baltimore, 801 F. Supp. 1506, 1508 (D. Md. 1992), *rev'd sub nom.* Baltimore Teachers Union v. Mayor of Baltimore, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994). Originally, the plaintiffs sought to repeal the furlough plan. *Id.* However, while the United States District Court for the District of Maryland was considering summary judgment motions filed by both parties, the city discontinued the plan upon learning the cuts in state aid would be less than anticipated. *Id.* After the city refused to reimburse the pay lost prior to cancellation, the plaintiffs amended their summary judgment motion to seek restitution. *Id.*

25. *Id.* at 1513.

26. *Id.*

27. *Baltimore Teachers Union*, 6 F.3d at 1022. The court of appeals remanded because the district court failed to consider other claims that it mistakenly believed the plaintiffs had abandoned. *Id.* at 1022 n.14.

28. *Baltimore Teachers Union*, 6 F.3d at 1015-22.

29. Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 411-12 (1983) (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)).

30. *Id.* at 413.

31. *Baltimore Teachers Union*, 6 F.3d at 1015. In support of this conclusion, the court relied on the *United States Trust* Court's recognition that a statute will be treated as a contract "when the

salary reductions constituted an impairment of these contracts.[32] Second, the court determined that the nearly one-percent pay reduction was substantial[33] because the level of compensation was a contractual inducement upon which the plaintiffs had especially relied.[34]

Addressing the third prong, the Fourth Circuit disagreed with the district court, holding that the furlough plan was a reasonable and necessary means of serving an important public purpose.[35] The court of appeals concluded that the furlough plan was a legitimate exercise of state power because it was narrowly tailored to address the anticipated cuts in state aid.[36] The court initially emphasized that even the police and teachers did not dispute the importance of the city's effort to maintain financial integrity.[37] Next, the court examined the reasonableness and necessity of the furlough plan.[38] Because the city stood to gain financially by impairing public labor agreements, the court purported to give less deference to the city's judgment than it would have given had the plan only impaired a private contract.[39] Nonetheless, the court concluded that the furlough plan was both

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language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977)).

32. *Id.* at 1015-16. Because contracts are generally interpreted to incorporate existing law, and § 2(g) of the City Charter had authorized the Board to "effect reductions . . . in appropriations" in response to a budgetary deficiency, the city argued that the contract unilaterally authorized the Board of Estimates to modify it. *Id.* The majority, however, rejected this interpretation of the language of § 2(g). *Id.* at 1016. In any event, the majority doubted that the section applied because the furlough plan had been initiated in response to anticipated cuts in state aid rather than an actual budgetary deficiency. *Id.* at 1016 n.4.

In a concurring opinion, Judge Widener argued that the court should not have found an impairment. *Id.* at 1022 (Widener, J., concurring). He interpreted § 2(g) more broadly, arguing that it authorized reductions in response to anticipated cuts as well as to current deficiencies. *Id.* at 1023-24 (Widener, J., concurring). Additionally, he argued that § 9(a) of the Budget Reconciliation Act for Fiscal Year 1992 defeated the contractual impairment claim of the police. *Id.* at 1024-25 (Widener, J., concurring). That section, which authorized the City of Baltimore to meet its financial obligations by reducing previously approved appropriations, took effect after the teachers had negotiated their labor agreement with the city but a month before the police had negotiated their agreement. *Id.* at 1024 (Widener, J., concurring). In Judge Widener's view, this section clearly authorized the city to reduce police salaries. *Id.* (Widener, J. concurring). By contrast, the majority determined that § 9(a) "so read, would almost certainly violate the Contract Clause." *Id.* at 1016 n.5.

33. *Id.* at 1016-17.

34. *Id.* at 6 F.3d at 1018. Although the court felt that the Supreme Court had provided "little specific guidance" on this issue, it determined that a substantial impairment fell somewhere between minimal alteration and total repudiation. *Id.* at 1017.

35. *Id.* at 1022.

36. *Id.*

37. *Id.* at 1019.

38. *Id.*

39. *Id.* The court relied on *United States Trust* in determining that state actions impairing public contracts require greater scrutiny than those impairing private contracts because the state's self-interest is at stake in the former. *Id.* *See infra* notes 69-81 and accompanying text. The

reasonable and necessary because it was a temporary measure designed only to offset the lost state aid.[40]

The language of the Contract Clause suggests no exception that would allow a state to impair a public contract. The clause states: "No state shall . . . pass any . . . law impairing the obligation of contracts."[41] Despite this broad language, the Framers intended primarily to prevent states from hampering commerce by the passage of debtor-relief laws.[42] Consequently, courts were left to reconcile the Clause's broad language with the limited intrusion on state sovereignty contemplated by the Framers.

In the early 1800s, Chief Justice John Marshall expressed a willingness to interpret the Contract Clause broadly.[43] His opinion in *Fletcher v.*

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majority assumed that action by Baltimore's Board of Estimates was equivalent to state legislative action. *Id.* at 1026 (Murnaghan, J., dissenting from denial of petition for rehearing en banc). The dissent, however, suggested that the Board's implementation of the furlough plan might be entitled to less deference because the Board was not elected and the City Council never approved the plan. *Id.* (Murnaghan, J., dissenting from denial of petition for rehearing en banc). See *infra* notes 88-99 and accompanying text for a discussion of the different positions lower courts have taken on the third prong of the Supreme Court's analysis of public contract cases.

40. *Id.* at 1020-21. Subsequent to the court of appeals decision, the city worker filed an unsuccessful petition for rehearing with a suggestion for rehearing en banc. *Id.* at 1026. In dissent from denial of rehearing, Judge Murnaghan questioned the panel's reasonableness and necessity determination, noting that other federal and state courts likely would have reached a different result. *Id.* at 1026-27 (Murnaghan, J., dissenting from denial of petition for reh'g en banc). Judge Murnaghan suggested that the furlough plan was not necessary because he believed the city, motivated by political expedience, chose the furlough plan over less drastic alternatives. *Id.* (Murnaghan, J., dissenting from denial of petition for rehearing en banc). The workers petition for certiorari to the United States Supreme Court was also denied. Baltimore Teachers Union v. Mayor of Baltimore, 114 S. Ct. 1127 (1994).

41. U.S. CONST. art. I, § 10, cl. 1.

42. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 257 (1978) (Brennan, J., dissenting) (arguing that the Contract Clause's inclusion in the same section as other currency provisions suggests the Framers intended that it be applied only to debtor-relief laws); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934) (contending that the Contract Clause was adopted because of the plight of debtors following the Revolutionary period); Leo Clarke, *The Contract Clause: A Basis For Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 188 (1985) ("[T]he Framers . . . apparently intended [the Contract Clause] to serve the limited purpose of preventing the states from adopting debtor-relief laws."); *see also*, Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 600 (1987) (suggesting that the Framers did not intend the Contract Clause to have a meaning as broad as its language). *Contra* United States Trust Co. v. New Jersey, 431 U.S. 1, 15 (1977) ("[T]he general purpose of the clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations."); BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE RIGHTS OF PROPERTY 273 (1965) (suggesting that the Framers intended the Contract Clause to provide broad protection against retroactive laws); BENJAMIN F. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 15 (1938) (arguing that at least some of the Framers understood the Contract Clause to have a broader application).

43. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137 (1810) (reasoning that the Contract Clause applies to public contracts since its language does not expressly exempt them); SCHWARTZ, *supra* note 42, at 270 (crediting Marshall with transforming the Contract Clause into

Peck,[44] barring the Georgia legislature from rescinding land sales made by a previous legislature,[45] established that the Contract Clause applies to public as well as private contracts.[46] Chief Justice Marshall equated Contract Clause protection with the strong constitutional protection provided against ex post facto laws and bills of attainder.[47] He reasoned that the clause was designed "to shield [people] and their property from the effects of those sudden and strong passions to which" legislatures are vulnerable.[48] Following *Fletcher*, the Marshall Court specifically recognized that the salary contracts of public officers are entitled to the same Contract Clause protection as private employment contracts.[49]

Despite Chief Justice Marshall's successful extension of Contract Clause protection to public contracts, the Clause never assumed the expansive role he envisioned. For example, in *Ogden v. Saunders*,[50] the Court rejected Chief Justice Marshall's position that the Contract Clause should be extended to bar laws that impair an individual's ability to enter future contracts.[51] Only two years after Marshall's death, the Court began to limit Contract Clause protection even more severely. In *Charles River Bridge v. Warren Bridge*,[52] the Court defeated a Contract Clause claim by holding that all ambiguities in public contracts would be construed in favor of the state.[53] In reaching this result, Chief Justice Taney reasoned that a strict application of the Contract Clause would unduly hamper a state's ability to act in the public interest.[54]

"a general safeguard of the sanctity of *all* contractual obligations"); Clarke, *supra* note 42, at 189 (crediting Marshall with giving the Contract Clause importance in Constitutional history).

44. 10 U.S. (6 Cranch) 87 (1810).

45. *Id.* at 133-137. Fletcher had purchased the property from Peck, a land speculator who had originally purchased it from the State of Georgia. *Id.* at 87-88. A subsequent Georgia legislature repealed the original sale because the previous legislature had been influenced by bribes. *Id.* at 89-90.

46. *Id.* at 137.

47. *Id.* at 138.

48. *Id.*

49. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 694 (1819).

50. 25 U.S. (12 Wheat.) 213 (1827).

51. *Id.* at 368. Ogden sued to recover debts owed him by Saunders. *Id.* at 214. Saunders argued that the debt had been discharged by a New York debtor-relief statute passed after the debt had been incurred. *Id.* The Court found that the law had only impaired contracts in existence when the law was passed. *Id.* at 215.

52. 36 U.S. (11 Pet.) 420 (1837).

53. *Id.* at 544. Massachusetts granted Charles River Bridge Co. a charter to operate a toll bridge over the Charles River. *Id.* at 536. The contract implied that this charter was to be exclusive, but the state later granted another charter to Warren Bridge Company. *Id.* at 536-37. The Court rejected Charles River Bridge Company's Contract Clause claim by construing its charter to be non-exclusive. *Id.* at 559; *see also* Merrill, *supra* note 42, at 603-04 (noting that this case established a dual standard of review because it did not suggest that the rule of strict construction was applicable to private contracts).

54. *Charles River Bridge*, 36 U.S. (11 Pet.) at 547.

Charles River Bridge foreshadowed the subsequent development of even broader limitations on the Contract Clause. Some forty years later, in *Stone v. Mississippi*,[55] the Court held that a state may not restrict through contract its own inalienable power to protect public health or morals.[56] During the Great Depression, the Court expanded police power limitations on the Contract Clause even further. In *Home Bldg. & Loan Ass'n v Blaisdell*,[57] the Court used the police power doctrine to validate emergency legislation designed to meet a financial crisis.[58] The Minnesota law that was upheld superseded private mortgage agreements and allowed mortgagors who were in default on their mortgages, and thus technically subject to foreclosure, to delay foreclosure.[59] The Court applied a balancing test, noting the following factors: whether the act (1) was an emergency measure, (2) protected a basic societal interest rather than particular individuals, (3) was tailored appropriately to its purpose, (4) imposed reasonable conditions and (5) was limited to the duration of the emergency.[60]

In 1965, in *El Paso v. Simmons*,[61] the Court readdressed the application of the police power doctrine to public contract cases. Under a Texas law, public land purchasers whose land was retaken by the state for tax delinquency retained an apparently unlimited right to redeem the land.[62] After oil and natural gas were discovered on many of the retaken lands, Texas amended the statute to require that all redemption rights be exercised within five years of the amendment.[63] Relying on the police powers doctrine,[64] the Court upheld the statute.[65] The Court gave the legislature wide discretion in determining that the impairment of the redemption rights was

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55. 101 U.S. 814 (1879).

56. *Id* at 817-19. Mississippi, which had granted Stone a charter to operate a lottery, later amended its constitution to prohibit lotteries. *Id.* at 814-15. The Court reasoned that the Contract Clause offered Stone no protection because Mississippi could not restrict contractually its general police power to prohibit lotteries. *Id.* at 819; *see also* Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 559 (1914) (implying that a regulation will fall within the police power so long as it benefits the community in some way and employs means that are not arbitrary); Clarke, *supra* note 42, at 191 ("The 'police power doctrine' established in *Stone* signalled the end of the significance of the Contract Clause.").

57. 290 U.S. 398 (1934).

58. *Id.* at 439-40.

59. *Id.* at 447-48.

60. *Id.* at 444-47. The Court found that Minnesota had been under severe economic distress, had no effective alternative, and had only enacted a temporary measure. *Id.* Also, the Court noted that the law was tailored to the emergency at hand because it required mortgagors, who had been protected from ouster, to pay the rental value for the period during which foreclosure was delayed. *Id.* at 445.

61. 379 U.S. 497 (1965).

62. *Id.* at 498-99.

63. *Id.* at 499.

64. *Id.* at 509.

65. *Id.* at 516-17.

necessary for the public welfare.[66] Moreover, the Court, finding that the impairment was only a "technical" one affecting a redemption right on which an original purchaser would not likely have relied,[67] suggested that the degree of impairment would affect its constitutionality. However, *El Paso*, like *Blaisdell*, provided no clear restrictions on police power.[68]

Although the Supreme Court tolerated expansive exercises of state police power impairing contractual rights during the forty years after *Blaisdell*, that climate of toleration changed in *United States Trust Co. v. New Jersey*.[69] In 1962, New York and New Jersey signed a covenant promising Port Authority bondholders that future revenues pledged as bond security would not be used to fund further takeover of unprofitable passenger railroad systems.[70] A dozen years later, as the national energy crisis intensified, New York and New Jersey repealed the covenant.[71] Giving new life to the Contract Clause,[72] the Court invalidated the repeal.[73] Initially, the Court determined that the police power doctrine does not excuse states from binding financial obligations[74] and that funding mass rail transit with the pledged revenues would seriously impair a public contract.[75] The Court next considered whether the impairment was nevertheless constitutional as

66. *Id.* at 508-09 (citing East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232-33 (1945)). The Court noted that the state sought, among other things, to remove clouds from land titles and to ensure more efficient utilization of mineral wealth. *Id.* at 515-16.

67. *Id.* at 512-15. The Court believed original purchasers assumed that, after retaking the land, the state would quickly resell it to third parties. *Id.* at 514. As the state's subsequent resale ended the original buyer's redemption rights, the Court concluded that the purchasers had not bargained for extensive redemption rights and would receive windfall gains if given an unlimited redemption right. *Id.* at 514-15.

68. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977) ("Both of these cases eschewed a rigid application of the Contract Clause to invalidate state legislation. Yet neither indicated that . . . its limitation on state power was illusory.").

69. 431 U.S. 1 (1977).

70. *Id.* at 9-10. The 1962 covenant excepted the Port Authority's proposed takeover of the Hudson & Manhattan Railroad. *Id.*

71. *Id.* at 12-14.

72. For a discussion on the revitalization of the Contract Clause see Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 770 (1984); Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1415 (1984).

73. *United States Trust*, 431 U.S. at 32.

74. *Id.* at 25. In support of this proposition, the Court quoted the following passage:

> The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. . . . [T]he contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

Id. at 25 n.23 (quoting Murray v. Charleston, 96 U.S. 432, 445 (1878)); *see also*, Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 n.14 (1983) ("In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.").

75. *United States Trust*, 431 U.S. at 27-28.

a reasonable and necessary means of serving an important public purpose.[76] In assessing reasonableness and necessity, the Court determined that "complete deference to [the] legislative assessment . . . is not appropriate because the [State]," as a party to the contract, has incentive to abuse an unchecked power of unilateral modification.[77] According to the Court, the impairment was not necessary because the states could have employed a less drastic means of mass transit financing by partially honoring the covenant rather than totally repealing it.[78] Additionally, the Court noted that the states could have discouraged automobile use and funded mass rail transit by alternative means such as taxing gasoline or parking.[79] Addressing the issue of reasonableness, the Court held that the impairment was not reasonable because the states knew of the need for mass rail transit and of the problems associated with automobile use when they entered into the 1962 covenant.[80] Although these concerns had become more urgent twelve years later, "the subsequent changes were of degree and not of kind."[81]

In *Allied Structural Steel Co. v. Spannaus*,[82] a case decided two years after *United States Trust*, the Court also briefly "revitalized" the Contract Clause as applied to private contracts.[83] In doing so, the Court employed a balancing text significantly more favorable to contract-impairing state action than that applied in United States Trust.[84] Since *Spannaus*, however,

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76. *Id.* at 28-32. *See also id.* at 25 ("[A]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.").

77. *Id.* at 26.

78. *Id.* at 30. The pledged revenues were generated from toll tunnels and bridges. *Id.* at 30 n.28. The Court suggested that the states could have used only the additional amounts obtained from the increased rates and the increased number of toll facilities to finance mass rail transit. *Id.* Also, the Court suggested expanding the covenant exception that allowed the acquisition of rails operating at a "permitted deficit" or modifying the covenant to ease the difficulty of obtaining bondholder approval of mass rail funding. *Id.*

Justice Brennan was particularly troubled by this aspect of the majority opinion. He dissented, arguing that judicial examination of policy alternatives was rarely appropriate and that bondholder financial interests were adequately protected by the market and political process. *Id.* at 61-62 (Brennan, J., dissenting).

79. *Id.* at 30 n.29. The Court took these specific alternatives from 38 Fed. Reg. 31389 (1973), an Environmental Protection Agency regulation unrelated to the 1962 covenant.

80. 431 U.S. at 31-32.

81. *Id.* at 32.

82. 438 U.S. 234 (1978).

83. *Id.* at 250-51.

84. In *Spannaus*, the Court utilized the Contract Clause to strike down a Minnesota statute that expanded the pension obligations of certain employers. *Id.* In determining that the statute did not represent a legitimate use of police power, the Court employed a balancing approach reminiscent of *Blaisdell* analysis. *Id.* at 247-51; *see* Clarke, *supra* note 42, at 200 ("By stressing the factors that distinguished *Blaisdell* and *El Paso* rather than applying the *United States Trust* test, Stewart seemed to be reverting to pre-*United States Trust* analysis."). The Court emphasized that the statute was not a response to an emergency, was designed to benefit only a narrow class, regulated an area not previously subject to regulation, and altered contractual relationships severely and permanently. *Spannaus*, 438 U.S. at 250-51.

the Court has been relatively unreceptive to Contract Clause claims, and none of the more recent decisions have involved public contracts.[85] By explaining that the considerable deference given legislative judgments only applies in private contract cases, the Court has, however, indicated that the more scrutinizing *United States Trust* analysis still controls in public contracts cases.[86]

Accordingly, lower courts have applied *United States Trust* in public contracts cases, but they have struggled with some of the ambiguities in that decision.[87] In particular, courts have struggled with the third prong of the *United States Trust* analysis. *United States Trust* specified only that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[88] The Supreme Court applied this standard of reduced deference in assessing the reasonableness and necessity of legislative means.[89] Although some lower courts have followed suit,[90] others have applied differing amounts of deference to legislative judgments. The Third Circuit apparently interpreted this

85. *See* General Motors Corp. V. Romein, 112 S. Ct. 1105, 1110 (1992) (rejecting a Contract Clause challenge by finding that collective bargaining with private employers had given employees no contractual rights); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 505-06 (1987) (rejecting a Contract Clause challenge by deferring to an implicit state legislative determination that the impairment of a private contractual right was necessary); Exxon Corp. v. Eagerton, 462 U.S. 176, 187-88 (1983) (rejecting a Contract Clause challenge by finding that private contractual rights had not been impaired); Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 413-15 (1983) (rejecting a Contract Clause challenge by finding that private contractual rights of participants in a highly regulated industry had not been substantially impaired).

86. *See DeBenedictis*, 480 U.S. at 472 (explaining the deference given to the legislative judgment as dependent upon the fact that the state was not a party to the contract in question); *Energy Reserves*, 459 U.S. at 412 n.14 (recognizing that, if a public contract had been impaired, the legislative action would have been subject to greater scrutiny).

87. *See* cases cited *infra* notes 90-92.

88. *United States Trust*, 431 U.S. at 26.

89. *See id.* at 29. ("We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.").

90. National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1487 (D. Nev. 1992) (determining under a standard of "less deference" that a Nevada statute which gave additional process to residents charged with NCAA violations was really designed to alter the NCAA's contract with state institutions—not to protect the livelihoods of Nevadans). *See* Gardiner v. Tschechtelin, 765 F. Supp. 279, 288-89 (D. Md. 1991) (analyzing state action under "closer scrutiny" that included an examination of legislative alternatives but ultimately recognizing the legitimacy of the legislative motives set out in statute); Maryland State Teachers Ass'n, Inc. v. Hughes, 594 F. Supp. 1353, 1361-1371 (D. Md. 1984) (recognizing that courts do not sit as "superlegislatures," but examining legislative documents extensively before determining that no less drastic alternatives existed); Pineman v. Oechslin, 494 F. Supp. 525, 549 n.43 (D. Conn. 1980) (noting that the examination of the reasonableness and necessity of legislative means does not necessitate reassessing the wisdom of state policy objectives), *vacated and remanded on other grounds*, 637 F.2d 601 (1981).

language to require that very little deference be given in public contract cases,[91] but a first First Circuit case applied an almost completely deferential standard.[92]

The Second Circuit, especially, has been willing to give the clause some backbone. In *Association of Surrogates v. New York*,[93] the court adopted a standard of reduced deference.[94] Using this standard, the court invalidated a New York statute that would have financed the expansion of the court system by deferring the payment of court employee wages for two weeks.[95] The state argued that the measure was necessary, in light of a fiscal crisis, to provide adequate court services.[96] After assuming arguendo the legitimacy of legislative ends, the court found that the means chosen by the state were not necessary.[97] Relying on *United States Trust* and its suspicion that the state was motivated by political expedience, the court determined that raising taxes was an obvious and less drastic alternative.[98] In contrast, the wage deferments placed a disproportionate amount of the cost for the expanded court system on a narrow class—court employees—who relied on their wages to pay for essentials such as food and housing.[99]

Although the *Baltimore Teachers Union* court also purported to apply *United States Trust*, it reached a different result from that reached by the

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91. *See* West Indian Co., Ltd. v. Government of V.I., 844 F.2d 1007, 1022 (3rd Cir. 1988) (dictum) ("Because the Virgin Islands Government is a party to the contract, we need not defer to the judgment of the Sixteenth Legislature, but 'may inquire whether a less drastic alteration of contract rights could achieve the same purpose and whether the law is reasonable.' ") (citation omitted); Nieves v. Hess Oil V.I. Corp., 819 F.2d 1237, 1243 (3rd Cir. 1987) (stating that customary deference to legislative judgment is inappropriate where the state is a party to the contract).

92. *See* Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 641-43 (1st Cir. 1981) (assessing legislative motives and alternative solutions in a deferential manner that did not require the state to show actual legislative purpose and arguing that the legislature is far better suited to determine the reasonableness and necessity of a particular statute).

93. 940 F.2d 766 (2nd Cir.), *cert. denied*, 112 S. Ct. 936 (1991).

94. *Id.* at 771-72.

95. *Id.* Court employees were to receive the deferred paycheck after the termination of their employment with the state. *Id.* at 768-70.

In Condell v. Bress, 983 F.2d 415, 420, *cert. denied*, 113 S. Ct. 1849 (1993), the Second Circuit relied on *Surrogates* to invalidate a lag payroll provision that applied to New York State executive employers. In that case, the defendants attempted to distinguish *Surrogates* by arguing that the lag payroll was an insubstantial impairment because it involved only five days of deferred pay whereas *Surrogates* involved twice as many days. *Id.* at 417-18. The court rejected this contention and applied the "reasonable and necessary" test. *Id.* at 419. The court found that a fiscal crisis worse than the state's billion dollar deficit would be required to justify a lag payroll. *Id.* at 417, 420. After recognizing that the state faced a difficult problem and had considered a number of alternatives, the court concluded that the lag payroll was not necessary because the state could have raised taxes. *Id.* at 420.

96. *Surrogates*, 940 F.2d at 773.

97. *Id.*

98. *Id.*

99. *Id.* at 772-73.

Second Circuit in a remarkably similar factual situation. In both *Surrogates* and *Baltimore Teachers Union*, city employees challenged a city's effort to meet its financial shortcomings by taking promised wages from its employees. The conflicting holdings illuminate the degree to which the circuits have reached different conclusions regarding the proper application of the *United States Trust* test[100] and point to the need for further Supreme Court review of this issue.

First, the Fourth Circuit misapplied the reasonableness test. In determining reasonableness in *United States Trust*, the Supreme Court focused on whether the impairing state action was a response to an unforeseen change of circumstances.[101] The Court determined that New York and New Jersey could have foreseen the growing need for mass transit when they entered the 1962 covenant with bondholders.[102] Even though costly environmental protection and energy conservation demands on the Port Authority had become more acute, the Court reasoned that these subsequent changes should have been foreseen because they "were of degree and not of kind."[103] In *Baltimore Teachers Union*, the Fourth Circuit addressed the Supreme Court's reasonableness analysis only in a footnote.[104] Inverting the Supreme Court's language, the Fourth Circuit reasoned that the furlough plan was reasonable because "the *magnitude* of the reductions in state aid rendered the budgetary shortfall . . . tantamount to a difference in *kind*" rather than degree.[105] In making this assertion, the court failed to truly address the narrower issue suggested by *United States Trust*—whether Maryland's announcement of additional cuts of $13.3 million, the announcement that brought about the furlough plan, signalled an unforeseen change of circumstances. By addressing the many reductions the city had experienced and the city's general financial plight,[106] rather than excluding the financial difficulties that already had arisen when the Ordinance of Estimate was ratified, the court improperly applied the reasonableness test set forth in *United States Trust*.

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100. *See supra* note 28-30 and accompanying text. The Fourth Circuit seems to have combined the *United States Trust* "reasonable and necessary" test with the "reasonable and appropriate" test used by the Supreme Court in connection with a private contracts cases. *Compare* United States Trust v. New Jersey, 431 U.S. 1, 22 (1976) (discussing the "reasonable and appropriate" test in connection with *Blaisdell*) *with Baltimore Teachers Union*, 6 F.3d at 1022 (concluding that the furlough plan was justified because it was "reasonable and appropriate").

101. *United States Trust*, 431 U.S. at 31-32.

102. *Id.* at 31-32.

103. *Id.* at 32.

104. *Baltimore Teachers Union*, 6 F.3d at 1021 n.13.

105. *Id.* (emphasis added).

106. *See id.* at 1021 ("[P]rior to the implementation of the furlough plan, [the city] 'was approaching the point where it [had] to begin cutting basic government services.' ") (citation omitted).

Ignoring the distinction between public and private contract cases, the Fourth Circuit supported its reasonableness analysis by a general examination of a number of factors that the Supreme Court has deemed important in private contracts cases.[107] Under a balancing approach reminiscent of *Blaisdell*,[108] the Fourth Circuit found the public contract at issue to be reasonable. First, the court determined that the furlough plan was enacted to redress a "broad, generalized economic or social problem."[109] Although it has relied on this factor in private contracts cases, the Supreme Court has linked it to the legitimacy of legislative ends, not the reasonableness of legislative means.[110] In *Baltimore Teachers Union*, the legitimacy of the ends behind the furlough plan was not at issue because the plaintiffs conceded that the city could act to address its financial difficulties.[111] Second, suggesting that the furlough plan was equivalent to a "generally applicable rule of conduct," the court determined that city employees did not constitute a narrow class.[112] Arguably, city employees were a narrow class.[113] In addition, the furlough plan did not define general rules of conduct; it did not apply to non-employees, and its main effect was to alter contractual terms. Third, and most inexplicably, the Fourth Circuit equated the legitimate expectations of public employees with those of highly regulated private industry.[114] In effect, the court argued that public employees relied less on their

107. *Id.* The court cited *Blaisdell*, *Spannaus*, *Energy Reserves* and *Exxon*, all cases that involved private contracts. *Id.* The court also cited page 22, note 19 of the *United States Trust* opinion. *Id.* This portion of the *United States Trust* opinion discussed the determination of reasonableness in *Blaisdell*, a private contracts case. *United States Trust v. New Jersey*, 431 U.S. 1, 22 n.19 (1977).

108. *See Baltimore Teachers Union*, 6 F.3d at 1021 (discussing the following five factors emphasized in *Blaisdell* and *Spannaus*: whether the furlough plan 1) was a response to an emergency, 2) was appropriately tailored to its purpose, 3) targeted only a narrow class, 4) regulated a previously regulated area, and 5) was only a temporary measure). *See supra* notes 57-60 and accompanying text.

109. 6 F.3d at 1021 (quoting *Spannaus*, 438 U.S. 234, 250 (1978)).

110. *See Spannaus*, 438 U.S. at 250 ("The law was not even purportedly enacted to deal with a broad, generalized social problem."); *Blaisdell*, 290 U.S. 398, 445 (1934) ("The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.").

111. *Baltimore Teachers Union*, 6 F.3d at 1019.

112. *Id.* at 1021.

113. *Cf.* Association of Surrogates v. New York, 940 F.2d 766, 772-73 (2nd Cir.), *cert. denied*, 112 S. Ct. 936 (1991) (arguing that it was impermissible for a state to place all the costs of an expanded court system on court employees where it could have distributed the costs more broadly among state taxpayers).

114. *Baltimore Teachers Union*, 6 F.3d at 1021. In private contract cases, the Court has analyzed this factor as having only an indirect effect on the reasonableness of legislative means. *Compare* Energy Reserves Group Inc. v. Kansas Power & Light Co., 459 U.S. 400, 413 ("The threshold determination is whether the . . . Act has impaired substantially . . . contractual rights. Significant here is the fact that the parties are operating in a heavily regulated industry.") *with* United States Trust v. New Jersey, 431 U.S. 1, 27 (1976) ("The extent of impairment is certainly a relevant factor in determining . . . reasonableness").

labor agreements than did private employees because public employees might anticipate being asked to sacrifice for the public interest.[115] However, the court failed to recognize that traditionally underpaid public employees are likely already making substantial sacrifices for the public interest and may not be in a position to make additional financial sacrifices.[116]

The Fourth Circuit's determination under the necessity prong was equally flawed. In *United States Trust*, the Supreme Court employed a two-part necessity determination that first considered whether a "less drastic modification would have permitted the contemplated" state action.[117] Addressing this issue, the Fourth Circuit correctly noted that the furlough plan would have been more drastic had it effected a pay reduction that was larger than or lasted longer than needed to meet the budgetary shortfalls.[118] The court, however, failed to realize that the city could have made the plan less

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115. *Baltimore Teachers Union*, 6 F.3d at 1021. The Supreme Court's rationale for using a plaintiff's participation in a highly regulated industry as a factor against finding a Contract Clause violation has been that the plaintiffs could have foreseen additional regulation when they entered the contract. Exxon Corp. v. Eagerton, 462 U.S. 176, 194 n.14 (1983).

The Fourth Circuit, however, did not assert that public employees are subject to greater regulation than private ones. Instead, the court employed an analysis reminiscent of the "extra-loyalty" doctrine—a somewhat dated doctrine used to limit the development of public employee collective bargaining rights. *Baltimore Teachers Union*, 6 F.3d at 1021. *See* Stephen A. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1232-33 (1985). Historically, this doctrine extended the scope of sovereign powers by implying that public employees owed extra duties to the state. *Id.* Commentators have severely criticized the extra-loyalty doctrine and noted that courts no longer rely on it. *See id.* at 1232, 1274 (criticizing "extra-loyalty" theory as paternalistic, outmoded, and discriminatory against public employees); Harry T. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 361 (1972) (describing "extra-loyalty" theory as vague, conclusory and not viable in modern society).

116. A recent evaluation of 100 widely held jobs indicated that police officers and teachers had median annual earnings slightly below average in 1992. Jersey Gilbert, *The Best Jobs in America*, MONEY, Mar. 1994, at 72-73. Compared with an average median annual earning of $34,195 for the 100 jobs, police earned $32,900 while high school teachers earned $32,500 and grade school teachers earned $31,000. *Id.*

117. *United States Trust*, 431 U.S. at 30. In *United States Trust*, the Supreme Court concluded that the total repeal of the 1962 covenant was unnecessary because New York and New Jersey could have subsidized mass transit by simply modifying the covenant. *Id.* at 29-30. According to the Court, the states could have amended the covenant to exclude revenues from toll facilities built after 1962, allow restricted Port Authority involvement with mass transit, or ease the procedures for obtaining bondholder approval. *Id.* at 30 n.28.

118. *Baltimore Teachers Union*, 6 F.3d at 1020. The court also found that the plan would have been more drastic had it required additional layoffs. *Id.* It supported this conclusion by analyzing the furlough plan's avoidance of layoffs with a New Jersey law provision that allowed bondholders of insolvent municipalities a partial recovery. *Id.* (citing Faitoute Iron & Steel Co. v. Asbury Park, 316 U.S. 502, 516 (1942)). This comparison was, however, inappropriate because bondholders in *Faitoute* would not have been entitled to recovery without the new law. *Faitoute*, 316 U.S. at 515-16. In contrast, prior to the furlough plan, the Baltimore teachers and police presumably had contractual protection from layoffs.

drastic had it considered compensating employees in some manner for their lost wages. Rather than making an unqualified refusal to pay the owed money, the city could have committed itself to repayment at a later date[119] or to providing additional nonsalary benefits.[120]

The second part of the Supreme Court's necessity determination in *United States Trust* asks whether, "without modifying the [public contract] at all, the [State] could have adopted alternative means of achieving [its] . . . goals."[121] In *United States Trust*, the Supreme Court considered the contention that choosing among alternatives was more properly a matter for legislative discretion,[122] but rejected this assertion because it doubted legislative impartiality in public contract cases.[123] Instead, the Court established a presumption in favor of alternatives that did not impair public contracts.[124]

Without modifying the labor agreements, Baltimore could have met its budgetary shortfalls by raising taxes or shifting funding from less essential programs, such as those for cultural activities.[125] Either of these alternatives would have been preferable to the furlough plan. Raising taxes would have more equitably spread the burdens of the city's financial difficulties among those who benefitted from city spending, since the deficit presumably had been accumulated by spending in the interest of all city taxpayers rather than just in the interest of city employees.[126] Also, reducing spending on the arts, arguably a less essential area than education or police pro-

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119. *But see* Association of Surrogates v. New York, 940 F.2d 766, 774 (2nd Cir.), *cert. denied*, 112 S. Ct. 936 (1991) (finding that even a lag payroll provision violated the Contract Clause because deferring payment would likely lead to eventual cancellation of wages).

120. *Cf. United States Trust*, 431 U.S. at 30 n.28 (finding that, rather than completely repealing a bondholder covenant, the states could have attempted to modify it in a manner consistent with its broader objectives).

121. *Id.* at 30. In *United States Trust*, the Court found that the repeal of the covenant was unnecessary because the states could have discouraged automobile use by subsidizing mass transit through increased tolls, gasoline taxes, or parking taxes. *Id.* at 30 n.29.

122. *Id.* at 30.

123. *See id.* at 26 ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.").

124. *Id.* at 30-31 ("[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.").

125. *Baltimore Teachers Union*, 6 F.3d at 1027 (Murnaghan, J., dissenting from denial of petition for reh'g en banc); *see also Association of Surrogates v. New York*, 940 F.2d 766, 773 (2d Cir.) (finding that a lag payroll provision was not necessary because the state could have raised taxes or shifted funds from other government programs), *cert. denied*, 112 S. Ct. 936 (1991).

126. Equity includes the notion that those who benefit from a certain action also carry its burdens. *Cf.* Ronald G. Aronowsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. Rev. 421, 437-38 (1990) (arguing that persons profiting from an activity should bear environmental clean-up risks and costs).

tection, would have allowed the city to address its financial problems without violating its contractual obligations to the police and teachers.

The Fourth Circuit, however, eschewed the examination of alternatives required by *United States Trust.* It reasoned that, as a court, it was ill-equipped to consider evidence relevant to a substantive policy decision.[127] Although it purported to give only some deference to the legislature's judgment,[128] the Fourth Circuit effectively accorded complete deference to the city's decision to adopt the furlough plan. The Fourth Circuit refused to consider the alternative of raising taxes because it believed that this alternative would always be available to overturn a state's impairment of its own financial obligations.[129] However, the Supreme Court has indicated that governments should almost always be held to their financial obligations.[130] And the Fourth Circuit's refusal to examine the alternative of raising taxes directly contradicts the Supreme Court's rationale for requiring additional scrutiny in public contract cases—that states are motivated to impair public contracts precisely because of political pressure not to raise taxes.[131]

The Fourth Circuit's misapplication of *United States Trust* cannot be explained by compelling factual differences because *Baltimore Teachers Union* presents an even stronger case for the application of the Contract Clause than did *United States Trust.* Baltimore employees suffered a definite loss in wages,[132] and Port Authority bondholders were never able to demonstrate clearly that the repeal of the 1962 covenant decreased the market value of their bonds.[133] Furthermore, city employees certainly depended on their wages to purchase essentials such as food and housing,[134]

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127. *Baltimore Teachers Union,* 6 F.3d at 1022.

128. *Id.* at 1019 n.10 ("The Court has never expressly stated that any deference is owed legislative judgment in the context of public contract impairment. However, . . . *some* degree of deference is appropriate even where a state acts to impair its own contracts.").

129. *Id.* at 1019-20.

130. *See supra* note 74 and accompanying text.

131. United States Trust v. New Jersey, 431 U.S. 1, 26 (1977) ("A governmental entity can always find a use for extra money, especially when taxes do not have to be raised."); *see also* Association of Surrogates v. New York, 940 F.2d 766, 773 (2d Cir.) (recognizing that "[this] alternative would [not] have been popular among politician-legislators, but that is precisely the reason that the Contract Clause exists—as a 'constitutional check on state legislation'" (citation omitted)), *cert. denied,* 112 S. Ct. 936 (1991).

132. *Baltimore Teachers Union,* 6 F.3d at 1014.

133. *United States Trust,* 431 U.S. at 19 ("[N]o one can be sure precisely how much financial loss the bondholders suffered."); *id.* at 41 (Brennan, J., dissenting) ("The repeal . . . has occasioned only the most minimal damage on the part of the . . . bondholders."). The Baltimore employees also suffered a more definite loss than the court employees in *Surrogates* who only suffered a temporary loss of wages. *See Surrogates,* 940 F.2d at 769 (noting that the lag payroll effectively delayed the payment of two weeks wages until an employee terminated his state job).

134. *See Baltimore Teachers Union,* 6 F.3d at 1027 (Murnaghan, J., dissenting from denial of petition for reh'g en banc) (citing *Association of Surrogates & Supreme Court Reporters v. New York,* 588 N.E.2d 51, 54 (N.Y. 1992)); *see also, Surrogates,* 940 F.2d at 772 (finding that the

while the *United States Trust* bondholders in all probability used their bonds solely for investment purposes.[135] Moreover, the change in circumstances was more easily foreseen in *Baltimore Teachers Union.* Baltimore impaired labor agreements that had been implemented just prior to the intensification of an already acute financial crisis.[136] In contrast, New York and New Jersey waited a dozen years before finding the increased need for mass transit unforeseeable.[137]

Important policy considerations also suggest that the holding in *Baltimore Teachers Union* is antithetical to *United States Trust.* Commentators have justified *United State Trust*'s invocation of the Contract Clause as a means of promoting economic stability.[138] In contrast, the *Baltimore Teachers Union* decision will hamper economic growth because it allows cities and states too much freedom to alter contracts unilaterally. In the public contract context, the dangers of a weakened Contract Clause are particularly apparent. Public employees who believe that states will be free to unilaterally reduce wages will demand a risk premium before agreeing to work.[139] In turn, states will be forced to spend more on essential govern-

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employees affected by the lag payroll provision "surely relied on full paychecks to pay for such essentials as food and housing," and that many "undoubtedly committed themselves to personal long-term obligations such as mortgages, credit cards, car payments, and the like").

135. The tax exemption given to municipal bonds pursuant to I.R.C. § 103 (1994) makes them an appealing investment primarily for individuals in the highest income tax bracket because they compose the class whose after-tax return is most affected by the switch from taxable to tax-exempt securities.

136. *Baltimore Teachers Union*, 6 F.3d at 1024 (Widener, J., concurring).

137. *United States Trust*, 431 U.S. at 32.

138. *See* Clarke, *supra* note 42, at 248-53 (supporting the *United States Trust* result by arguing that it protected individual reliance interests and encouraged states to contract efficiently); Epstein, *supra* note 72, at 770 (arguing that *United States Trust* preserved the long-term soundness of the lending market at the expense of short-term opportunistic behavior); John L. Kraft et al, *Accommodating the Rights of Bondholders and State Public Purposes Beyond* United States Trust, 55 TUL. L. REV. 735, 743-45 (1981) (arguing that the *United States Trust* decision was sound because it restored investor confidence in the municipal bond market). *But see* Merrill, *supra* note 42, at 618 (citing *United States Trust*, 431 U.S. 1, 61-62 (1976) (Brennan, J., dissenting)) (arguing that Contract Clause protection was not necessary in *United States Trust* because lost investor confidence in government bonds would be offset by the higher rate of return that future investors would be able to obtain).

139. *See* Clarke, *supra* note 42, at 242-43 (discussing risk premiums); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contract Clause*, 88 COLUM. L. REV. 647, 664 (1988) (noting that risk premiums might be included in government contract prices to compensate for the possibility of breach); *cf.* David D. Haddock et al, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 46 (1990) (noting that employees who face physical hazards negotiate risk premiums in advance); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90-91 (1977) (characterizing the risk of impossibility of performance as an expected cost that parties consider in contract pricing); Steven Walt, *Expectations, Loss Distribution and Commercial Impracticability*, 24 IND. L. REV. 65, 68 (1990) (noting that the reliability of contract enforcement affects pricing in commercial contracts). Given the weak Contract Clause protection

ment services or to reduce the quality of services offered.[140] Raising taxes, reducing police protection, or reducing the quality of public education all tend to discourage business and individuals from locating in an area.[141]

In addition to creating the problems associated with a risk premium, weakened Contract Clause protection will tend to cause deterioration in the work ethic of employees. Public employees who doubt the stability of their employment agreements will likely perform less efficiently on the job.[142] Those disadvantaged by unilateral alterations will certainly feel angered and slighted. Consequently, the quality of essential government services may be reduced as employees hold "sickouts" and engage in other forms of protest.[143] Those under increased fear of unilateral alterations but unable to negotiate for risk premiums may engage in more subtle forms of protest. For example, employees may take it upon themselves to compensate for their increased insecurity by making their work less productive but more enjoyable.

Consideration of the possible economic effects of reduced public contract security supports the *United States Trust* decision and suggests that the court in *Baltimore Teachers Union* should have reached a different result. Some commentators, however, have argued that *United States Trust* provided too much protection for public contractual rights,[144] suggesting that the Fourth Circuit's less protective approach might produce better results. Most notably, *United States Trust* has been criticized as allowing inappropriate judicial intrusion on legislative judgment.[145] Commentators have

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available under *Baltimore Teachers Union*, parties will be unable to allocate this risk through contract, and even cities with an exemplary record of upholding public contracts will be forced to pay some risk premium. Risk premiums will likely be highest for cities or states already suffering financial trouble because these governmental entities will be perceived as most likely to renege on their financial obligations.

140. A city may choose to pay the risk premium through deficit spending. This approach will, however, tend to increase risk premiums, trapping the city in a downward spiral.

141. For example, the reduction in the quality of government services will be less pronounced in the Second Circuit, where risk premiums will be smaller. Thus, businesses and individuals will have incentive to locate there rather than in the Fourth Circuit.

142. *See* Association of Surrogates v. New York, 940 F.2d 766, 773 (2d Cir.) ("If a state government could so cavalierly disregard the obligations of its own contracts, of what value would its promises ever be?"), *cert. denied*, 112 S. Ct. 936 (1991).

143. *See*, Horwitz & Greene, *supra* note 2, at A1 (describing sickout and protests held by furloughed Washington teachers); Palmer, *supra* note 2, at 18 (describing bitterness of furloughed carmen).

144. *See e.g.*, Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1462-63 (1992) (questioning the *United States Trust* decision's rationale for closely scrutinizing legislative judgments in public contract cases).

145. *See* Clarke, *supra*, note 42, at 251-52 (suggesting that the *United States Trust* test should be replaced with an approach that would invoke Contract Clause protection only upon legislative failure "to recognize the reliance interest of the contractors"); Douglas W. Kmiec & John D. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST.

proposed an alternative process-oriented approach under which the Contract Clause would be invoked to protect contract holders inadequately represented in the political forum.[146] However, a closer examination of this approach only casts further doubt on the *Baltimore Teachers Union* result.

A process-oriented approach would require that courts invoke Contract Clause protection only as a response to failings in the political process.[147] Such failings would often be characterized by legislation burdening public contract holders who are politically weak or easy targets for the imposition of the costs of impairment.[148] In addition, process failings might also be characterized by legislative willingness to burden public contractors simply

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L.Q. 525, 526 (1987) (arguing that courts should employ the Contract Clause to guard against the danger that the political majority will disregard minority rights); Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1645 (1980) (arguing that courts should focus on whether the legislature made the judgments necessary to support its decision and whether interested parties had a fair opportunity to challenge the impairment through the political process); Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277, 345 (1990) (suggesting that the Contract Clause was enacted to allow judicial protection against short-lived republican passions); Merrill *supra* note 42, at 45 (contending that courts should focus on whether a state's impairing action was motivated by a desire to protect the interest of groups not represented in the political process); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 926-27 (1984) (arguing that the Contract Clause should prevent politically powerful groups from expropriating investments in contracts).

146. *See* authors cited *supra* note 145.

United States Trust has been subject to a second major line of criticism. Commentators advocating a Takings Clause analysis have argued that the *United States Trust* approach should be abandoned because a finding of a Contract Clause violation may require specific performance of contract terms where a damage remedy would be more efficient. *See* Rappaport, *supra* note 145, at 925 (arguing that states should be required to pay damages for impairing public contractual rights). For example, the *United States Trust* Court's reinstitution of the bondholder's covenant arguably hampered the states' effort to expand mass transit while providing at most a negligible increase in the value of the bonds. *See* Clarke, *supra* note 42, at 255 (arguing the Contract Clause provides holders of public contractual rights unnecessary constitutional protection). Under the Takings Clause approach, the *United States Trust* Court should have allowed New York and New Jersey to modify the bondholder's covenant after compensating the bondholders for the lost security provision.

The Takings Clause solution proposed above is not directly applicable to the *Baltimore Teachers Union* facts. Because the city had reinstituted the labor agreements after unilaterally modifying them for a three-month period, the continued enforcement of the labor agreements was not at issue because plaintiffs instead sought damages for the past Contract Clause violation. Baltimore City Lodge 3 FOP v. Mayor, 801 F. Supp. 1506, 1508 (D. Md. 1992), *rev'd sub nom.* Baltimore Teachers Union v. Mayor of Baltimore, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994). In addition, when the contract impairment at issue involves a furlough plan, the logic of the Takings Clause alternative is inapposite. Because the measure of damages the government would be required to pay in compensation exactly equals the amount saved by furloughing the public employees, the government gains nothing under the Takings approach.

147. The process-oriented approach is a rearticulation of the view that the Supreme Court's role in evaluating state legislation should be limited to "representation-reinforcement." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 68 (2nd ed. 1991).

148. *See* Note, *A Process-Oriented Approach to the Contract Clause*, *supra* note 145, at 1625.

to benefit the political majority.[149] Under this approach, suspicious legislative impairments would be upheld only if the legislature offered sufficient justification for burdening public contractors.[150] Requiring the legislature to articulate the reasons for choosing impairment over other alternatives would subject it to checks by public criticism, not by courts.[151]

This process-oriented approach does not support the result in *Baltimore Teachers Union.* The Board of Estimates, the municipal executive agency that enacted the furlough plan, was not an elected body, and thus not subject to direct political checks.[152] Furthermore, even if the furlough plan had been enacted by a legislative body, it would still have been questionable under the process-oriented approach. The plan burdened an easily targeted group—municipal employees. The plan allowed the city to refuse to disperse funds rather than undertake the political[153] and administrative burdens of raising the taxes of all of Baltimore's taxpayers. Additionally, city employees had relatively less political strength than city taxpayers, who greatly outnumbered them and had incentives to pressure Baltimore not to raise taxes.[154] Lastly, the Board of Estimates offered no justification for

149. *Id.* The process-oriented approach suggests that the *United States Trust* test is overprotective because it protects public contract holders who have adequate political representation merely because the state could not have foreseen the need for the impairment when it entered the contract. *Id.* at 1640-41.

150. *Id.* at 1646. The usual justification for burdening a particular group is a determination that the group was causally responsible for the problem being addressed. *Id.* at 1634-35.

151. *Id.* at 1646.

152. *Baltimore Teachers Union,* 6 F.3d at 1026 (Murnaghan, J., dissenting from denial of petition for reh'g en banc).

153. Baltimore taxpayers likely strongly opposed raises because the cuts in state aid came during the recession. *See* Richard Tapscott, *Schaefer Says Md. Can't Keep Cutting,* WASH. POST, Dec. 18, 1991, at C1 (Maryland's "public mood—darkened by the recession—is far from friendly toward any additional taxes."). The effects of the recession were likely felt the most in Baltimore, home to 59% of the state's poor. Richard Tapscott, *A Storm of Reaction Swirls Around Md. Governor: Schaefer's Budget Cutting Plan Draws Ire of State Employees, Advocates for the Poor,* WASH. POST, Oct. 2, 1991, at D1.

154. On the other hand, proponents of collective action theory might argue that the police and teachers, represented by organized unions, would be able to exert a disproportionately strong political voice. Collective action theory suggests that majority interests will likely be inadequately represented because the public will face difficulties organizing and its members will have incentive to become free-riders. *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 66-97 (1965).

Collective action problems are, however, likely to be overcome by the majority in times of political crisis. James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order,* 139 U. PA. L. REV. 287, 320 (1990). "Republican moments" theory asserts that legislatures pass laws in the public interest in response to the media's ability to raise public awareness in times of crisis. Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform,* 10 YALE J. ON REG. 369, 418 (1993) (citing Daniel A. Farber, *Politics and Procedure in Environmental Law,* 8 J. L. ECON. & ORG. 59, 66 (1992)). Thus, "republican moments" theory suggests that had the furlough

burdening city employees. Equity demands that the whole city, not just its employees, carry the burden of the fiscal crisis.

The Supreme Court's summary refusal to consider *Baltimore Teachers Union*[155] and its reluctance to invoke Contract Clause protection in private contract cases cast doubt on the continued viability of *United States Trust*. Yet the Court continues to cite *United States Trust*,[156] and has twice within the past year summarily affirmed the Second Circuit's willingness to constitutionally protect lag payroll provisions.[157] The Second Circuit's interpretation of the Contract Clause is clearly in conflict with that of the Fourth Circuit.[158] By denying certiorari in both cases, the Court has further clouded the murkiest area of the *United States Trust* decision. Maintaining significant Contract Clause protection for public contracts depends upon according only a limited amount of deference to legislative judgments of reasonableness and necessity. In light of the growing importance of public contracts and the increased willingness of public entities to employ drastic measures like furlough plans, the Court should reaffirm the availability of significant Contract Clause protection for public contracts. By considering a public contract case, the Court could reaffirm *United States Trust* and provide assurance that the Contract Clause's strong language still has meaning. In doing so, the Court could also address the perceived shortcomings of *United States Trust* that have plagued its application.

THOMAS H. LEE, JR.

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plan been a "legislative action," municipal employees might have been a politically disadvantaged group considering the financial crisis faced by the City of Baltimore.

155. 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994).

156. See cases discussed *supra* note 86 and accompanying text.

157. See cases discussed *supra* notes 93-99 and accompanying text.

158. *Compare* cases discussed *supra* notes 93-99 *with* case discussed *supra* notes 16-40.

Corporate Law—Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to -10-07 (1993)

Two people nervously sit in the reception area of a small North Carolina bank waiting for a turn with the loan officer. One is a middle-aged man who needs money to realize his lifelong dream of operating a deep-sea fishing charter service on the Outer Banks with his brother-in-law. Across from him sits a young woman. She and several of her former classmates want to start a private law practice in the mountains. Although they have different goals, the man and woman have a common decision to make: each must select the best business form for his or her needs. In the past, the only choices available for entrepreneurs in North Carolina were the corporation,[1] the subchapter S corporation,[2] the general[3] or limited partnership,[4] and the sole proprietorship.[5] In 1993 the North Carolina General Assembly introduced another choice, the limited liability company (the "LLC").[6]

The Limited Liability Company Act ("the Act"),[7] which took effect November 1, 1993,[8] allows business owners, professionals, and entrepre-

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1. *See* N.C. GEN. STAT. §§ 55-1-01 to -17-05 (1990 & Supp. 1993). North Carolina allows professionals to incorporate under the Professional Corporation Act. *Id.* §§ 55B-1 to -15 (1991 & Supp. 1993). In a corporation, shareholders are not liable for the acts or debts of the company beyond the extent of their capital contribution; however, their income is taxed twice, once at the corporate level and again when it is personally received as dividends. *See infra* notes 9-10 and accompanying text.

2. The federal government has provided taxation requirements for subchapter S corporations. *See* I.R.C. §§ 1361-79 (U.S.C.C.A.N. 1993). Shareholders in a subchapter S corporation enjoy limited liability, and their income is only taxed once, but there are limitations on this business format. *See infra* notes 120-30 and accompanying text.

3. N.C. GEN. STAT. §§ 59-31 to -84.1 (1989 & Supp. 1993). In a general partnership, all partners are jointly and severally liable for the debts and obligations of the partnership. *Id.* § 59-45(a) (Supp. 1993).

4. *Id.* §§ 59-101 to -1106 (1989 & Supp. 1993). In the limited partnership, only general partners are liable for the debts and obligations of the partnership. Limited partners can be held liable if they exercise a requisite amount of control over the management of the business. *Id.* § 59-303(a) (1989); *see also infra* notes 63-70, 131-34 and accompanying text.

5. The sole proprietorship is the oldest business form and is in many respects the simplest. The single owner receives all profits but is also responsible for all losses. Income from the business is treated as personal income and is therefore not subject to double taxation, and the business dissolves upon the death of the owner. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 57-60 (3d ed. 1983).

6. The bill was introduced in the House on April 14, 1993, and was ratified on July 15, 1993. *See* H.R. Res. 923, 2d Sess. (1993).

7. N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (1993). The Act had a relatively smooth journey through both houses of the General Assembly. Thirteen members sponsored the original bill; it was ratified three months after introduction. The North Carolina Limited Liability Company Act, ch. 354, 1993 N.C. Sess. Laws 499 (codified at N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (1993)). *See supra* note 6.

8. N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (1993).

neurs to take advantage of the best features of both the corporation and the partnership: limited liability and partnership tax treatment, respectively. The corporation provides limited liability for all its shareholders.[9] However, its income is taxed twice—once at the applicable corporate rate and once at the shareholder's personal rate.[10] Partnership income is taxed only once—at the individual partner's personal income tax rate—but partners in a general partnership and general partners in a limited partnership do not enjoy limited liability.[11] The S corporation offers limited liability and its income is taxed only once, but there are numerous restrictions to this format.[12] Members of an LLC, by contrast, receive partnership tax treatment, limited liability (regardless of the extent of their participation in the management of the business), and are not subject to the restrictions of an S corporation.[13] While the LLC may not be the perfect choice for everyone, it offers an interesting alternative to the business entities it now joins.

This Note examines in detail the main provisions of the Act and summarizes the concepts underlying the statute.[14] Next, the Note tracks the development of the LLC in other states[15] and describes past IRS treatment of associations organized under existing LLC state statutes.[16] The Note then compares the LLC to the corporation, the subchapter S corporation, the partnership, and the limited liability partnership, and examines the likely tax treatment of a properly organized North Carolina LLC.[17] Finally, the Note determines the types of businesses best suited to form or convert to an LLC, paying particular attention to the advantages of LLCs for professionals.[18]

The North Carolina Limited Liability Company Act[19] combines several familiar provisions in an unfamiliar way. The first article of the Act is devoted to various procedural and filing requirements.[20] Article 2 sets forth the purposes and powers of an LLC and the process of its formation.[21] Ar-

9. *See* I.R.C. §§ 1, 11 (U.S.C.C.A.N. 1993).

10. *Id.*

11. All partners in a general partnership are jointly and severally liable for the partnership's debts and obligations. N.C. GEN. STAT. § 59-45 (Supp. 1993). General partners in a limited partnership are also fully liable. *Id.* § 59-403 (1989).

12. I.R.C. §§ 1361-79 (1993); *see also infra* notes 126-34 and accompanying text.

13. *See* I.R.C. §§ 1361-79 (1993); *infra* notes 126-35 and accompanying text.

14. *See infra* notes 19-62 and accompanying text.

15. *See infra* notes 63-94 and accompanying text.

16. *See infra* notes 95-119 and accompanying text.

17. *See infra* notes 120-41 and accompanying text.

18. *See infra* notes 142-48 and accompanying text.

19. N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (1993).

20. *Id.* §§ 57C-1-01 to -1-29. This article contains, among other things, the schedule of fee assessments for organizing an LLC and the procedure for correcting filed documents.

21. *Id.* §§ 57C-2-01 to -2-43; *see infra* notes 31-38 and accompanying text.

ticle 3 discusses the various aspects of membership and management.[22] Article 3 contains the most important provision of the Act—a provision that limits the liability of all members and managers to their initial capital investment, just like shareholders in a corporation.[23] Article 4 of the Act deals with financing the LLC, including contributions and distribution.[24] Article 5 of the statute borrows a familiar requirement from partnership law by restricting the transferability of LLC interests from a member to a nonmember,[25] and Article 6 provides for dissolution upon the occurrence of certain events.[26] Article 7 addresses foreign limited liability companies,[27] while Article 8 deals with derivative actions.[28] Article 9 sets forth the requirements for mergers,[29] and Article 10 contains the miscellaneous provisions of the statute.[30]

The Act contains many procedural requirements for the formation of an LLC, and several of these closely resemble filing and formation requirements for North Carolina corporations.[31] To organize an LLC, the members of the proposed company must deliver properly executed articles of organization to the Secretary of State,[32] who in turn files the

22. *Id.* §§ 57C-3-01 to -3-32; *see infra* notes 39-45 and accompanying text.

23. *Id.* § 57C-3-30.

24. *Id.* § 57C-4-01 to -4-08.

25. *Id.* §§ 57C-5-01 to -5-06. The restrictions on transferability of partnership interests are found in N.C. GEN. STAT. §§ 59-301, -48(7), -401 (1989).

26. *Id.* §§ 57C-6-01 to -6-09 (1993).

27. *Id.* §§ 57C-7-01 to -7-14. Under the North Carolina Act, the State will recognize foreign limited liability companies if they file a certificate of authority with the Secretary of State. *Id.* § 57C-7-02(a). The laws of the state under which the LLC is organized will govern the affairs of the LLC. *Id.* § 57C-7-01. North Carolina requires the foreign LLC to maintain both a registered office and registered agent within the state. *Id.* § 57C-7-07.

28. *Id.* § 57C-8-01. Members of the LLC may bring derivative actions against the managers of the LLC to recover damages in favor of the company. *Id.*

29. *Id.* §§ 57C-9-01 to -9-06. This provision allows one or more LLCs to merge with another LLC upon unanimous consent of the members. *See Id.*

30. *Id.* §§ 57C-10-01 to -10-07. This article contains provisions for jurisdiction, *id.* § 57C-10-04, and rules of construction, *id.* § 57C-10-03, and it classifies the LLCs for state taxation purposes "in accordance with their classification for federal income tax purposes," *id.* § 57C-10-06.

31. *Compare* N.C. GEN. STAT. § 55-1-20 to -1-29 (1990 & Supp. 1993) *with* 57C-1-01 to -1-29 (1993) (noting the similar requirements in the formation of LLCs and corporations).

32. *Id.* § 57C-2-20(a) (1993). An LLC must be comprised of at least two people. *Id.* To be properly executed, the articles of organization must contain the name of the LLC, the latest date by which dissolution will occur, the name and address of each person executing the articles, the address of the LLC's initial registered office, and a statement designating which members will be managers. In the absence of this last requirement, all members will be presumed to be managers. *Id.* § 57C-2-21(a), -3-20(a).

articles.[33] The LLC comes into existence upon the proper filing of the articles.[34]

Once the LLC is created, it may engage in "any lawful business unless a more limited lawful purpose is set forth in its articles of organization."[35] It may "do all things necessary or convenient to carry out its business and affairs . . . ."[36] It can sue, be sued, contract, lend money, purchase land, or take any other legal action available to an individual or corporation.[37] Professionals may organize in the LLC form under the same conditions and guidelines that govern the operation of a professional corporation.[38]

Article 3 sets forth the requirements of membership and the duties of managers.[39] The executors of the articles of organization become members of the company when the articles are filed with the Secretary of State.[40] New members can be admitted only through compliance with the applicable rules set forth in the articles of organization or the written operating agreement.[41] If there are no rules dealing with admission of members, new members can be admitted only with the unanimous approval of the existing members.[42]

Every member is considered to be a manager of the LLC unless the articles of organization or operating agreement provide otherwise.[43] Unless specified differently in the articles or operating agreement all managers have equal power. Management decisions require the consent of a majority of the managers.[44] Each manager is also an agent of the LLC and can bind

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33. *Id.* § 57C-1-25.

34. *Id.* § 57C-2-20(b)(1). Filing fees must be paid upon the filing of the articles of organization and at other times throughout the existence of the LLC. *Id.* § 57C-1-22. The present fee for filing the articles of organization with the Secretary of State is $100.00. *Id.* § 57C-1-22(a)(1).

35. *Id.* § 57C-2-01(a).

36. *Id.* § 57C-2-02.

37. *Id.* The LLC can be a member of another LLC, a shareholder in a corporation, or a partner in a partnership. *Id.*

38. *Id.* § 57C-2-01(c). For the conditions and guidelines governing professional corporations see *id.* §§ 55B-1 to -15 (1991 & Supp. 1993).

39. *Id.* § 57C-3-01 to -3-26 (1993).

40. *Id.* § 57C-3-01(a).

41. *Id.* An operating agreement is "[a]ny agreement, written or oral, of the members with respect to the affairs of a limited liability company and the conduct of its business that is binding on all the members." *Id.* § 57C-1-03(16).

42. *Id.* § 57C-3-01(b). Unless the articles of organization or the written operating agreement provides otherwise, the consent of all members is also required to "[a]dopt or amend an operating agreement; . . . [to s]ell, transfer, or otherwise dispose of all or substantially all of the assets of the limited liability company prior to the dissolution of the limited liability company; [or to m]erge the limited liability company into or with another limited liability company." *Id.* § 57C-3-03.

43. *Id.*

44. *Id.* § 57C-3-20.

the company in the ordinary course of business, unless the other party to the transaction knows that the manager has no authority to bind the LLC.[45]

The most revolutionary feature of the LLC is the limited liability provision contained in Article 3.[46] This provision limits the liability of each member of the company, including managers, to his or her contribution of capital[47] for debts or obligations of the LLC not arising from the member's own conduct.[48] For example, a lawyer in a firm that was formed under the Act cannot be held liable for the malpractice of his partner but could be held personally liable for his own malpractice.[49] Furthermore, an LLC's articles of organization or operating agreement can limit, or even eliminate, the managers' liability for a breach of the duty of care.[50] Liability for breach of the duty of loyalty, however, may not be limited or eliminated.[51]

While interests in an LLC are not freely transferable from members to nonmembers,[52] an interest may be assigned to a nonmember. An assignee, however, is accorded only the right to receive whatever profits or distributions the assignor is entitled to receive.[53] The assignee can become a member only if the remaining members unanimously consent to the assignee's membership in the company.[54] When a member assigns her entire interest in an LLC, her membership terminates unless the articles of organization or operating agreement provide otherwise.[55] Assignment, however, normally does not dissolve an LLC.[56]

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45. *Id.* § 57C-3-23. A manager cannot bind the LLC for an act "that is not apparently for carrying on the usual course of the business" of the LLC unless the remaining managers approve the act through authorization or ratification. *Id.*

46. *Id.* § 57C-3-30.

47. Another provision in Article 4 allows a member's capital contribution to be in the form of cash, property, promissory notes, or services rendered. *Id.* § 57C-4-01.

48. § 57C-3-30 (a) provides:

> A person who is a member or manager, or both, of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member or manager or both, and does not become so by participating, in whatever capacity, in the management or control of the business. A member or manager may, however, become personally liable by reason of his own acts or conduct.

49. *See id.* § 57C-2-01(c) (stating that a member of a professional LLC is not liable for the malpractice of another member).

50. *Id.* § 57C-3-32(a)(1).

51. *Id.* § 57C-3-32(b).

52. *Id.* § 57C-5-02. Nonmembers include relatives or business associates. *Id.*

53. *Id.*

54. *Id.* § 57C-5-04. The unanimous-consent requirement can presumably be changed in the articles of organization or operating agreement, but making such changes could have certain adverse tax consequences. *See infra* notes 113-115 and accompanying text.

55. *Id.* § 57C-5-02.

56. *Id.* The LLC would be dissolved if the member makes an assignment for the benefit of creditors. *Id.* §§ -3-02(3)(a), -6-01(4).

Although the Act does not specifically limit the life of an LLC to a certain term of years, the LLC automatically dissolves upon certain events,[57] including the bankruptcy[58] or death[59] of a member. The LLC may continue after one of these events only if certain conditions are met: (1) there is at least one remaining member; (2) the articles of organization or operating agreement provide that remaining members may continue the business; and (3) the remaining members unanimously vote to carry on the business.[60] An LLC also may be dissolved by the written consent of all the members,[61] or by judicial decree in certain circumstances.[62]

The forerunner of the LLC was the limited partnership. The nation's first limited partnership statute was enacted in Pennsylvania in 1874,[63] and other states followed suit.[64] North Carolina's limited partnership statute was enacted in 1941.[65] It was extensively revised in 1986.[66] It requires the filing of a certificate of limited partnership with the Secretary of State[67] and allows limited partners to escape the debts and obligations of the partnership unless they are also general partners or they "take[ ] part in the control of the business."[68] The disadvantage to the limited partnership is that not

57. *Id.* § 57C-6-01.

58. *Id.* § 57C-3-02(3)(b).

59. *Id.* § 57C-3-02(5). An LLC also could be dissolved if a court determines a member is "incompetent to manage his person or property." *Id.* In addition, the law provides for dissolution "in the case of a member who is acting as a member by virtue of being a trustee of a trust" when the trust involved terminates. *Id.* § 57C-3-02(6). An LLC likewise will dissolve upon the dissolution of a member partnership, corporation or LLC. *Id.* § 57C-3-02(7). If an estate is a member, the LLC will dissolve when the trustee of the estate has distributed the "estate's entire interest in the limited liability company." *Id.* § 57C-3-02(9).

60. *Id.* § 57C-6-01(4)(i)-(iii).

61. *Id.* § 57C-6-01(3). The articles of organization, the written operating agreement, or both, can also specify a duration for the existence of the LLC or specify other events that will trigger dissolution. *Id.* § 57C-6-01(2).

62. *Id.* § 57C-6-02. An LLC can be judicially dissolved "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or an operating agreement." *Id.* § 57C-6-02(a). The articles of organization or the operating agreement could conceivably eliminate all the events that can cause dissolution under the Act. However, such a clause could give the LLC the corporate characteristic of continuity of life, perhaps jeopardizing the LLC's favorable partnership tax treatment. *See infra* notes 88, 112.

63. *See* Act of Dec. 19, 1975, 1975 Pa. Laws 524, No. 155, § 1 (codified at PA. STAT. ANN. tit. 59, § 341 (1964)), *repealed by* Act of Dec. 21, 1988, Pub. L. 1444, No. 177, § 302(e)(1) (effective Oct. 1, 1989). The old limited partnership statute was replaced by the Uniform Limited Partnership Act, 59 PA. CONS. STAT. ANN. §§ 501-569 (Supp. 1993).

64. *See generally* HENN & ALEXANDER, *supra* note 5, at 85 (discussing the history of the liimited partnership).

65. Uniform Limited Partnership Act of 1941, ch. 251, 1941 N.C. Sess. Laws 354 (codified at N.C. GEN. STAT. §§ 59-1 to -30.1 (1941)).

66. *See* Revised Uniform Limited Partnership Act of 1986, ch. 989, 1985 N.C. Sess. Laws 319 (current version at N.C. GEN STAT. §§ 59-101 to 1106 (1989 & Supp. 1993)).

67. N.C. GEN. STAT. § 59-201(a) (1989 & Supp. 1993).

68. *Id.* § 59-303(a).

every partner escapes liability. One or more partners must be general partners with unlimited liability to third persons for the partnership's obligations.[69] An advantage, however, is that limited partnerships are entitled to certain tax benefits that a corporation does not enjoy.[70]

Wyoming enacted the first LLC statute in 1977.[71] The purposes of the statute were the same as those of North Carolina's LLC Act: all members would enjoy limited liability to third parties,[72] but would avoid double taxation.[73]

The Wyoming Act differs from the North Carolina Act in one important respect. Unless the articles of organization or the operating agreement provide otherwise, the Wyoming Act limits the LLC to a thirty-year duration.[74] In contrast, North Carolina's Act requires that the articles of organization state "[t]he latest date on which the limited liability company is to dissolve," but sets forth no minimum or maximum duration.[75] However, the many circumstances that can cause a North Carolina LLC to dissolve effectively limit its continued existence.[76]

An LLC revolution did not commence with the enactment of the Wyoming statute. In fact, five years passed before another state, Florida, enacted a similar statute.[77] A central motivation behind the enactment of the Florida LLC statute was attracting investments from Central and South

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69. *Id.* § 59-403.

70. *See* Treas. Reg. §§ 301.7701-2, -3 (as amended in 1993). The main tax benefit is that income in a partnership is taxed only once, to the individual partners when they receive their share of the partnership income. *See* HENN & ALEXANDER, *supra* note 5 at 80-81. Corporations lack this "pass-through" tax treatment. *See infra* notes 105-06 and accompanying text.

71. Act of Mar. 4, 1977, ch. 158, § 1, 1977 Wyo. Sess. Laws 537 (codified at WYO. STAT. § 17-15-101 to -15-143 (1993)).

72. *Id.* § 17-15-113 (1989).

73. *See* Marybeth Bosko, Note, *The Best of Both Worlds: The Limited Liability Company*, 54 OHIO ST. L.J. 175, 177 (1993). The Wyoming legislators wanted to use the new LLC format to attract new business into the state and "reap associated benefits from acting as the national haven for 'tramp' LLCs that would bring their activities . . . to Wyoming in order to avail themselves of the LLC statute." Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 389 (1991). Apparently, Wyoming wanted to become to LLCs what Delaware is to corporations. It is estimated that more than one-third of Fortune 500 corporations are incorporated in Delaware and "only one—du Pont—has its general headquarters in Delaware." HENN & ALEXANDER, *supra* note 5, at 7 n.12. Unfortunately for Wyoming's business community and tax base, this never occurred. The first eleven years produced only 26 LLCs in Wyoming. *See* Joseph P. Fonfara & Corey R. McCool, Comment, *The Wyoming Limited Liability Company: A Viable Alternative to the S Corporation and the Limited Partnership?*, 23 LAND & WATER L. REV. 523, 523 (1988).

74. WYO. STAT. § 17-15-107(a)(ii) (1993).

75. N.C. GEN. STAT. § 57C-2-21(a)(2) (1993).

76. *See supra* notes 57-62 and accompanying text.

77. *See* Act of Apr. 21, 1982, 1982 Fla. Laws ch. 82-177, § 2 (codified at FLA. STAT. ch. 608.401 to .471 (1993 & Supp. 1994)).

America.[78] After Florida's enactment, there was a lull in state LLC activity until 1990 when both Colorado and Kansas unveiled LLC statutes.[79]

The scarcity of state statutes is probably attributable to uncertainty over the tax treatment of the LLC entity.[80] The IRS settled some of this uneasiness in 1988 when it released Revenue Ruling 88-76,[81] which classified a Wyoming organization operating under the Wyoming LLC act as a partnership for tax purposes.[82] The IRS used a four-factor test previously outlined in a treasury regulation to determine whether the association was a partnership or a corporation for tax purposes.[83] The regulation's test defines the four characteristics of a corporation as continuity of life, centralized management, limited liability, and free transferability of interests.[84] The IRS recognized that if an association "possesses more corporate characteristics than non-corporate characteristics, it constitutes an association taxable as a corporation."[85]

The IRS found that the Wyoming LLC had only two of the four corporate characteristics. Since three designated managers ran the association, the IRS determined that the LLC had centralized management.[86] Next, the IRS determined that the characteristic of limited liability was present since

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78. *See* Richard Johnson, Comment, *The Limited Liability Company Act*, 11 FLA. ST. U. L. REV. 387, 387 (1983). The countries from which Florida was trying to attract investment had a business form known as *limitada*, which is similar to an LLC. *See id.* at 387-88. Despite Florida's effort, few businesses took advantage of this statute. *Id.*

79. *See* Act of April 18, 1990, 1990 Colo. Sess. Laws 414, § 1 (codified at COLO. REV. STAT. §§ 7-80-101 to -80-913 (Supp. 1993)); Act of July 1, 1990, ch. 80, § 1, 1990 Kan. Sess. Laws (codified at KAN. STAT. ANN. §§ 17-7601 to -7651 (Supp. 1993)).

80. The IRS initially proposed regulations that would have halted the development of the LLC by denying the LLC tax treatment similar to that of a partnership. Prop. Treas. Reg. § 301.7701-2, 45 Fed. Reg. 75, 709 (1980). These regulations would have denied partnership tax treatment to any association that shielded all its members from liability. *Id.* Ironically, the first hint that the IRS would treat the LLC as a partnership for tax purposes came that same year in a private letter ruling that classified a Wyoming LLC as a partnership. *See* Priv. Ltr. Rul. 8106082 (Nov. 18, 1980).

81. Revenue rulings are opinions issued by the IRS; they are similar to reported cases and contain facts, a summary of the law, analysis and a conclusion. MICHAEL D. ROSE & JOHN C. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION 771 (3d ed. 1988). These rulings may be used by taxpayers to determine the consequences of certain actions that are factually similar to the rulings. *Id.*

82. Rev. Rul. 88-76, 1988-2 C.B. 360-61.

83. Treas. Reg. § 301.7701-2 (as amended in 1993).

84. *Id.*

85. Rev. Rul. 88-76, 1988-2 C.B. 360, 361. Equal weight must be given to each of the four characteristics. *Id.*

86. *Id.* The IRS stated that centralized management exists "if any person (or group of persons that does not include all the members) has continuing exclusive authority to make management decisions necessary to the conduct of the business for which the organization was formed." *Id.* (citing Treas. Reg. § 301.7701-2(c)(1) (as amended in 1983)).

limited liability was conceded in the title and purpose of the Act under which the association was organized.[87]

However, the IRS determined that the Wyoming organization did not have continuity of life because, under the act, the occurrence of certain events would dissolve the LLC unless all the remaining members voted to continue the business.[88] Finally, the IRS found that the association did not have the corporate characteristic of free transferability of interests,[89] since transfer required unanimous approval.[90] Since the LLC did not have more corporate characteristics than noncorporate characteristics—it had two of each—the IRS classified it as a partnership for tax purposes.[91]

That revenue ruling triggered a flood of legislation. Thirty-five other states have since authorized the LLC,[92] and ten others have introduced lim-

87. *Id.* (noting that "an organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of, or claims against, the organization") (citing Treas. Reg. § 301.7701-2(d)(1) (as amended in 1983)). "Personally liable" means that a creditor can seek damages from an individual partner, even beyond the capital investment she has made, if the organization's assets are not enough to satisfy the claim. *Id.*

88. *Id.* The Act provided for termination of the LLC when the fixed period of duration expired, upon unanimous written consent of all the members, or upon the death, bankruptcy, or dissolution of a member. *Id.*

89. *Id.* The IRS noted that "[a]n organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization." *Id.* (quoting Treas. Reg. § 301.7701-2(b)(1) (as amended in 1983)).

90. *Id.* The IRS distinguished the transfer of an interest from the assignment of an interest. It stated that an assignee did not "become a substitute member and [did] not acquire all the attributes of the member's interest." *Id.* Therefore, while the ability to transfer a complete interest without the requirement of consent by the remaining members gives the LLC the corporate characteristic of free transferability of interests, the ability to merely assign a right to share in the profits does not. *See infra* note 115 and accompanying text.

91. *Id.*

92. *See* ALA. CODE §§ 10-12-1 to -12-61 (Supp. 1993); ARIZ. REV. STAT. ANN. §§ 29-601 to -857 (Supp. 1993); ARK. CODE ANN. §§ 4-32-101 to -32-1316 (Michie Supp. 1993); COLO. REV. STAT. §§ 7-80-101 to -80-913 (Supp. 1993); DEL. CODE ANN. tit. 6, §§ 18-101 to -1107 (1993); FLA. STAT. ch. 608.401 to .471 (1993 & Supp. 1994); GA. CODE ANN. §§ 14-11-100 to -11-1109 (Michie Supp. 1993); IDAHO CODE § 53-601 to -672 (Supp. 1993); ILL. ANN. STAT. ch 805, para. 180/1-1 to /1-60 (Smith-Hurd Supp. 1994); IOWA CODE ANN. §§ 490A.100 to .1601 (West Supp. 1994); KAN. STAT. ANN. §§ 17-7601 to -7651 (Supp. 1993); LA. REV. STAT. ANN. §§ 12:1301 to -1369 (West Supp. 1994); MD. CORPS. & ASS'NS CODE ANN. §§ 4A-101 to -1103 (1993 & Supp. 1993); MINN. STAT. ANN. §§ 322B.01 to -960 (West Supp. 1994); MONT. CODE ANN. §§ 35-8-101 to -8-1307 (1993); N.H. REV. STAT. ANN. 304-C:1 to C:85 (Supp. 1993); 1993 N.J. Laws 210; N.M. STAT. ANN. §§ 53-19-1 to -19-74 (Michie Supp. 1993); N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (1993); N.D. CENT. CODE § 10-32-01 to -32-155 (Supp. 1993); OKLA. STAT. ANN. tit. 18, §§ 2000-2060 (Supp. 1994); R.I. GEN. LAWS § 7-16-1 to -16-75 (1992 & Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 47-34-1 to -34-59 (Supp. 1993); TEX. REV. CIV. STAT. ANN. art. 1528n 1.01-11.07 (West Supp. 1994); UTAH CODE ANN. §§ 48-2b-101 to -2b-157 (1994); VA. CODE ANN. §§ 13.1-1000 to -1-1073 (Michie 1993); W. VA. CODE §§ 31-1A-1 to -1A-69 (Supp. 1993); WIS. STAT. ANN. §§ 183.0102 to -.1305 (West Supp. 1994); WYO STAT. §§ 17-15-101 to -15-143 (1989 & Supp. 1993); 1993 Conn. Acts 267 (Reg. Sess.); 1993 Mich. Pub. Acts 23; 1993 Miss. Laws 530; 1993 Mo. Laws 146; 1993 Or. Laws 173. Kentucky also recently passed 1994 Ken-

ited liability company bills.[93] Thus, only three states have no LLC legislation at all.[94]

After Revenue Ruling 88-76, the Internal Revenue Service did not issue another ruling on the tax status of LLCs under the various state statutes until 1993. The first of several 1993 rulings considered the classification of an LLC formed under the Virginia statute.[95] Applying the same four-factor test,[96] the IRS determined that the Virginia association lacked two corporate characteristics—continuity of life and free transferability of interests—but did possess the characteristics of limited liability and centralized management.[97] Based on these conclusion, the Virginia LLC received partnership tax treatment. The IRS followed its Virginia ruling with eleven others in rapid succession. Each dealt with an LLC organized under a different state statute, and each classified the LLC in question as a partnership.[98]

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tucky Senate Bill No. 184 authorizing LLCs. 1994 KY S.B. (SN), *available in* WESTLAW, KY-BILLTRK database.

93. These states are California, Hawaii, Indiana, Massachusetts, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Vermont.

94. The remaining states are Alaska, Maine, and Washington.

95. *See* Rev. Rul. 93-5, 1993-1 C.B. 227 (examining an LLC formed under VA. CODE ANN. §§ 13.1-1000 to -1073 (Michie 1993)).

96. *See supra* notes 83-85 and accompanying text.

97. Rev. Rul. 93-5, 1993-1 C.B. 227.

98. *See* Rev. Rul. 94-6, 1994-3 I.R.B. 11 (Alabama); Rev. Rul. 93-93, 1993-42 I.R.B. 13 (Arizona); Rev. Rul. 93-6, 1993-1 C.B. 229 (Colorado); Rev. Rul. 93-38, 1993-1 C.B. 233 (Delaware); Rev. Rul. 93-53, 1993-26 I.R.B. 7 (Florida); Rev. Rul. 93-49, 1993-25 I.R.B. 11 (Illinois); Rev. Rul. 94-5, 1994-2 I.R.B. 21 (Louisiana); Rev. Rul. 93-30, 1993-1 C.B. 231 (Nevada); Rev. Rul. 93-92, 1993-42 I.R.B. 11 (Oklahoma); Rev. Rul. 93-81, 1993-38 I.R.B. 7 (Rhode Island); Rev. Rul. 93-91, 1993-41 I.R.B. 22 (Utah); Rev. Rul. 93-50, 1993-25 I.R.B. 13 (West Virginia). Apparently, the IRS intends to issue a revenue ruling analyzing an LLC organized under each state's statute. With the numerous new statutes enacted in 1993 and 1994, many more revenue rulings on this subject are likely. The IRS has also issued other revenue rulings which do not directly examine an LLC but have implications for the conversion to an LLC. *See, e.g.*, Rev. Rul. 84-52, 1984-1 C.B. 157. This ruling did not specifically deal with an LLC, but ruled on the consequences of converting a general partnership to a limited partnership. The partnership in question was formed as a general partnership under the Uniform Partnership Act, and the four partners had equal interests in the partnership. The partners wanted to amend the partnership agreement to convert to a limited partnership that would continue to carry on the partnership's business. Two of the partners became general partners, two became limited partners, and all the partners' contributions to capital remained the same. The IRS held that none of the partners had a recognizable gain or loss as a result of the conversion. *Id.* at 157-58. Although this conversion did not involve an LLC, the IRS later held that the conversion of a general partnership to a limited liability company was "directly analogous" to the situation in Revenue Ruling 84-52. Priv. Ltr. Rul. 9226035 (Mar. 26, 1992). Thus, the conversion of a general partnership to an LLC would not result in any recognized gain or loss by the members, the LLC, or the partnership. Priv. Ltr. Rul. 9350013 (Sept. 15, 1993).

Private letter rulings apply the law to a particular set of facts and are issued by the IRS to a specific taxpayer. The rulings are then made available to the public with certain information deleted. The IRS maintains that private letter rulings cannot be used or cited as precedent. *See* I.R.C. § 6110(j)(3) (U.S.C.C.A.N. 1993).

Other federal statutes may affect the organization of new LLCs or conversion of existing associations to the LLC form. The Internal Revenue Code establishes the methods of tax accounting that a business may use. The general rule states that "[t]axable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books."[99] The two methods of accounting which are permissible under the Code are the cash method[100] and the accrual method.[101]

Generally, corporations, partnerships with a corporate partner, and tax shelters may not use the cash method of accounting.[102] However, the Code exempts qualified personal service corporations (such as incorporated law firms) from this restriction.[103] In a 1993 private letter ruling, the IRS determined that a partnership converting to an LLC could continue using the cash method of accounting because it was not treated as a corporation, it did not have a corporate partner, and it was not a tax shelter.[104]

Aside from limited liability, the most attractive feature of the LLC is its favorable tax treatment. A corporation's earnings are subject to double taxation because they are taxed first as income to the corporation,[105] and then again as income to the shareholder when and if the earnings are distributed as dividends.[106] Under the IRS revenue rulings outlined above, an

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99. I.R.C. § 446(a) (U.S.C.C.A.N. 1993). The Code states that "[i]f no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income." *Id.* § 446(b).

100. Under the cash method of accounting, "cash, property, and services constituting gross income are reported in the taxable year of actual or constructive receipt and expenditures are deducted when actually made . . . ." BORIS I. BITTKER, FUNDAMENTALS OF FEDERAL INCOME TAXATION § 35.1, at 35-6 to 35-7 (student ed. 1983).

101. I.R.C. § 446(c)(2) (U.S.C.C.A.N. 1993). Under the accrual method, "income is included (and deductions are allowed) in the taxable year in which all events fixing the taxpayer's right to receive the income (or the taxpayer's liability to pay) have occurred and the amount can be determined with reasonable accuracy." BITTKER, *supra* note 100, § 35.1 at 35-7.

102. I.R.C. § 448(a) (U.S.C.C.A.N. 1993).

103. *Id.* § 448(b)(2).

104. Priv. Ltr. Rul. 9350013 (Sept. 15, 1993). The cash method of accounting is generally preferred by professionals "because of lagging collections and the traditional nature of professional service organizations (where charging interest on late payments is viewed as uncomfortable for both the firm and its client). Use of the accrual method by professionals typically results in accelerated recognition of taxable income." Sheldon I. Banoff, *New IRS Ruling Encourages Professionals to Form Limited Liability Companies*, 79 J. TAX'N. 68, 68-69 (1993).

105. *See* I.R.C. § 11 (U.S.C.C.A.N. 1993). *See generally* HENN & ALEXANDER, *supra* note 5, at 132-38 (discussing the double taxation of corporate income).

106. *See* I.R.C. § 61(a)(7) (U.S.C.C.A.N. 1993). Corporations that wish to avoid taxation at the shareholder level by accumulating income without distributing it to the shareholders can be penalized through what is called the accumulated earnings tax, a levy equal to 28% of the accumulated taxable income. *Id.* § 531. A corporation is subject to this tax when "the earnings and profits of a corporation are permitted to accumulate beyond the reasonable needs of the business."

LLC organized under the North Carolina Limited Liability Company Act should receive tax treatment akin to that of a partnership.[107] To take advantage of that beneficial tax treatment, the North Carolina LLC must possess no more than two of the four corporate characteristics recognized by the IRS.[108] An LLC organized under the North Carolina Act will automatically have the corporate characteristic of limited liability.[109] The other three characteristics will depend on how the members choose to organize the LLC.

An organization properly drafted under the North Carolina Act will have neither continuity of life nor free transferability of interests.[110] Treasury regulations provide, and the IRS has ruled, that an LLC that is dissolved upon the death, bankruptcy, insanity, retirement, resignation, or expulsion of a member lacks continuity of life.[111] Since under the North Carolina Act a member's death, bankruptcy, incompetence, withdrawal, or removal will cause the LLC to dissolve unless the remaining members vote to continue the business,[112] an LLC properly organized under the Act will lack continuity of life under IRS rules.

Under the North Carolina Act, an assignee of a membership interest may not become a member without the unanimous consent of all the remaining members, "except as otherwise provided in the articles of organiza-

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Id. § 533(a). *See generally* HENN & ALEXANDER, *supra* note 5, at 944-48 (discussing the tax treatment of dividends).

107. *See supra* notes 80-91 and accompanying text. In addition to avoiding double taxation, the LLC is also exempt from the North Carolina Franchise Tax, which corporations are required to pay. *See* N.C. GEN. STAT. § 105-122 (1992 & Supp. 1993). The tax is levied at the rate of $1.50 per $1,000 of capital stock "for the privilege of carrying on, doing business, and/or the continuance of the articles of incorporation or domestication of each such corporation in this State." *Id.* § 105-122(d). The North Carolina Secretary of Revenue feared the exemption for LLCs would cause "potential revenue loss [from] new entities formed as LLC's in lieu of corporations, [and] potential revenue loss from corporations converting to LLC status . . . ." Memorandum from Janice H. Faulkner, Secretary of Revenue, to Rep. Robert C. Hunter & Rep. Annie Brown Kennedy 1 (April 30, 1993) (on file with the *University of North Carolina Law Review*).

108. *See* Treas. Reg. § 301.7701-2(a)(3) (as amended in 1993). The four corporate characteristics are limited liability, centralized management, continuity of life, and free transferability of interests. *See supra* notes 83-84 and accompanying text.

109. N.C. GEN. STAT. § 57C-3-30 to -3-32 (1993).

110. *See id.* § 57C-5-04 (stating that the assignee of membership interest can become a member only with the consent of all other members); *id.* § 57C-6-01 (stating that the company dissolves upon the happening of certain events).

111. *See* Treas. Reg. § 301.7701-2(b)(1) (as amended in 1993); Rev. Rul. 88-76, 1988-2 C.B. 360, 361.

112. N.C. GEN. STAT. §§ 57C-3-02, -6-01 (1993). However, the statute provides that the articles of organization or operating agreement can change, add to, or eliminate the events which cause dissolution. If the changes deviate too much from the statutory provisions, the LLC could have the corporate characteristic of continuity of life, jeopardizing its partnership tax treatment. *See supra* note 88 and accompanying text.

tion or operating agreement."[113] The IRS has ruled that when an assignee cannot become a member without the consent of all the remaining members an LLC lacks the corporate characteristic of free transferability of interests.[114] The IRS has not addressed directly the issue of whether a provision in the articles of organization or operating agreement that allows a two-thirds or simple majority vote on transfer of membership would establish free transferability of interests. However, the IRS has stated that, "[i]n order for [free transferability of interests] to exist . . . the member must be able, without the consent of other members, to confer upon the member's substitute all the attributes of the member's interest in the organization."[115] By this definition, a requirement of majority consent appears sufficient to negate free transferability.

If LLC members desire freely transferable interests, they may still be able to obtain favorable partnership tax treatment by foregoing another corporate characteristic such as centralized management. Centralized management is present when "a designated manager or managers" have "continuing exclusive authority to make management decisions."[116] The North Carolina statute allows management to be vested equally in all the

113. *Id.* § 57C-5-04(a).

114. *See* Rev. Rul. 88-76, 1988-2 C.B. 360.

115. *Id.* The IRS has concluded that "free transferability of interests [exists] if each of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization." Treas. Reg. § 301.7701-2(e)(1) (as amended in 1993). Read literally, this language would mean that free transferability would not exist when the operating agreement provided that the consent of only two or more members would allow a member to transfer his interest. In a 50-member LLC, such a limitation could restrict the transferability of interests. When the IRS has addressed this issue in Revenue Rulings, it has stated only that free transferability of interests does not exist when the transferring member must gain unanimous consent from the other members. When the requirement is something less than unanimous consent, it becomes unclear whether or not the LLC lacks free transferability. *See infra* notes 81-91, 94-98 and accompanying text. If the members of the LLC provide in their articles of organization or their operating agreement that less than unanimous consent by all the remaining members is sufficient to allow an assignee of a membership interest to become a member, the characteristic of free transferability of interests might exist, which could preclude the LLC from gaining partnership tax treatment. On the other hand, a supermajority requirement of eighty or ninety percent of the remaining members might be sufficient to find that the LLC lacks free transferability of interests. A two-thirds majority vote requirement might also be enough of an impediment to transferability, but the closer one moves to a simple majority, the more likely it becomes that the IRS will find that the LLC has freely transferable interests. In order to be safe, organizers should follow the statutory requirement of unanimous consent to ensure that the LLC will be treated as a partnership for tax purposes. *See* Kristen E. Hazel, *Drafting the Operating Agreement for a Limited Liability Company*, 21 TAX'N FOR LAW. 184, 186 (Nov./Dec. 1992).

116. Rev. Rul. 88-76, 1988-2 C.B. 360, 361. Centralized management may be very desirable in a large organization where complete member democracy would be impractical; however, vesting management power in all the members may work well in a smaller organization where all members prefer to be involved in the decision-making process.

members of an LLC.[117] If the operating agreement or articles of organization allow all or nearly all of the members to have an equal voice in the management of the company—or a voice in proportion to their interests—the company should be found to lack centralized management.[118] If a particular LLC lacks centralized management, an LLC could conceivably retain its partnership tax status yet allow free transferability of interests.[119]

Another entity, the "Subchapter S" (S) corporation,[120] has benefits similar to those of the LLC. This business form allows members to retain limited liability like a corporation, while enjoying the single taxation benefits of a partnership.[121] However, there are several drawbacks to the S corporation. For instance, an S corporation cannot have more than thirty-five shareholders.[122] By contrast, the size of an LLC is not expressly limited under the North Carolina Act.[123] Other limitations on the S corporation are that it can have only individuals as shareholders, cannot have a nonresident alien as a shareholder, and cannot have more than one class of stock.[124] The Internal Revenue Code imposes no such statutory limitations on LLCs.[125]

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117. N.C. GEN. STAT. § 57C-3-20 (1993).

118. *See* Priv. Ltr. Rul. 9010027 (Dec. 7, 1989). Some commentators suggest that a taxpayer can also avoid centralized management by "having member managers own at least twenty percent of the member interests." Gazur & Goff, *supra* note 73, at 446. This proposition rests on an analogy between "member-managers and general partners of a partnership." *Id.* n.317. This conclusion is based on Rev. Proc. 89-12, 1989-1 C.B. 798, which states that "[l]imited partner interests, excluding those held by general partners, may not exceed 80 percent of the total interests in the partnership, or the Service will not rule that the partnership lacks centralized management." *Id.* at 801. This ruling implies that if member-managers own more than 20 percent of the LLC interests, the LLC may lack centralized management. Gazur and Goff suggest that "[e]ven if that analogy is apt, an LLC could not rely on the percentage guideline without securing a private letter ruling." Gazur & Goff, *supra* note 73, at 446 n.317.

119. For practical purposes, however, an LLC large enough to desire free transferability of interests would probably need centralized management. Voting power vested in all members would become cumbersome in an organization that desires a quick and efficient decision-making process.

120. *See* I.R.C. §§ 1361-79 (1993).

121. *Id.*

122. *Id.* § 1361(b)(1)(A).

123. N.C. GEN. STAT. § 57C-3-01 (1993). It should be noted, however, that such a limitation could exist as a matter of practice because the absence of free transferability and continuity of life would make a large LLC difficult to maintain. For example, compare an LLC with 100 members to one with 10. The likelihood that a dissolution event will occur is greater for the larger LLC, and it would also be more difficult for the large LLC to secure unanimous consent when a membership interest assignee wants to become a member. Nevertheless, even with these practical limitations, it is still possible to operate an LLC with more than 35 members and retain favorable tax treatment, whereas the size of an S corporation is strictly limited. I.R.C. § 1361(b)(1)(A) (1993).

124. *Id.* § 1361(b).

125. The holder of an interest in an LLC can be an individual, corporation, partnership, trust, estate, or other LLC. *See* N.C. GEN. STAT. § 57C-3-02 (1993).

While the S corporation shares the single taxation benefit with the LLC, some differences in tax treatment exist between the two entities. First, there is taxation at the corporate level when an S corporation has "[traditional corporate] earnings and profits" at the end of the taxable year and "gross receipts more than twenty-five percent of which are passive investment income."[126] Such a taxable event can occur when a traditional corporation converts to an S corporation, but should not be a problem when a corporation converts to an LLC.[127]

Second, an important difference between the tax treatment of an LLC and that of a subchapter S corporation occurs when a member contributes to the company property whose liabilities exceed its basis.[128] In an S corporation, the shareholder/contributor will recognize gain in the amount that the liabilities exceed the basis.[129] In most situations, a contribution of this type by a member of an LLC will not result in gain to the member.[130]

Limited liability companies are also similar in form to the limited partnership. An LLC and a limited partnership will receive similar tax treatment because both presumably will be taxed as a partnership,[131] and the limited partners in a limited partnership enjoy limited liability.[132] However, general partners are responsible to third parties for all debts and obligations of the partnership.[133] In addition, limited partners may become liable to the same extent as a general partner if they exercise control over the manage-

126. I.R.C. § 1375(a) (1993). Passive investment income is defined as "gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities . . . ." *Id.* § 1362(d)(3)(D)(i).

127. *See* Louis A. Mezzullo, *Limited Liability Companies: A New Business Form?*, 21 TAX'N. FOR LAW. 296, 298-99 (Mar./Apr. 1993).

128. The basis is generally the price paid for the property, adjusted for depreciation, capital expenditures, and losses. *See* I.R.C. §§ 1011, 1012, 1016 (U.S.C.C.A.N. 1993). In addition, the basis will be calculated differently when the property is acquired by gift or inheritance. *See id.* §§ 1014, 1015. *See also* DANIEL Q. POSIN, FEDERAL INCOME TAXATION 152-53 (student ed. 1983) ("Where the property is not acquired by purchase, but in a tax-free exchange or by gift or inheritance . . . other techniques than cost will have to be used to establish basis in order to compute gain or loss properly on a subsequent disposition.").

129. *See* I.R.C. § 357(c) (U.S.C.C.A.N. 1993); *see also* R. Donald Turlington & Susan Pace Hamill, *Tax Aspects of Limited Liability Companies*, *in* FORMING AND USING LIMITED LIABILITY COMPANIES 103, 139 (Martin I. Lubaroff & Brian L. Schorr eds., 1993) ("Shareholders of S corporations contributing property with liabilities exceeding the property's basis recognize gain to the extent of the excess.").

130. Turlington & Hamill, *supra* note 129, at 139 ("[T]he contributing member only recognizes gain to the extent the distribution equal to the amount of the debt exceeds the member's basis equal to its shares of that debt at the LLC level plus the basis of all property or any money contributed as part of the same transaction."). *See* Mezzullo, *supra* note 127, at 298-99. The tax consequences of transactions involving an S corporation and transactions in an LLC are divergent. For a good discussion of these differences, see Turlington & Hamill, *supra* note 129, at 121-43.

131. *See* Treas. Reg. § 301.7701-2 (as amended in 1993).

132. N.C. GEN. STAT. § 59-303(a) (1989).

133. *Id.* § 59-403.

ment of the business.[134] By contrast, presumably all members of a limited liability company—even those who are also managers—will be liable only to the extent of their investment.[135] Because an LLC retains the tax benefits of a partnership and assures all members limited liability, it is preferable to the limited partnership.

The North Carolina Legislature recently created another entity, a watered down version of the LLC known as the limited liability partnership (LLP).[136] The LLP, which also became effective in 1993, allows partners to enjoy limited liability for the "debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business . . ." by fellow partners and other representatives of the partnership.[137] Unlike the LLC, however, partners still remain jointly and severally liable for all other debts and obligations of the partnership that arise from any other cause of action, such as breach of contract.[138] The only advantage that the LLP would seem to have over the LLC is the relative ease with which an existing general partnership can change over to an LLP. All the partnership is required to do is file an application with the Secretary of State along with a registration fee of $100.[139] Even with this advantage, an LLC may be a better choice because

134. *Id.* § 59-303(a).

135. *Id.* § 57C-3-30 (1993). Absolute limited liability may not exist because of the doctrine of piercing the corporate veil, under which the corporate entity can be disregarded and shareholders held liable for the obligations of the corporation. The doctrine may apply where the corporation is "a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy . . . ." Henderson v. Security Mortgage & Fin. Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). Under the instrumentality rule, three elements are required to pierce the corporate veil: (1) complete domination of finances and policy, (2) used "to commit [a] fraud or wrong," (3) which "proximately cause[s] the injury complained of." Glenn v. Wagner, 313 N.C. 450, 455, 329 S.E.2d. 326, 330 (1985). Factors that will be considered to justify piercing the corporate veil are inadequate capitalization, failure to comply with corporate formalities, complete control over the corporation, and "excessive fragmentation of a single enterprise into separate corporations." *Id.*, 329 S.E.2d at 330-31. These factors, taken individually, do not automatically compel shareholder liability, but combined, they can be dispositive of a court's disregard of the corporate entity. The doctrine of piercing the corporate veil can likely be applied to an LLC; Colorado law expressly provides that "the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced." COLO. REV. STAT. § 7-80-107 (1993).

136. *See* N.C. GEN. STAT. §§ 59-32(7), 59-45, 59-84.1 to -84.2 (Supp. 1993).

137. *Id.* § 59-45(b). The first partner is not liable when the partner or representative who committed the wrongdoing is "not working under the supervision or direction of the first partner at the time the [wrongdoing] occurred, unless the first partner was directly involved in the specific activity in which the [wrongdoing was] committed by the other partner or representative." *Id.*

138. *Id.* § 59-45(c).

139. *Id.* § 59-84.2. The application must state "the name of the partnership, the address of its principal office, the number of partners, and a brief statement of the business in which the partnership engages." *Id.* The registration is only effective for one year, and must be renewed annually. *Id.* Each time the registration is renewed, the $100 fee must be paid. *Id.*

its members enjoy limited liability for all of the debts and obligations of the company,[140] while the partners in an LLP do not.[141]

Although the LLC may look like the perfect hybrid business form, it is not suitable for every association. For example, a corporation with more than 100 shareholders that converts to an LLC may find it almost impossible, and certainly impractical, to obtain the unanimous consent of all the members to continue the business after the occurrence of one of the statutory dissolution events.[142] Furthermore, members who are inclined to freely trade their shares would find it difficult to negotiate the restrictions on the free transferability of their interests.[143]

On the other hand, individuals currently involved in general partnerships, limited partnerships, or subchapter S corporations may find converting to an LLC advantageous.[144] For those who want to limit their personal liability, the LLC offers a safe haven from great financial risk. Any business that has not found it cumbersome and restrictive to operate as either a partnership or an S corporation would be well advised to convert to an LLC. In addition, those entrepreneurs who are considering forming either a partnership or a close corporation and who do not anticipate doing a great deal of their business across state lines[145] should seriously consider the new LLC format offered under North Carolina law.

Perhaps the group that will benefit most from the new LLC Act will be those professionals who are incorporated or who are involved in a limited or general partnership. While LLC members remain liable for their own malpractice, the LLC will insulate individual partners from liability for their partners' negligence and malpractice.[146] Consequently, conversion to the

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140. *Id.* § 57C-3-30 (1993).

141. *See supra* notes 137-38 and accompanying text. The sentiment in the business community is that the LLC is the better choice. As of June 10, 1994, the Secretary of State reported that 1172 businesses had either converted to LLC status or started a new business as an LLC, while only 169 businesses have taken advantage of the LLP. Telephone Interview with Bonnie Elek, Office of the Secretary of State of North Carolina (June 10, 1994).

142. *See supra* notes 57-62 and accompanying text.

143. *See supra* note 42 and accompanying text.

144. A corporation or partnership wanting to convert to an LLC could go about it in several ways. Some states have statutory merger or consolidation provisions, but a corporation or partnership could also exchange its assets for those of the LLC, liquidate the corporation or partnership and transfer the assets to the LLC, or simply exchange the ownership interests in the corporation or partnership for similar interests in the LLC. *See* Rita Cain & Larry R. Garrison, *The Limited Liability Company: When Is It the Right Choice?*, 11 J. ST. TAX'N 52, 59-61 (1993).

145. An entity that does a great deal of business in other states may not want to convert to the LLC format for fear that the limited liability status would not be honored in states that do not have LLC legislation. *Id.* at 59. The rapid enactment of LLC legislation in most states may soon eliminate this fear. Quite possibly, every state may enact LLC legislation in the next few years to make itself more competitive in attracting new businesses.

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

LLC form may reduce the cost of malpractice insurance for doctors and lawyers.[147]

With the introduction of the limited liability company, North Carolina now has a business form that incorporates the best attributes of both a corporation and a partnership. With the advantages of limited liability and partnership taxation treatment, the LLC offers an alternative to the limited partnership and the S corporation. As awareness of the LLC form spreads, a significant number of new businesses will likely start up as LLCs, and many existing businesses may convert to the LLC form.[148]

The LLC offers particular promise to professionals who wish to shield themselves from liability for their partners' malpractice and who wish to retain the cash method of tax accounting. Although the LLC is not as well established and doctrinally developed as the corporation or the partnership, it should be the entity of the future for small associations in North Carolina.

LEE STANFORD SHERRILL, JR.

147. Alan E. Weiner, *Considerations When Asking: To Be or Not to Be an LLC?*, 24 TAX ADVISER 645, 645 (1993). If professionals are currently organized under either a general or limited partnership, conversion to an LLC should be a tax-free transfer. *See* Priv. Ltr. Ruls. 9010027 (Dec. 7, 1989) and 9119029 (Feb. 7, 1991). On a personal level, conversion to an LLC could reduce individual stress for partners who might then stop worrying about whether they will suffer if their partners commit malpractice. *See* Weiner, *supra*, at 645. Moreover, it appears that professional organizations that convert to LLCs may be able to continue using the cash method of accounting for tax purposes. *See* Priv. Ltr. Ruls. 9350013 (Sept. 15, 1993); 9321047 (Feb. 25, 1993).

148. *See* Telephone Interview, *supra* note 141.

State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate Punishment

Public concern about violent crime has risen sharply.[1] The United States Congress has responded to the outcry by considering an omnibus crime bill,[2] and many state legislatures are debating similar measures.[3] Across the country, citizens and lawmakers alike have called for longer sentences for criminals[4] and have demanded that those convicted actually serve their full sentences.[5] Many also call for swifter and more frequent use of the death penalty.[6]

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1. *See, e.g.*, Richard Lacayo, *Lock 'Em Up!*, TIME, Feb. 7, 1994, at 51 ("In one of the most startling spikes in the history of polling, large numbers of Americans are abruptly calling crime their greatest concern."); President Bill Clinton, State of the Union Address (Jan. 25, 1994) *in* L.A. TIMES, Jan. 26, 1994, at A19 ("Violent crime and the fear it provokes are crippling our society, limiting personal freedom and fraying the ties that bind us.").

It is not clear that the increased fear corresponds exactly to increased crime. The Federal Bureau of Investigation announced that crime in general decreased by five percent during January-June, 1993. Judy Keen, *Besieged by Crime*, USA TODAY, Jan. 25, 1994, at 1A. Some categories of crime showed marked increases, however; between 1982 and 1992, the rate of violent crime rose by almost one third, 142% more juveniles were arrested for homicide, and murders of children involving firearms increased by 143%. *Id.* In North Carolina in 1993 the total number of violent crimes increased by only one percent, and crime overall decreased by one percent. Angela Wright, *N.C. Violent Crime Rate Holds Steady, But Urban Homicides Rise 24 Percent in '93*, CHARLOTTE OBSERVER, Mar. 3, 1994, at 3C. Attorney General Michael F. Easley commented on these statistics: "Overall crime appears to be leveling . . . [b]ut this is the same unacceptable high rate of crime that propelled this state from 41st to 16th in the nation. North Carolinians cannot tolerate this level." *Id.*

2. President Clinton's crime proposals include community policing programs, funding for 100,000 new police officers, more regulation of the sale of handguns, and drug treatment and prevention, among other initiatives. Clinton, *supra* note 1, at A19.

3. Governor James Hunt called the North Carolina General Assembly into a special session on February 8, 1994 and introduced a 34-point package for the legislature's consideration. Rob Christensen & Joe Drew, *Hunt, Legislature Target Crime*, RALEIGH NEWS & OBSERVER, Feb. 9, 1994, at 1A. Ultimately, the General Assembly passed, among other bills, the Crime Control Act of 1994, which increases penalties for firearm possession, allows juvenile defendants age 13 or above to be transferred to Superior Court, and mandates life imprisonment for defendants convicted of a third violent crime, commonly referred to as "three strikes, you're out." Act of March 26, 1994, ch. 22, 1994 N.C. Sess. Laws (to be codified at various sections of N.C. GEN. STAT. Chs. 14 & 7A). The Legislature also passed a statute mandating life sentences without parole for first degree murderers not sentenced to death. Act of March 23, 1994, ch. 21, 1994 N.C. Sess. Laws (to be codified at N.C. GEN. STAT. § 14-17).

4. For example, a "three strikes, you're out" proposal, mandating life imprisonment without parole for third-time violent offenders, has been widely touted by President Clinton (among others), Clinton, *supra* note 1, at A19, and passed by the North Carolina General Assembly on March 26, 1994. Crime Control Act of 1994; *see also supra* note 3.

5. *E.g.*, Charles Babington, *Maryland Legislators Urge Tightening of Parole*, WASH. POST, Jan. 26, 1994, at B5.

6. A crime bill currently before the United States House of Representatives would add 65 crimes to the list of those eligible for the federal death penalty, including "fatal carjackings, drive-by killings, murders by federal prisoners and retaliatory killings of witnesses, victims and infor-

Missing from much of the public discourse is concern for the rights of criminal defendants.[7] In this context, the duty of judges to safeguard the constitutional rights of accused and convicted criminals becomes even more critical.[8] The North Carolina Supreme Court reviewed a death sentence in 1993[9] and failed to fulfill this duty.[10] Most individuals would agree with the court that Patricia Jennings's murder of her elderly husband was horrible.[11] Nonetheless, in allowing the death penalty to stand under constitutionally questionable circumstances,[12] the supreme court has demonstrated a willingness to assume that a jury did not unconstitutionally apply its instructions, even when that jury sentenced a defendant to death, and even when strong arguments suggest that instructions were misapplied.[13]

Patricia Jennings was convicted of the first degree murder of her husband and sentenced to death on October 8, 1990.[14] In her direct appeal to

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mants." Brad Todd, *Watt Resists Rush to Pass Crime Bill*, RALEIGH NEWS & OBSERVER, Apr. 16, 1994, at 3A. North Carolina State Senator Frank Ballance, a death penalty opponent, introduced a bill in the General Assembly's special session devoted to crime, proposing public executions, apparently in hopes of sparking debate about the death penalty. Joseph Neff, *Legislator Proposes Public Executions*, RALEIGH NEWS & OBSERVER, Feb. 11, 1994, at 3A. Some members of the public clearly support expansion of capital punishment: "What are we going to do about these kids (monsters) who kill with guns??? Line them up against the wall and get a firing squad and pull, pull, pull. I am volunteering to pull, pull, pull." Anonymous letter written to a judge in Dade County, Florida, *quoted in* Lacayo, *supra* note 1, at 51.

7. For example, a TIME/CNN poll found that 47 percent of those surveyed favored "[a]llowing police in [their] area to stop and search people for weapons if these people fit a criminal profile." Lacayo, *supra* note 1, at 53. At least one writer, however, has cautioned readers not to disregard constitutional rights: "[I]n our rush to judgment, best that we watch our step, careful not to trample on the constitutional rights of any individual, lest we go over the edge." Joe Murray, *Lock 'Em up and Throw Away the Constitution?*, RALEIGH NEWS & OBSERVER, Feb. 9, 1994, at 13A.

8. North Carolina Supreme Court Chief Justice Jim Exum, a death penalty opponent, said, "When you're facing the ultimate penalty of death, naturally you're not going to leave any procedural stone unturned. . . . That's our obligation, our duty." Bill Krueger, *Death Penalty Frustrates Victims, Lawyers, Judges*, RALEIGH NEWS & OBSERVER, Feb. 22, 1994, at 1A, 6A. Former United States Supreme Court Justice Powell wrote: "I speak for myself, and I am sure other judges in both the state and federal systems, in saying that one reviews a capital sentence with the greatest care and concern." Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1041 (1989). Justice Powell went on to argue, however, that the current system of collateral federal review of death sentences defeats capital punishment's purposes of retribution and deterrence. *Id.* at 1042.

9. State v. Jennings, 333 N.C. 579, 430 S.E.2d 188, *cert. denied*, 114 S. Ct. 644 (1993).

10. *See infra* notes 159-68 and accompanying text.

11. *Jennings*, 333 N.C. at 627-28, 430 S.E.2d at 213; *see also infra* text accompanying notes 18-23.

12. *See infra* notes 121-54 and accompanying text.

13. Given that supreme court justices are elected officials in North Carolina, this decision might be read as part of the larger social context in which lawmakers are responding to increased public concern about crime. *See infra* note 168 and accompanying text.

14. 333 N.C. at 589, 430 S.E.2d at 191.

the North Carolina Supreme Court,[15] she raised a number of issues, most of which the court dismissed with little or no discussion.[16] The court concluded "that the jury selection and the guilt and sentencing phases of the defendant's trial were free from prejudicial error, and that the sentence of death was not disproportionate [to her crime]."[17]

The State's evidence showed that the defendant tortured, stomped, and beat her elderly husband[18] ("Mr. Jennings") to death in a motel room.[19] When paramedics arrived on the scene, the defendant was wearing the cowboy boots that she had used to stomp Mr. Jennings, and she lied about how long he had been "down."[20] Forensic evidence showed that the victim was severely cut and bruised, that his anus had been penetrated with an object, and that his penis was marked with sharply defined imprints probably caused by forceps found in the hotel room.[21]

Prosecution witnesses testified that prior to his death Mr. Jennings had told them of the defendant's ongoing abuse;[22] one witness said Mr. Jennings once told him that his wife had beaten him, dragged him across the room, and threatened to stomp him to death with her cowboy boots.[23] The defendant's expert witnesses concluded that Mr. Jennings suffered from dementia.[24] The state's expert witnesses, however, disputed these conten-

15. Under North Carolina's capital punishment statute, a death-sentenced defendant may automatically seek review by the state supreme court. N.C. GEN. STAT. § 15A-2000(d)(1) (1988).

16. For example, the court found no error in the trial court's decision to allow the testimony of a forensic pathologist that the victim had been tortured, *Jennings*, 333 N.C. at 597, 430 S.E.2d at 196; the court found that defense counsel essentially invited a State Bureau of Investigation agent to comment on the defendant's decision to remain silent after her arrest, *id.* at 604, 430 S.E.2d at 200; and the court noted that "cowboy boots, when worn to kick or stomp an elderly man, may be a deadly weapon," thus supporting the trial court's "deadly weapon" jury instruction, *id.* at 614, 430 S.E.2d at 206. The court found other possible errors harmless beyond a reasonable doubt, including testimony about the defendant's refusal to consent to a warrantless search, *id.* at 605, 430 S.E.2d at 200, and the trial court's initial improper instructions on the essential elements of first-degree murder, which were promptly and effectively corrected. *Id.* at 612-13, 430 S.E.2d at 205.

17. *Id.* at 589, 430 S.E.2d at 192. By statute, the supreme court must consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C. GEN. STAT. § 15A-2000(d)(2) (1988).

18. At the time of the murder, the defendant was 46 years old, and her husband was 80. *See Jennings*, 333 N.C at 590, 430 S.E.2d at 192.

19. *Id.* at 589, 430 S.E.2d at 192.

20. *Id.* at 590, 430 S.E.2d at 192. The defendant told a paramedic that her husband had been on the floor five or ten minutes, *id.*, but the local medical examiner testified that he had been dead six to eight hours. *Id.* at 591, 430 S.E.2d at 192.

21. *Id.*, 430 S.E.2d at 193.

22. *Id.* at 590, 430 S.E.2d at 192.

23. *Id.*

24. *Id.* at 592, 430 S.E.2d at 193.

tions, having found no evidence of any brain disorder.[25] In her defense, the defendant claimed only that Mr. Jennings's injuries were self-inflicted.[26]

At the sentencing phase of the trial, the judge submitted, and the jury found, three statutory aggravating factors:[27] (1) "that the murder was committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object";[28] (2) that the murder was committed for pecuniary gain;[29] and (3) that the murder was especially heinous, atrocious, or cruel.[30] The jury found four mitigating circumstances: (1) the defendant had no record of criminal convictions;[31] (2) she had been an otherwise peaceful person; (3) she had no prior record of violent crimes; and (4) she showed no indication of a habitually violent nature.[32] Finding the mitigating circumstances insufficient to outweigh the aggravating ones, and the aggravating circumstances sufficiently substantial to call for the death penalty,[33] the jury recommended death.[34]

On appeal, the defendant advanced three assignments of error.[35] First, she objected to the trial court's instructions on the pecuniary gain aggravating circumstance.[36] Second, she objected to the written instructions on the verdict sheet related to the sexual assault aggravating circumstance.[37] Finally, she contended that the jury considered two aggravating circumstances premised upon the same evidence.[38] Justice Whichard, writing for the ma-

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25. *Id.*

26. *Id.* at 593, 430 S.E.2d at 194. The defendant's rather bizarre account of Mr. Jennings's injuries included her testimony that her husband occasionally retreated into "canine behavior." She testified that, on the day he died, he had beaten his testicles with a shoe, hit himself with a piece of old cheese, and fallen in the bathtub. *Id.*

27. *Id.* at 594, 430 S.E.2d at 194.

28. *Id.* This circumstance was intended to reflect the following statutory aggravating factor:

> The capital felony was committed while the defendant was engaged, or was an aider or abetter, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

See N.C. GEN. STAT. § 15A-2000(e)(5) (1988).

29. *Jennings*, 33 N.C. at 594, 430 S.E.2d at 194 (applying § 15A-2000(e)(6)).

30. *Id.* (applying § 15A-2000(e)(9)).

31. *Id.* (applying § 15A-2000(f)(1)).

32. *Id.* These three circumstances are not specifically described in the statute but are admitted by way of a section that allows consideration of "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C. GEN. STAT. § 15A-2000(f)(9); *see also infra* note 72 and accompanying text.

33. *See infra* text accompanying note 67.

34. *Jennings*, 333 N.C. at 594, 430 S.E.2d at 194.

35. This Note will refer to these assignments of error as first, second, and third, although these numbers do not correspond to the defendant's actual assignments of error.

36. *See infra* notes 122-41 and accompanying text.

37. *See infra* notes 142-45 and accompanying text.

38. *See infra* notes 146-54 and accompanying text.

jority, found no prejudicial error in the defendant's trial or sentence.[39] Justice Frye, joined by Chief Justice Exum, concurred in the guilt-innocence phase and dissented in the sentencing phase.[40] Justice Frye focused on the cumulative effect of several potential errors and contended that, when taken together, they demanded a new sentencing proceeding, even though each standing alone might not constitute prejudicial error.[41]

Justices Frye and Exum disagreed with the four-justice majority on three issues. First, they objected to the trial judge's instructions on the pecuniary gain aggravating circumstance. The judge stated that an aggravating circumstance would exist if the jury found that the defendant "stood to benefit" financially from the victim's death.[42] The defendant maintained that this circumstance should apply only when a defendant killed the victim *for the purpose* of obtaining money. The majority approved the jury instructions and found "substantial evidence" that the murder had been committed for pecuniary gain.[43] Justice Frye agreed with the defendant that the instructions were unconstitutionally vague and overbroad, because they allowed the jury to apply the circumstance even if the defendant merely "*expected* to receive money as a result of her husband's death."[44]

Second, the dissent took issue with the written instructions on the verdict sheet relating to the sexual assault aggravating circumstance. The defendant argued that the aggravating circumstance of the murder's commission during penetration of the victim's anus with an object was improperly submitted as a nonstatutory aggravating circumstance.[45] Because the defendant had not objected at trial to the wording on the verdict sheet, the majority limited its review to determining whether the trial court committed plain error.[46] Finding no plain error, the court overruled the assignment of error.[47] Justice Frye, like the majority, found that the trial judge gave a proper oral instruction on this circumstance,[48] requiring the jury to find that penetration occurred by force and against the will of the victim for the act to constitute a sex offense.[49] He also found, however, that the ver-

39. *Jennings*, 333 N.C. at 589, 430 S.E.2d at 192.

40. *Id.* at 637, 430 S.E.2d at 219 (Frye, J., concurring in part and dissenting in part). Justice Parker did not participate in the consideration or decision of the case. *Id.*

41. *Id.* at 638, 430 S.E.2d at 219-20 (Frye, J., concurring in part and dissenting in part).

42. *Id.*, 430 S.E.2d at 220 (Frye, J., concurring in part and dissenting in part).

43. *Id.* at 622, 430 S.E.2d at 210.

44. *Id.* at 640, 430 S.E.2d at 221 (Frye, J., concurring in part and dissenting in part).

45. *Id.* at 640-41, 430 S.E.2d at 221 (Frye, J., concurring in part and dissenting in part).

46. *Id.* at 616, 430 S.E.2d at 207.

47. *Id.* at 619, 430 S.E.2d at 208.

48. *Id.* at 642, 430 S.E.2d at 222 (Frye, J., concurring in part and dissenting in part).

49. See N.C. GEN. STAT. § 14-27.5(a)(1) (1993) for a definition of sexual offense.

dict sheet required only penetration,[50] and thus did not meet the sex offense criteria for a statutory aggravating circumstance.[51] He believed there was no way to know whether the jury based its finding on the proper oral instruction or the improper verdict sheet.[52]

Finally, the dissent argued that the court improperly submitted two aggravating circumstances supported by the same evidence.[53] Two circumstances—that the murder was especially heinous, atrocious, or cruel, and that it was committed while the defendant was engaged in the commission of a sex offense—might have been supported by the finding of forced penetration of the anus against the will of the victim, thus leading to automatic cumulation of aggravating circumstances.[54] The majority found independent evidence to support both circumstances and declined to find plain error in the trial court's failure to instruct the jury that it must not use the same evidence to support two factors.[55] Justice Frye agreed with the majority that the evidence was probative of both aggravating circumstances, but concluded that the trial court erred in refusing to instruct the jury that the evidence should not be used as the basis for two aggravating circumstances.[56] Ultimately, the majority affirmed the defendant's death sentence,[57] though Justices Frye and Exum would have vacated and remanded for a new sentencing proceeding.[58]

A brief review of North Carolina's death penalty scheme,[59] which promotes individualized determinations of the appropriateness of capital punishment based on guided discretion,[60] will help demonstrate the

50. *Jennings*, 333 N.C. at 642, 430 S.E.2d at 222 (Frye, J., concurring in part and dissenting in part).

51. *Id.* (Frye, J., concurring in part and dissenting in part).

52. *Id.* (Frye, J., concurring in part and dissenting in part).

53. *Id.* at 627, 430 S.E.2d at 213.

54. *Id.* at 642, 430 S.E.2d at 222 (Frye, J., concurring in part and dissenting in part).

55. *Id.* at 628, 430 S.E.2d at 214.

56. *Id.* at 642, 430 S.E.2d at 222 (Frye, J., concurring in part and dissenting in part).

57. *Id.* at 636, 430 S.E.2d at 219.

58. *Id.* at 644, 430 S.E.2d at 223 (Frye, J., concurring in part and dissenting in part).

59. For a discussion of North Carolina's death penalty in light of United States Supreme Court death penalty jurisprudence, see State v. Barfield, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979) (holding that North Carolina's death penalty scheme is constitutional), *cert. denied*, 448 U.S. 907 (1980); *see also* Joel M. Craig, Comment, *Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court*, 59 N.C. L. REV. 911, 914-42 (1981) (scrutinizing North Carolina's death penalty scheme in light of U.S. Supreme Court guidelines); Geoffrey C. Mangum, Comment, *Vague and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute*, 16 WAKE FOREST L. REV. 765, 768-818 (1980) (analyzing North Carolina's death penalty scheme); Christopher R. Opalinsky, Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 WAKE FOREST L. REV. 737, 759-64 (1980) (discussing North Carolina's death penalty scheme in light of the U.S. Supreme Court's guidelines).

60. *See Barfield*, 298 N.C. at 351, 259 S.E.2d at 542. This same fundamental approach underlies North Carolina's Fair Sentencing Act, which applies to non-capital crimes. N.C. GEN.

significance of *Jennings*. Capital defendants[61] are tried and sentenced in bifurcated proceedings,[62] generally by the same jury.[63] In light of the United States Supreme Court's decision in *Gregg v. Georgia*,[64] capital sentencing guidelines must "narrow the class of murderers subject to" the death penalty.[65] Accordingly, the judge must instruct the jury to consider any aggravating or mitigating circumstance(s) listed in the statute[66] and to recommend a sentence based upon the following guidelines:

> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in [the statute] exist;
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in [the statute], which outweigh the aggravating circumstance or circumstances found, exist; and
> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.[67]

The North Carolina Pattern Jury Instructions direct the jury to weigh the aggravating and mitigating circumstances not by "applying a mathematical formula,"[68] but by considering the "relative substantiality and persuasive-

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STAT. § 15A-1340.4(a) (1988) (repealed effective 10/1/94, Act of March 26, 1994, ch. 24, 1994 N.C. Sess. Laws (to be codified at N.C. GEN. STAT. § 15A-1340.10)). The Act lists aggravating and mitigating circumstances trial judges must consider in making their sentencing decisions. *Id.* § 1340.4(a)(1)-(2). These circumstances should guide the judges in deciding individual sentences that fall between the statutory "presumptive" and maximum sentences. *Id.* § 15A-1340.4(a). For an overview of North Carolina's Fair Sentencing Act, see Susan Kelly Nichols, Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act*, 60 N.C. L. REV. 631 (1982). The legislature passed a structured sentencing law which will replace the Fair Sentencing Act as of October 1, 1994. Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 1359. The new sentencing scheme "eliminates paroles and lengthens sentences for violent crimes." Christensen & Drew, *supra* note 3, at 1A.

61. Although North Carolina's Constitution lists murder, arson, burglary, and rape as punishable by death, N.C. CONST. art. XI, § 2, under the United States Supreme Court's decision in Coker v. Georgia, 433 U.S. 584 (1977), a defendant cannot be put to death for the rape of an adult woman. *Id.* at 597. In light of *Coker*, arson and burglary may not constitutionally be punishable by the death penalty. *Cf. id.* at 598 ("We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.").

62. N.C. GEN. STAT. § 15A-2000(a)(1) (1988).

63. *Id.* § 15A-2000(a)(2).

64. 428 U.S. 153 (1976).

65. *Id.* at 196. In *Gregg* the Supreme Court considered the constitutionality of Georgia's statute imposing the death penalty for the crime of murder. *Id.* at 158. The Court held that the "punishment of death does not invariably violate the Constitution." *Id.* at 169. The Court recommended bifurcated proceedings, stressing that the jury must receive relevant information as well as guidance from the court. *Id.* at 195. The Court approved Georgia's capital punishment statutes, which "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Id.* at 206. For an analysis of *Gregg*'s impact on capital punishment in North Carolina, see Craig, *supra* note 59, at 913-14.

66. N.C. GEN. STAT. § 15A-2000(b) (1988).

67. *Id.*

68. N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 44 (1993).

ness of the existing aggravating and mitigating circumstances" and determining "how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances."[69]

The jury may consider only aggravating circumstances that are enumerated in the statute.[70] These factors embrace aspects of the defendant's actions that make the murder "worse" in some measure than other murders.[71] Mitigating circumstances, on the other hand, are not limited to those in the statute and can include "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value."[72] The jury must assign weight to the aggravating and mitigating circumstances.[73] Even if the jury finds that the mitigating circumstances do not outweigh the aggravating circumstances, it is not required to recommend a death sentence.[74]

When defendants sentenced to death have challenged trial courts' jury instructions on aggravating and mitigating circumstances, the North Carolina Supreme Court has followed the standard of *Estelle v. McGuire*.[75] In that case, the United States Supreme Court reviewed a jury instruction to determine "whether there [was] a reasonable likelihood that the jury has

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69. *Id.*

70. N.C. GEN. STAT. § 15A-2000(e) (1988).

71. "An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law." N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 7 (1993).

72. N.C. GEN. STAT. § 15A-2000(f)(9). The United States Supreme Court has held that the sentencer in a capital case may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (footnote omitted). In 1990, the United States Supreme Court held unconstitutional the North Carolina requirement that the jury unanimously find mitigating circumstances before giving them any weight. McKoy v. North Carolina, 494 U.S. 433, 435 (1990) (citing Mills v. Maryland, 486 U.S. 367 (1988)). For an analysis of the *McKoy* case and its implications for capital punishment in North Carolina, see Carolyn A. Martin, Note, *Sifting Through the Fallout of North Carolina's Death Penalty Jurisprudence: Getting Down to the Real* McKoy, 69 N.C. L. REV. 1504 (1991).

73. N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 42 (1993). One commentator argued:

> It is much easier to find that a given aggravating circumstance exists beyond a reasonable doubt than it is to conclude that an aggravating factor outweighs a mitigating factor. Thus the balancing process is the point in the sentencing procedure at which the sentencer's discretion plays its most important role.

John R. Perkins, Jr., Comment, *Capital Punishment: Impairment of a Death Sentence by the Invalidity of an Aggravating Circumstance*, 52 U. CIN. L. REV. 541, 552 (1983).

74. McDougall v. Dixon, 921 F.2d 518, 530-31 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2840 (1991).

75. 112 S. Ct. 475, 482 (1991). *See, e.g.*, State v. Montgomery, 331 N.C. 559, 573, 417 S.E.2d 742, 750 (1992).

applied the challenged instruction in a way that violates the Constitution."[76] The North Carolina Supreme Court explained that although this standard requires a defendant to show "more than a 'possibility' that the jury applied the instruction in an unconstitutional manner, . . . a defendant need not establish that the jury was 'more likely than not' to have misapplied the instruction."[77]

The North Carolina Supreme Court applied the *Estelle* standard in *Jennings* when it considered the trial court's instructions regarding the pecuniary gain aggravating circumstance.[78] The North Carolina Pattern Jury Instructions suggest applying the pecuniary gain factor when the defendant, in committing the murder, "has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for having committed the crime, or as a result of the death of the victim."[79] The court has considered this circumstance in several previous cases. For example, in *State v. Oliver*,[80] the supreme court held that submitting the pecuniary gain aggravating circumstance to the jury was proper when the defendants murdered two men after robbing a convenience store.[81]

Three years after *Oliver*, the supreme court specifically found that the pecuniary gain aggravating circumstance is not limited to cases involving contract murders. In *State v. Gardner*[82] the capital defendant objected to submission of the pecuniary gain factor, contending that a 1983 amendment

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76. *Estelle*, 112 S. Ct. at 482 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)). This standard contemplates a balancing of the needs for finality and accuracy, and it seeks to eliminate cases in which the possibility of error is remote:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial to prevail over technical hairsplitting.

Jennings, 333 N.C. at 621, 430 S.E.2d at 210 (quoting *Boyde*, 494 U.S. at 380-81).

77. *Jennings*, 333 N.C. at 639, 430 S.E.2d at 220 (citing *Boyde*, 494 U.S. at 380).

78. *Id.*

79. *Id.* at 620, 430 S.E.2d at 209 (citing N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 17-18 (1993)).

80. 302 N.C. 28, 274 S.E.2d 183 (1981).

81. *Id.* at 62, 274 S.E.2d at 204. Although the defendants argued that they had already acquired the money from the robbery and did not consider further pecuniary gain, the court held that "[t]he murder of [one victim] was apparently committed in an effort to eliminate a witness to the robbery; and the murder of [another victim], in the hope that defendants could successfully escape, avoid prosecution, and enjoy the fruits of their sordid endeavor." *Id.* The court held that the jury could find that the "murders were committed for the purpose of permitting defendants to *enjoy* pecuniary gain." *Id.* (emphasis added). For a discussion of the submission of both pecuniary gain and the underlying felony as aggravating circumstances, see *infra* notes 115-20 and accompanying text.

82. 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230 (1985).

to the Fair Sentencing Act's[83] pecuniary gain provision clarified the circumstance as applicable when the "defendant was hired or paid to commit the offense."[84] The court wrote that the legislative act amending the Fair Sentencing Act[85] applied *only* to the Fair Sentencing Act, and not the death penalty; thus, the court refused to modify *Oliver*'s holding that the pecuniary gain aggravating circumstance in a capital sentencing proceeding may be submitted "when the killing [is] for the purpose of getting money or something of value."[86]

Jennings also raised questions about the "especially heinous, atrocious, or cruel" circumstance.[87] This statutory circumstance has prompted academic criticism[88] and constitutional challenge.[89] The United States Supreme Court addressed a similar circumstance in *Godfrey v. Georgia*,[90] in which it held that the Georgia Supreme Court had affirmed an unconstitutional interpretation of the "outrageously or wantonly vile, horrible and inhuman" circumstance.[91] Because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman,' " the Court found "no principled way to distinguish [that] case, in which the death penalty was imposed, from the many cases in which it was not."[92]

In 1988 the United States Supreme Court addressed Oklahoma's interpretation of the "especially heinous, atrocious, or cruel" aggravating circumstance.[93] In *Maynard v. Cartwright*, the Court noted that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.' "[94] The Court held that, like the circum-

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83. *See supra* note 60.

84. *Gardner*, 311 N.C. at 513, 319 S.E.2d at 606 (citing N.C. GEN. STAT. § 15A-1340.4(a)(1)(c) (1988)).

85. Act of Oct. 1, 1983, ch. 70, 1983 N.C. Sess. Laws 43 (codified as amended at N.C. GEN. STAT. § 15A-1340.4 (1993)).

86. *Jennings*, 311 N.C. at 513, 319 S.E.2d at 606; *see also supra* notes 80-81 and accompanying text.

87. *See infra* notes 147-54 and accompanying text.

88. *See* Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 992 (1986) ("[T]he especially heinous aggravating circumstance, by itself, has unnecessarily provided an opportunity for [arbitrariness, caprice and discrimination] to reenter the capital sentencing process and therefore should be eliminated.").

89. *E.g.*, State v. Boyd, 311 N.C. 408, 434, 319 S.E.2d 189, 206 (1984), *cert. denied*, 471 U.S. 1030 (1985); State v. Martin, 303 N.C. 246, 253-55, 278 S.E.2d 214, 219-20, *cert. denied*, 454 U.S. 933 (1981).

90. 446 U.S. 420 (1980).

91. *Id.* at 432.

92. *Id.* at 433.

93. Maynard v. Cartwright, 486 U.S. 356 (1988).

94. *Id.* at 364 (citing *Godfrey*, 446 U.S. at 428-29).

stance in *Godfrey*, this circumstance was unconstitutionally vague.[95] *Maynard* and *Godfrey* instruct state courts that these aggravating circumstances must be construed in such a way as to appropriately narrow the class of murderers subject to the death penalty.

The North Carolina Supreme Court has limited the "especially heinous, atrocious, or cruel" circumstance by clarifying that it does not apply in every capital case.[96] In *State v. Goodman*, the court held that the circumstance applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[97] Under such a construction, the court reasoned, the especially heinous circumstance "will not become a 'catch all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances."[98] Similarly, the North Carolina Pattern Jury Instructions explain that, for this circumstance to apply, "any brutality which was involved in [the murder] must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim."[99]

Regardless of which aggravating circumstances apply in a particular capital case, the North Carolina Supreme Court has been relatively clear about submitting two aggravating circumstances based upon the same facts: Two or more aggravating factors may not be supported by the same evidence. In *State v. Goodman*,[100] the court addressed whether the trial court erred in submitting the aggravating circumstances that the "capital felony

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95. *Id.*

96. State v. Goodman, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979).

97. *Id.* at 25, 257 S.E.2d at 585 (quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied sub nom.* Hunter v. Florida, 416 U.S. 943 (1974)). "By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this section." *Id.* (citing State v. Rust 250 N.W.2d 867, 874 (Neb.), *cert. denied*, 434 U.S. 912 (1977); State v. Simants, 250 N.W.2d 881, 891 (Neb.), *cert. denied*, 434 U.S. 878 (1977); State v. Stewart, 250 N.W.2d 849, 522-23 (Neb. 1977)).

98. *Id.* (citing Harris v. State, 230 S.E.2d 1, 10 (Ga. 1976), *cert. denied*, 431 U.S. 933 (1977)). In *Goodman*, the court found submission of the circumstance proper based on the following facts:

> [The] decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality.

Id. at 26, 257 S.E.2d at 585.

99. N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 23 (1993); *see, e.g.*, State v. Syriani, 333 N.C. 350, 392-93, 428 S.E.2d 118, 141, *cert. denied*, 114 S. Ct. 392 (1993); State v. Oliver, 309 N.C. 326, 349, 307 S.E.2d 304, 320 (1983).

100. 298 N.C. 1, 257 S.E.2d 569 (1979).

was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws,"[101] and the "capital felony was committed for the purpose of avoiding or preventing a lawful arrest."[102] The supreme court found the latter of these circumstances properly submitted, because the jury could have inferred that the defendant committed a murder to avoid or prevent being arrested.[103] The court agreed with the defendant that submission of both circumstances was improper, however, because the trial court grounded the two aggravating circumstances on essentially the same evidence.[104] This, the court held, "amounted to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant."[105]

To prevent an overly broad reading of the *Goodman* decision, Justice Britt wrote that the court did not intend to suggest that "the aggravating circumstances enumerated in G.S. 15A-2000(e) can never overlap or that more than one of them can never arise from a single incident."[106] Noting that such situations might commonly occur when both the defendant's motive and a specific factual aspect of the crime were at issue, the court addressed the importance of the trial court's resolution of these situations:

> In such cases it will be difficult for the trial court to decide which factors should be presented to the jury for their consideration. We believe that error in cases in which a person's life is at stake, if there be any, should be made in the defendant's favor, and that the jury should not be instructed upon one of the statutory circumstances in a doubtful case.[107]

Courts have subsequently applied *Goodman* without much discussion or modification. For example, in *State v. Hutchins*[108] the supreme court upheld submission of the aggravating circumstances that the murder was committed against an officer in the performance of his duties and that the murder was for the purpose of avoiding a lawful arrest.[109] According to the court, the first circumstance addressed the act itself, and the second ad-

101. N.C. GEN. STAT. § 15A-2000(e)(7) (1988).

102. *Id.* § 15A-2000(e)(4).

103. *Goodman*, 298 N.C. at 27, 257 S.E.2d at 586. The court noted that "[i]n a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest." *Id.* at 26, 257 S.E.2d at 586. This aggravating factor, however, applies only where "at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime." *Id.* at 27, 257 S.E.2d at 586.

104. *Id.* at 28, 257 S.E.2d at 587.

105. *Id.* at 29, 257 S.E.2d at 587. The court also recognized the difficulty presented by these two aggravating circumstances, which will often overlap and cause confusion for trial courts and juries. *Id.* at 28, 257 S.E.2d at 587.

106. *Id.* at 30, 257 S.E.2d at 588.

107. *Id.*

108. 303 N.C. 321, 279 S.E.2d 788 (1981).

109. *Id.* at 355, 279 S.E.2d at 809 (citing N.C. GEN. STAT. §§ 15A-2000(e)(8), (e)(4) (1988)).

dressed the defendant's motivation.[110] Similarly, in *State v. Green*,[111] the supreme court upheld submission of two aggravating circumstances related to the murder of a witness: "The circumstance of violent course of conduct[112] directs the jury's attention to the factual circumstances of defendant's crimes. The circumstance of witness elimination[113] requires the jury to consider not defendant's actions but his motive in shooting a man in a defenseless posture."[114]

When the first degree murder conviction is based upon felony murder, the same principles apply. One statutory aggravating factor requires consideration of whether the capital crime was committed while the defendant was perpetrating another serious offense.[115] The supreme court held that the felony underlying the felony murder conviction should not be used as the basis for this aggravating circumstance,[116] unless the defendant was also convicted of first-degree murder based upon deliberation and premeditation.[117] In *State v. Oliver*,[118] however, the court found that the pecuniary gain aggravating circumstance could be submitted to the jury even though the case involved a felony murder conviction in which the underlying robbery could *not* be submitted as an aggravating circumstance.[119] The court wrote that the pecuniary gain circumstance "examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence."[120]

In light of this background, it appears that the *Jennings* court misapplied the *Estelle* standard. That standard requires consideration of whether there is a "reasonable likelihood" of unconstitutional application of jury instructions.[121] There is clearly a reasonable likelihood—and perhaps even a

110. *Id.* at 355, 279 S.E.2d at 809.

111. 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900 (1988).

112. N.C. GEN. STAT. § 15A-2000(e)(11) (1988).

113. *Id.* § 15A-2000(e)(8).

114. *Green*, 321 N.C. at 610, 365 S.E.2d at 597.

115. N.C. GEN. STAT. § 15A-2000(e)(5).

116. State v. Cherry, 298 N.C. 86, 113, 257 S.E.2d 551, 567-68 (1979), *cert. denied*, 446 U.S. 941 (1980).

117. State v. Goodman, 298 N.C. 1, 24, 257 S.E.2d 569, 584-85 (1979). For a critical analysis of the felony murder rule and the use of the underlying felony as an aggravating circumstance, see Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1120-37 (1990). Professor Rosen noted that "[n]o state has premeditation and deliberation as an aggravating circumstance . . . [but] a felony murder narrowing device does no more to narrow the class than one based on premeditation and deliberation." *Id.* at 1125.

118. 302 N.C. 28, 274 S.E.2d 183 (1981).

119. *Id.* at 62, 274 S.E.2d at 204.

120. *Id.*

121. *See supra* notes 75-77 and accompanying text.

probability—that the jury applied its instructions unconstitutionally in sentencing Patricia Jennings to death.

Under the defendant's first assignment of error, the *Jennings* court endorsed a broad reading of the meaning of pecuniary gain as an aggravating circumstance by refusing to find error in the trial court's jury instructions. In her first assignment of error, the defendant challenged not the court's use of the North Carolina Pattern Instructions on pecuniary gain,[122] but the court's description of the particular pecuniary gain that could be based on the evidence in the case:[123] "[t]he defendant stood to benefit from the remaining partnership accounts at the Merrill Lynch [sic] in the name of the decedent."[124] The defendant argued that this language failed to "narrow the class of murderers subject to capital punishment" as required by the United States Supreme Court's decision in *Gregg v. Georgia*,[125] because "incidental financial gain will accrue to the surviving spouse of virtually every marriage."[126]

The majority and the dissent[127] both evaluated the trial court's pecuniary gain instruction under *Estelle v. McGuire*.[128] The majority agreed with the State: "[W]hen read in conjunction with the first paragraph, and in the context of the trial record, the instruction is not constitutionally infirm."[129] The majority buttressed this conclusion by reviewing facts in the record tending to support the existence of pecuniary gain as an aggravating circumstance.[130]

Justice Frye, however, wrote that the State's argument[131] did not address the real issue on appeal—whether the jury was properly instructed on

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122. *See supra* text accompanying note 79.

123. The Pattern Instructions guide the trial court's explanation in this way: "describe pecuniary gain, e.g., had been hired to do so." N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 18 (1993).

124. *Jennings*, 333 N.C. at 620, 430 S.E.2d at 209 (citing N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 14-15 (1993)) (emphasis omitted).

125. *Id.* at 620, 430 S.E.2d at 209 (citing Gregg v. Georgia, 428 U.S. 153, 187, 196 (1976)); *see also supra* note 65 and accompanying text.

126. *Jennings*, 333 N.C. at 620, 430 S.E.2d at 209.

127. This Note refers to Justice Frye's opinion as the dissent because, although he concurred in part and dissented in part, only the dissenting portions of his opinion are relevant to this analysis.

128. 112 S. Ct. 475, 482 (1991); *see also supra* notes 75-77 and accompanying text.

129. *Jennings*, 333 N.C. at 622, 430 S.E.2d at 210.

130. *Id.* at 622-24, 430 S.E.2d at 210-11. When the defendant killed Mr. Jennings, he had approximately $21,000 that the defendant had apparently unsuccessfully attempted to have transferred to her. *Id.* at 623, 430 S.E.2d at 211. Furthermore, "witnesses testified that Jennings frequently complained that defendant was draining him of money to the point of destitution." *Id.* at 624, 430 S.E.2d at 211.

131. Justice Frye noted that the State implicitly recognized that the instruction "sweeps too far in that it directs the jury to find this aggravating circumstance on the mere fact that defendant

the aggravating circumstance such that it could weigh the competing evidence.[132] Justice Frye concluded:

> [T]here is a "reasonable likelihood" that the jury applied this instruction in an unconstitutional manner, that is, in a manner which allowed it to find this aggravating circumstance without regard to whether defendant killed the victim *for the purpose* of obtaining the money. The pecuniary gain instructions were therefore unconstitutionally vague and overbroad as applied in this case.[133]

It is plausible that the defendant did *not* murder her husband with the intention or expectation of obtaining money.[134] Evidence presented at trial showed that Mr. Jennings had a brokerage account containing approximately $170,000 when he married the defendant.[135] Shortly after their marriage, Mr. Jennings transferred large sums of money to the defendant, bought her a car, and paid credit card bills with funds from the account.[136] For some period of time, the defendant had power of attorney over the accounts.[137] By the time of his death, Mr. Jennings had only $21,000 in his account.[138] That the defendant had already managed to obtain most of Mr. Jennings's assets without killing him indicates that she may not have killed her husband *for the purpose* of pecuniary gain.[139]

Jennings's effect on future cases involving the pecuniary gain aggravating circumstance may prove to be minor, since the supreme court's broad reading of pecuniary gain originated in previous cases.[140] Nevertheless, *Jennings* leaves the reach of the circumstance unsettled. For instance, although it is settled that pecuniary gain need not have been the only moti-

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'stood to benefit' financially from the death of her husband." *Id.* at 639, 430 S.E.2d at 220 (Frye, J., concurring in part and dissenting in part).

132. *Id.* at 640, 430 S.E.2d at 221 (Frye, J., concurring in part and dissenting in part).

133. *Id.* (Frye, J., concurring in part and dissenting in part). The court has upheld a purpose requirement for the aggravating circumstance of avoiding lawful arrest. *See* State v. Goodman, 298 N.C. 1, 27, 257 S.E.2d 569, 586 (1979).

134. *See supra* text accompanying note 124 (setting forth the language of the instruction).

135. *Jennings*, 333 N.C. at 623, 430 S.E.2d at 211.

136. *Id.*

137. She claimed she had such power of attorney at the time of Mr. Jennings's death, although a representative of the brokerage firm testified that the company refused to transfer funds from Mr. Jennings's account unless several conditions were first satisfied. *Id.* at 623-24, 430 S.E.2d at 211. Those conditions required Mr. Jennings to write a letter requesting that money be transferred to his new broker, formally request liquidation of the accounts, or have his new broker agree to accept the accounts. *Id.*

138. *Id.* at 623, 430 S.E.2d at 211.

139. The point of this analysis is not to excuse the defendant's actions, or to suggest in any way that they are less horrible because financial benefit was not her specific motivation for the murder. Instead, the analysis challenges the majority's facile conclusion that the potentially erroneous instruction had no probable effect on the jury's deliberation.

140. *See, e.g.*, State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984) (discussed *supra* notes 82-86 and accompanying text), *cert. denied*, 469 U.S. 1230 (1985); State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981) (discussed *supra* notes 80-81 and accompanying text).

vation for a murder, it is unclear how significant a role it must have played in the decision to murder. If incidental financial gain to a surviving spouse[141] satisfies the circumstance, must a significant amount of money be involved? Must the murdering spouse even be aware of the precise amount of money she is likely to receive?

Under the defendant's second assignment of error, the majority and the dissent again disagreed about the impact of improper jury instructions. The defendant argued that, although the trial court's oral instructions properly set forth the elements of the aggravating circumstance of sexual offense, the instructions on the jury's verdict sheet were improper.[142] Noting that the defendant had failed to object at trial to the wording of the verdict sheet, the majority limited its review to whether the incorrect sheet amounted to plain error.[143] The court concluded that since the oral instructions were proper, there was no plain error, because "the additional or alternative written instructions . . . suggested by defendant would have had no probable effect on the jury's response to the issue."[144]

Justice Frye disagreed. He concluded that the mistakes on the verdict sheet did constitute plain error, because the trial court effectively submitted a nonstatutory aggravating circumstance for the jury's consideration.[145] Justice Frye's argument is bolstered by the fact that the jury heard the oral instructions only one time—buried amongst numerous other instructions on complicated legal issues—but the incorrect written verdict sheet remained in the jury room throughout deliberations, allowing the jury to ponder its every word.

In her third assignment of error, the defendant argued that the trial court improperly submitted two aggravating circumstances that were based upon the same factual evidence.[146] Specifically, she contended that the "especially heinous, atrocious, or cruel" circumstance[147] and the fact that the murder was committed during a sex offense[148] both stemmed from evidence that she penetrated Mr. Jennings's anus with an object.[149] The majority and dissent agreed that the trial court should have instructed the jury that the same evidence could not be used to support two aggravating cir-

141. *See supra* text accompanying note 126.

142. *Jennings*, 333 N.C. at 615-16, 430 S.E.2d at 206; *see also supra* notes 45-52 and accompanying text.

143. 333 N.C. at 616, 430 S.E.2d at 207.

144. *Id.* at 617-18, 430 S.E.2d at 207.

145. *Id.* at 641, 430 S.E.2d at 221 (Frye, J., concurring in part and dissenting in part).

146. *Id.* at 627, 430 S.E.2d at 213.

147. N.C. GEN. STAT. § 15A-2000(e)(9) (1988).

148. *Id.* § 15A-2000(e)(5).

149. *Jennings*, 333 N.C. at 627, 430 S.E.2d at 213.

cumstances[150] and that the record contained sufficient evidence to support the finding of both circumstances based on independent evidence.[151]

The justices disagreed, however, about the effect of the incomplete instructions. The majority distinguished *Jennings* from cases that had disallowed the submission of two aggravating circumstances supported by completely overlapping evidence.[152] In spite of potential partial overlap of evidence in *Jennings*, the majority found that the evidence could clearly support both aggravating circumstances independently: "We do not believe the failure to so instruct had a probable impact on the jury's finding of these circumstances; we thus decline to find plain error in the failure to so instruct."[153] The dissent agreed with the majority that prior cases were distinguishable, but adopted the defendant's argument that there was "a reasonable likelihood that a jury would find the sexual offense alleged, the forced penetration of the anus with an object against the will of the deceased, to be also especially heinous, atrocious, or cruel. This would result in the 'cumulation of aggravating circumstances against the defendant.' "[154]

Ostensibly, the majority upheld the North Carolina rule disallowing two aggravating circumstances based on the same facts; in effect, however, the court implicitly recognized an exception to the rule.[155] When, as here,

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150. *Id.* at 628, 430 S.E.2d at 214; *id.* at 642, 430 S.E.2d at 222 (Frye, J., concurring in part and dissenting in part).

151. *Id.* at 627, 430 S.E.2d at 213 ("There was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the murder was committed 'while attempting the penetration of the anus with an object.' "); *id.* at 643, 430 S.E.2d at 222 (Frye, J., concurring in part and dissenting in part) ("I agree with the State that there was evidence *other than the sexual offense* which would have supported the proper submission of the aggravating circumstance of especially heinous, atrocious, or cruel.").

152. *Id.* at 628, 430 S.E.2d at 214; *see also* State v. Goodman, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979) (discussed *supra* notes 96-107 and accompanying text); State v. Quesinberry, 319 N.C. 228, 239, 354 S.E.2d 446, 453 (1987) (finding error in trial court's submission of aggravating circumstances that murder was committed while defendant was engaged in commission of a robbery and committed for pecuniary gain), *rev'd on other grounds*, 494 U.S. 1022 (1990).

153. *Jennings*, 333 N.C. at 628, 430 S.E.2d at 214.

154. *Id.* at 643, 430 S.E.2d at 223 (Frye, J., concurring in part and dissenting in part) (citing *Goodman*, 298 N.C. at 29, 257 S.E.2d at 587).

155. Other kinds of exceptions could be said to exist as well:

(1) In a conviction for felony murder based on robbery, pecuniary gain may be submitted as an aggravating circumstance, since pecuniary gain speaks to the motive of the defendant rather than his acts. *See supra* notes 115-20 and accompanying text. It could be argued that pecuniary gain is an inextricable part of the robbery, and therefore of the felony that gives rise to a first degree murder conviction. Thus, it should not be a separate aggravating circumstance.

(2) The "especially heinous, cruel or atrocious" aggravating circumstance often overlaps with other aggravating circumstances, as the defendant argued in this case. This has been called a "standardless standard," Rosen, *supra* note 88, at 992, although the North Carolina courts have insisted that it is not intended to be a "catch-all." *See supra* notes 96-99 and accompanying text. In this case, the overlap is even more apparent because it is not clear that the jury even properly found that the defendant committed the murder while engaged in a sex offense.

the supreme court determines that the jury *would have found* two separate aggravating circumstances if properly instructed, the court will overrule an assignment of error related to the improper instructions.

The majority found nothing in the defendant's sentencing proceeding that would entitle her to a new trial.[156] The dissent, however, would have vacated her sentence and remanded for a new proceeding.[157] Justice Frye clearly stated that he did not decide whether any one of the three errors he found would in and of itself justify new sentencing. Instead, he focused on their cumulative effect and found them "sufficiently prejudicial to require a new capital sentencing proceeding."[158] Justice Frye's reliance upon "cumulative errors" to reach his conclusion suggests that, even in the eyes of the dissenters, none of the errors standing alone amounted to a miscarriage of justice. Thus, it is unclear how the dissenters would treat similar errors if they arose in another case.

The *Jennings* court perhaps let the horrifying facts of the case cloud its reasoned judgment; the defendant stomped, sexually assaulted, and tortured her elderly husband to death.[159] Not surprisingly, Patricia Jennings aroused little sympathy or compassion. Whatever one concludes about death as an appropriate penalty for this particular defendant, the case suggests that the supreme court does not, as one critic has claimed, "search for any reason to order new sentencing hearings."[160] The court could have held that "pecuniary gain" applies only to murders for hire and murders specifically committed *for the purpose* of financial gain, rather than murders that simply offer the possibility of financial gain. Furthermore, the court could have held that evidence of "sexual torture" would support either, but not both, of two aggravating circumstances. Were this the case, the jury might have weighed one aggravating circumstance against four mitigating circumstances.[161] Although it could be argued that the aggravating circumstance would nonetheless outweigh the mitigating circumstances, it is at least possible that the jury would have found the balance to mitigate against a sentence of death. Because the supreme court declined to remand for a new sentencing proceeding, and instead substituted its judgment as to the appro-

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

157. *See supra* note 41 and accompanying text.

158. *Jennings*, 333 N.C. at 638, 430 S.E.2d at 219-20 (Frye, J., concurring in part and dissenting in part).

159. *See supra* notes 18-23 and accompanying text.

160. Foon Rhee, *Does Court Thwart N.C. Death Penalty? 12 Percent of Capital Sentences Upheld Since 1990, But Justice Says U.S. Law Is the Reason*, CHARLOTTE OBSERVER, June 13, 1993, at 1C. Many critics apparently subscribe to such a belief; A.A. "Dick" Adams, chairman of the N.C. Crime Victims Compensation Commission, said, "In the interests of justice, they've done absolutely nothing. . . . In terms of exonerating inmates on death row, they've done a lot." *Id.*

161. *See supra* notes 27-32 and accompanying text.

priateness of the death penalty, the possibility of an alternative balance will never be tested.[162]

Jennings undermines North Carolina's death penalty scheme, which depends upon the discretion of juries to find and weigh aggravating and mitigating circumstances to determine whether death is an appropriate sentence. The supreme court itself has recognized in previous cases that whenever doubt exists about either the applicability of a particular aggravating circumstance or about whether the evidence supports more than one aggravating circumstance, the doubt should be resolved in favor of the defendant, and the circumstance should not be submitted.[163] Because the jury is specifically instructed that its weighing function is not to be based upon a simple mathematical equation,[164] it is free to consider the circumstances in their contexts. Under present constitutional standards, the imposition of the death penalty must be based on guided, yet discretionary consideration by the sentencer of both aggravating and mitigating circumstances.[165]

Trial courts may infer from *Jennings* that they need not be scrupulously careful in presenting aggravating circumstances to capital juries; yet this appears contrary to both legislative intent and United States Supreme Court dictates.[166] It does not, however, appear contrary to current popular sentiment demanding harsh and swift punishment for violent offenders.[167] North Carolina's elected supreme court justices may be responding more to

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162. In previous cases, the supreme court has recognized its inability to substitute its own judgment for the weighing function of the jury. *See, e.g.*, State v. Williams, 304 N.C. 394, 426, 384 S.E.2d 437, 456-57 (1981) (remanding for new sentencing after finding that "it is reasonably possible that the submission of the erroneous issue may have tipped the balance in favor of the death sentence"), *cert. denied*, 456 U.S. 932 (1982); State v. Cherry, 298 N.C. 86, 114, 257 S.E.2d 551, 568 (1979) (remanding for new sentencing after the jury considered one erroneous aggravating circumstance out of three total, and only limited mitigating circumstances), *cert. denied*, 446 U.S. 941 (1980); State v. Goodman, 298 N.C. 1, 29-30, 257 S.E.2d 569, 587-88 (1979) (remanding for new sentencing even though "the jury answered the issues submitted on five aggravating circumstances against defendant and only one issue on mitigating circumstances in his favor").

163. *See supra* text accompanying note 107.

164. N.C. PATTERN JURY INSTRUCTIONS—CRIM. § 150.10, at 44 (1993); *see also supra* notes 66-69 and accompanying text.

165. *See supra* notes 59-67 and accompanying text. Some commentators debate whether the death penalty can ever be constitutional. In February, 1994 Justice Blackmun announced his belief that "the death penalty experiment has failed." Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting), *denying cert. to* 998 F.2d 269 (5th Cir. 1993). For earlier arguments that the Constitution does not permit any imposition of capital punishment, see the concurring opinions of Justices Brennan and Marshall in Furman v. Georgia, 408 U.S. 238, 257-306, 314-71 (1972). For an argument against the death penalty as it is presently applied in the United States, see Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1675 (1986) ("[T]he real American system of capital punishment clearly fails when measured against the most common justifications for the infliction of punishment, deterrence, and retribution.").

166. *See supra* notes 59-74 and accompanying text.

167. *See supra* notes 1-6 and accompanying text.

public sentiment than to reasoned judicial principles; *Jennings* may lead one to ask whether an elected judiciary may be counted on to protect the constitutional rights of criminal defendants in the face of political winds calling for constriction of those rights.[168]

The North Carolina Supreme Court has arguably misapplied the standard for convicted defendants challenging jury instructions on appeal. The majority ostensibly would overturn a sentence if it found a reasonable possibility that the jury applied an instruction unconstitutionally, but the majority failed to find such a reasonable possibility despite having recognized two errors. The dissent's view—that cumulative errors warranted a new sentencing proceeding—would have more appropriately fulfilled the court's duty to ensure a procedurally fair application of capital punishment.

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168. It must be noted that appointed judges also respond to some degree to the political climate in which they live and judge. Moreover, the appointed federal judiciary has also become less responsive to the claims of death-sentenced petitions, *cf., e.g.*, Herrera v. Collins, 113 S. Ct. 853 (1993) (denying habeas corpus relief to death row inmate), so it is not clear to what degree the decisions of North Carolina's state judges are influenced by their elected status.

Inmate Access to Prison Computers for Legal Work and the Right of Access to the Courts: *Bryant v. Muth*

Over the past thirty years, lawsuits concerning the rights of prisoners have become a substantial portion of the civil rights litigation in this country.[1] In the past, courts were extremely reluctant to acknowledge that prisoners had any rights at all.[2] In part, this reluctance was an emanation of the "hands off" doctrine, which establishes that the courts will not interfere in the administration of prisons and will give great latitude and deference to prison officials.[3] This doctrine weakened over time as courts began recognizing that prisoners retain many of their constitutional rights notwithstanding their incarceration.[4]

Although largely dormant, the "hands off" doctrine recently emerged in the case of *Bryant v. Muth*.[5] In *Bryant*, the Fourth Circuit addressed the question of whether prison officials were entitled to qualified immunity for confiscating computer disks from a prisoner who was using the disks to store legal materials pertinent to his ongoing legal actions.[6] Distinguishing two of its prior cases which held that officials could be liable for seizing and destroying an inmate's legal materials,[7] the court ruled that the prisoner had no right to the information on the disks because the disks were contraband under federal regulations and because the prisoner had created the legal materials through unauthorized access to prison computers.[8]

This Note will outline the facts of *Bryant* and present the reasoning of the court.[9] Next, it will discuss background law helpful to understanding the opinion[10] and will then analyze and criticize the court's reasoning.[11] Finally, this Note will comment on the impact of *Bryant* and make policy arguments for reconsideration of the government's current unpublished pol-

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1. During fiscal year 1991, the number of prisoner-filed civil rights complaints in federal district courts rose to 26,045, constituting 12% of all filings. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 419 & nn.1-2 (1993) (citing ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT 1991, at 190 tbl. C-2A. In contrast, 19,340 other civil rights cases were filed during the same fiscal year. *Id.* at 419 n.2; *see also id.* at 419-20 & nn.3-7 (discussing other statistics relating to prisoner civil rights filings).

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

3. *See infra* notes 65-69 and accompanying text.

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

5. 994 F.2d 1082 (4th Cir.), *cert. denied*, 114 S. Ct. 559 (1993).

6. *Id.* at 1086.

7. Carter v. Hutto, 781 F.2d 1028 (4th Cir. 1986); Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975) (per curiam).

8. *Bryant*, 994 F.2d at 1087.

9. *See infra* notes 13-63 and accompanying text.

10. *See infra* notes 64-148 and accompanying text.

11. *See infra* notes 149-226 and accompanying text.

icy of severely restricting inmate microcomputer access for preparing legal materials.[12]

On November 13, 1987, prison officials at the Federal Correctional Institute (FCI) in Butner, North Carolina, confiscated three computer floppy disks belonging to Victor George Bryant.[13] The disks contained legal materials necessary to his efforts to prevent his extradition to England and "to pursue other post-conviction remedies."[14] Bryant had prepared the materials on the disks by using computers in the prison's Education Department.[15] The officials seized the disks because they suspected that Bryant had taken them from the prison's Education Department and because they believed that Bryant's use of the computers to create his legal materials was unauthorized.[16] Shortly after seizing the disks, officials placed Bryant in disciplinary segregation pending a hearing to be held a few days later.[17] At the hearing, inmate Richard Lopez testified that he received the disks from an instructor at the prison and in turn gave them to Bryant as a gift.[18] Upon being satisfied that the disks were not stolen government property, officials released Bryant from disciplinary segregation.[19] Bryant maintained throughout the inquiry that he believed that using computers in the Education Department for legal work was permitted during evening hours.[20]

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12. *See infra* notes 227-33 and accompanying text.

13. *Bryant*, 994 F.2d at 1083.

14. *Id.* at 1084. Most of the material on the disks consisted of legal documents and "rambling reconstructions . . . of circumstances surrounding his arrest and prosecution." Petitioner's Petition for Certiorari at 5, 27, Bryant v. Muth, 114 S. Ct. 559 (1993) (No. 93-5842) (denying certiorari). The disks also contained Bryant's petition for federal habeas corpus. *Id.*

Although the facts are sketchy, it appears that one of the disks was a program or boot disk necessary in order to use the computers on which he was preparing his legal work, and the other two disks were data disks on which Bryant had stored his legal material. *Bryant*, 994 F.2d at 1084 n.6.

15. *Id.* at 1083; Petition for Certiorari at 5 n.5, *Bryant* (No. 93-5842).

16. *Bryant*, 994 F.2d at 1083.

17. Petition for Certiorari at 4, *Bryant* (No. 93-5842).

18. *Bryant*, 994 F.2d at 1084; Petition for Certiorari at 4, *Bryant* (No. 93-5842). The instructor had brought the disks from her home. *Bryant*, 994 F.2d at 1084.

19. Petition for Certiorari at 4-5, *Bryant* (No. 93-5842).

20. *Id.* at 5. Bryant and other inmates believed that the prison enforced no specific policy in the computer room during evening hours. *Id.* at 5 n.5. Indeed, during the evening, Bryant and other prisoners "'played computer games, wrote personal letters, wrote legal work and generally tried to accustom themselves with this new technology.'" Appellant's Opening Brief at 3, Bryant v. Muth, 994 F.2d 1082 (4th Cir.) (No. 91-6672), *cert. denied*, 114 S. Ct. 559 (1993). Prison officials apparently did not post any rules regarding the use of computers outside the computer lab until after the seizure of Bryant's disks in November, 1987. *Id.* at 29 n.19. Furthermore, three prison inmates attested in affidavits that they had never heard of nor seen posted BOP Policy Statement 1237.6, discussed *infra* notes 227-30 and accompanying text, the unpublished policy statement relied upon by the court and by Muth and Robbins for the position that Bryant's access to the computers in the Education Department was unauthorized. *Id.*; *see Bryant*, 994 F.2d at 1083 n.2, 1087.

On November 14, 1987, one day after the disks were seized, the officials who had seized the disks turned them over to William Muth, the prison's Supervisor of Education.[21] Knowing that the disks contained Bryant's legal materials, Muth then delivered the disks to Gregg Robbins, a computer instructor at FCI Butner, and ordered him to reformat the disks.[22] However, Robbins objected to such a "harsh" penalty for unauthorized computer access, and suggested that they find a way of enforcing the penalties for unauthorized computer access while preserving Bryant's legal materials.[23] As a result, the disks were never reformatted.[24]

Approximately two weeks after the seizure of the disks, Bryant requested that the prison provide him with a hard copy of the contents of the disks, explaining the critical nature of the material on the disks to his ongoing court actions.[25] Robbins and Muth, believing that Bryant had no right to a complete printout of the materials, decided that they would provide Bryant with an edited version of the disks' contents that would contain what they regarded as "'raw factual data'" and not material " 'which was elaborated into a prose document.'"[26] In total, the printout only amounted to approximately one-third of the disks' contents.[27]

Upon complaining to Muth and being rebuffed,[28] on March 16, 1988, Bryant filed a *pro se* ex parte motion with the United States District Court

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As far as the particular systems Bryant used to prepare his materials, the facts indicate only that they were "TRS-80 computers located at the back of the prison computer classrooms." *Bryant*, 994 F.2d at 1085. The author of this Note strongly suspects that the computer system Bryant used was a TRS-80 Model III or Model 4, hardly a dangerous piece of technology even in 1987. The facts indicate that the computers involved were not equipped with modems, Petition for Certiorari at 5, *Bryant* (No. 93-5842), and the computers were not otherwise networked, either with each other or with computer systems outside the classroom. *See id.*

21. Petition for Certiorari at 6, *Bryant* (No. 93-5842).

22. *Bryant*, 994 F.2d at 1084; Petition for Certiorari at 6, *Bryant* (No. 93-5842).

23. Petition for Certiorari at 6, *Bryant* (No. 93-5842). *See Bryant*, 994 F.2d at 1084.

24. *Bryant*, 994 F.2d at 1084.

25. *Id.*; *see supra* notes 14-15 and accompanying text.

26. Petition for Certiorari at 6-7, *Bryant* (No. 93-5842); *Bryant*, 994 F.2d at 1084-85. The court's opinion indicates that Robbins and Muth maintained that Bryant was not entitled to *any* of the disks' contents. *Bryant*, 994 F.2d at 1084. In contrast, the petition for certiorari indicates that Robbins and Muth believed that Bryant was at least entitled to some portion of the disks' contents. Petition for Certiorari at 6, *Bryant* (No. 93-5842). Because the petition for certiorari quotes from the joint appendix in support of that point, and given that Robbins and Muth provided Bryant with a portion of his legal materials, it stands to reason that Robbins and Muth believed that they had some obligation to provide Bryant with at least a portion of his legal materials.

27. *Bryant*, 994 F.2d at 1085.

28. Muth told Bryant that no more material would be forthcoming and that his decision was final. Appendix to Petitioner's Petition for Certiorari at 21a, Bryant v. Muth, 114 S. Ct. 559 (1993) (No. 93-5842) (denying certiorari). Bryant also stated in his ex parte motion for injunctive relief that Muth had told him at one point that "[w]e should not have strung you along the way we did, [sic] actually we have done you a diservice [sic]. WE [sic] should have told you that the discs had been reformatted." *Id.*

for the Eastern District of North Carolina seeking an injunction and a temporary restraining order (TRO) barring Muth and Robbins from reformatting the disks or otherwise destroying or corrupting the stored legal materials.[29] The court granted and entered the TRO on March 25, 1988.[30] On April 1, 1988, David Farmer, FCI Butner's Executive Assistant, supplied Bryant with what he believed to be a complete printout of all the materials on the disks.[31] Muth and Robbins then successfully moved for summary judgment on the ground that Bryant now had a complete printout of his legal materials.[32] Approximately one month later, Bryant filed a motion for reconsideration, claiming that he had not received a complete printout of his legal materials.[33] The District Court found that prison officials mistakenly had believed that the two data disks were copies of each other and, because of this error, had printed only the contents of one of the data disks.[34] Shortly thereafter, the court struck its previous summary judgment order and reinstated Bryant's complaint.[35] The court eventually ordered that the disks be turned over for a commercial printout and that a copy of the printout be filed with the court.[36] Bryant finally received a full and complete printout of the disks' contents on July 19, 1989, more than twenty months after the original seizure.[37]

After Muth and Robbins once again moved for summary judgment, Bryant moved to amend his complaint to state claims for compensatory and punitive damages against Muth and Robbins for depriving him of his legal materials "in violation of his clearly established constitutional right" of access to the courts.[38] Muth and Robbins responded by moving for summary judgment on the amended complaint on the grounds that they were entitled to qualified immunity.[39] Affirming and adopting the report of the magistrate judge, Judge James C. Fox ruled that although Bryant may not have been entitled to the disks themselves as a matter of constitutional law, he was entitled to the legal materials on the disks because of his clearly established constitutional right of access to the courts.[40] Muth and Robbins im-

29. *Bryant*, 994 F.2d at 1085.

30. *Id.* The court also construed Bryant's motion as a complaint against Robbins and Muth individually because it had been prepared on a form used by prisoners filing civil rights complaints. *Id.*

31. Appellant's Opening Brief at 6, *Bryant* (No. 91-6672).

32. *Bryant*, 994 F.2d at 1085.

33. *Id.*

34. *Id.*

35. *Id.*

36. Petition for Certiorari at 7, *Bryant* (No. 93-5842).

37. *Bryant*, 994 F.2d at 1085.

38. *Id.* at 1085.

39. *Id.* at 1086; *see infra* notes 141-49 and accompanying text.

40. *Bryant*, 994 F.2d at 1086. The magistrate judge, assuming the allegations of Bryant's complaint to be true, found that Bryant had sufficiently stated a claim for violation of his constitu-

mediately appealed Judge Fox's order denying their qualified immunity defense to the United States Court of Appeals for the Fourth Circuit.[41]

In an opinion written by Senior Circuit Judge Chapman, the Fourth Circuit reversed the district court's denial of qualified immunity for Muth and Robbins.[42] First determining that Bryant's three disks were contraband under Bureau of Prisons regulations,[43] the court held that as such they were "subject to seizure and confiscation by prison officials."[44]

After reviewing the defense of qualified immunity,[45] the court next examined the constitutional right of access to the courts.[46] Noting the "well settled" principle that prisoners have a constitutional right of access to the courts,[47] the court briefly discussed *Carter v. Hutto*[48] and *Oxendine v. Williams*,[49] two Fourth Circuit cases in which the court found that confiscation of a prisoner's "handwritten legal materials"[50] and denial of writing supplies[51] could violate the right of access to the courts.[52] The district court relied on *Carter* and *Hutto* in finding that Bryant's right to his legal materi-

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tional right of access to the courts. Appendix to Petitioner's Petition for Certiorari at 14a, *Bryant* (No. 93-5842). Furthermore, the magistrate judge found that Bryant would be entitled to damages for deprivation of his constitutional right provided that the averments in his complaint were true. *Id.*

41. *Bryant*, 994 F.2d at 1086. Denial of qualified immunity by a district court is an immediately "appealable 'final decision' within the meaning of 28 U.S.C. § 1291." Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (citing 28 U.S.C. § 1291 (1988)).

42. *Bryant*, 994 F.2d at 1088.

43. *Id.* at 1084. The regulations regarding property of inmates in federal prisons are found at Part 553, Subpart B of the Bureau of Prisons (BOP) regulations, 28 C.F.R. §§ 553.10-15 (1993) (originally promulgated in 1983). The court quoted two regulations from this subpart in support of its conclusion that the disks were contraband. *Bryant*, 994 F.2d at 1084 nn.3-4. First, the court quoted from § 553.10, which states that BOP policy is to permit inmates to retain only property that is authorized to be possessed when the inmate is admitted, that is issued to the inmate during incarceration, that the inmate purchases from the commissary, or that the prison staff permits to be mailed or otherwise delivered to the inmate. 28 C.F.R. § 553.10 (1993); *Bryant*, 994 F.2d at 1084 n.3. The court also quoted the definition of contraband, which designates as contraband property an inmate has in his possession that does not fit into one of the above-mentioned categories. *See* 28 C.F.R. § 553.12(a) (1993); *Bryant*, 994 F.2d at 1084 n.4. Through the use of a constructive dilemma, the court reasoned that because the disks were either stolen government property or a gift of property from another inmate, under 28 C.F.R. § 553.13(b)(2)(ii), Bryant could not make a claim of ownership to the disks. *Bryant*, 994 F.2d at 1084. As such, they were contraband within the meaning of § 553.12, and thus subject to confiscation. *Id.*

44. *Bryant*, 994 F.2d at 1084.

45. *Id.* at 1086. See *infra* notes 141-48 and accompanying text for a more thorough discussion of qualified immunity.

46. *Bryant*, 994 F.2d at 1086-87.

47. *Id.*

48. 781 F.2d 1028 (4th Cir. 1986).

49. 509 F.2d 1405 (4th Cir. 1975) (per curiam).

50. *Carter*, 781 F.2d at 1032.

51. *Oxendine*, 509 F.2d at 1407.

52. *Bryant*, 994 F.2d at 1087.

als was clearly established.[53] The Fourth Circuit distinguished *Carter* and *Oxendine* on the ground that the inmates in those cases used authorized means to create their legal materials:

> Unlike the inmates in *Carter* and *Oxendine*, Bryant chose not to create his legal materials by writing or typing, or getting written authorization to use a prison computer. Instead, he violated established prison regulations by creating his materials from the knowingly unauthorized use of prison computers. Instead of paper, Bryant recorded his legal materials on contraband computer disks. . . .
> . . . Therefore, unlike the legal materials in *Carter* and *Oxendine*, under [Bureau of Prisons] regulations, Bryant's legal materials composed and stored on disks were contraband.[54]

After concluding that Bryant had no constitutional right to his legal materials, the court considered the defendants' claim of qualified immunity.[55] Chiding the district court for its failure to distinguish *Carter* and *Oxendine* from the case at bar,[56] the court went on to state that, "[h]ad Muth and Robbins confiscated Bryant's legal materials, *legally prepared and retained*, there is no question that they would not be entitled to qualified immunity."[57] However, because Bryant violated "established prison rules and regulations" regarding the use of computers by inmates, the court found that he had no constitutional right to his legal materials.[58] Accordingly, because a nonexistent constitutional right is the antithesis of a "clearly established statutory or constitutional right . . . which a reasonable person would have known," the court concluded that Muth and Robbins were entitled to qualified immunity.[59] Directly addressing the seizure and withholding of the disks, the court found that Muth and Robbins had followed BOP procedures in their treatment of the disks.[60] Furthermore, the court considered the delay in delivering a printout to Bryant to be a consequence of the unorthodox manner in which he had stored his material on the disks.[61] The court also stated that because Bryant used unauthorized means

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* (emphasis added).
58. *Id.*
59. *Id.* at 1088 (quoting Harlow v. Fizgerald, 457 U.S. 800, 818 (1982)). The court also stated that under *Harlow*, it should not hold Muth and Robbins to the standard of "constitutional lawyers." *Bryant*, 994 F.2d at 1088.
60. *Id.*
61. *Id* at 1087. The court had previously stated that Bryant formatted his disks for use on the TRS-80 computers in the rear of the computer lab and not for use with IBM-compatible machines. *Id.* at 1085. Furthermore, Bryant apparently created directories on the disks that led Muth and Robbins to believe the data on the two data disks was identical. *Id.* Thus, when Muth and Rob-

to prepare his legal materials, to hold that he had a constitutional right to the legal materials "would allow him to benefit from the fruits of his unauthorized activity."[62] The court concluded by arguing that prison regulations regarding use of computers by inmates should be strictly enforced.[63]

In order to understand the court's holding in *Bryant*, it is necessary to consider it in the context of the growth of prisoners' rights over the past century. Prisoners historically have had few, if any, legally enforceable rights, and they often have found the courthouse doors closed when they have sought the courts' protection.[64] Judicial reluctance to hear the complaints of prisoners or otherwise interfere in the administration of prisons has appropriately been dubbed the "hands off" doctrine.[65] Prior to the 1960s, the federal courts generally refused to entertain complaints by prisoners that prison conditions violated the Constitution.[66] One of the concerns underlying this doctrine was the principle of separation of powers; judges felt it was not within the province of the judiciary to tell the executive and legislative branches how to run the nation's prisons.[67] Another key concern was federalism and the judicial distaste for invading the province of the states.[68] Courts also believed that they lacked the expertise to become involved in this area and feared an avalanche of prisoner complaints if they attempted to dispense relief to prisoners.[69]

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bins first attempted to make a hard copy of the disks' contents, they mistakenly printed out only the contents of one disk. *Id.* The court also noted that because of the sheer volume of material Bryant had stored on the disks, it took three hours of continuous printing in order to print out all of the material. *Id.* Conspicuously absent from the court's opinion is any mention of the commercial printout the district court ordered at the time Bryant had his original complaint reinstated. *See id*; *see also supra* note 36 and accompanying text.

62. *Bryant*, 994 F.2d at 1087.

63. *Id.* at 1088. *See infra* notes 223-26 and accompanying text.

64. *E.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) ("[A prisoner] is for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe."). *But see* Gilmore v. Lynch, 319 F. Supp. 105, 108 (N.D. Cal. 1970) (noting that the view expressed in *Ruffin* had long since been rejected), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

65. James M. Hill, Comment, *An Overview of Prisoners' Rights: Part I, Access to the Courts Under Section 1983*, 14 ST. MARY'S L.J. 957, 959 (1983). The commentators seem to agree that the term was first coined by FRICH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961), *cited in* Hill, *supra*, at 959 n.14; 1 MICHAEL MUSHLIN, RIGHTS OF PRISONERS, § 1.02, at 7 n.22 (2d ed. 1993).

66. Hill, *supra* note 65, at 959; 1 MUSHLIN, *supra* note 65, § 1.02, at 7. One court went so far as to say that "it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951), *quoted in* 1 MUSHLIN, *supra* note 65, § 1.02, at 7.

67. 1 MUSHLIN, *supra* note 65, § 1.01, at 7.

68. *Id.* § 1.02, at 7-8.

69. *Id.* § 1.02, at 8.

Beginning in the 1960s, lower courts began to entertain the complaints of prisoners about conditions in the nation's prisons.[70] Among other factors,[71] the incorporation of most of the provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment allowed many more prisoners to allege violations of federal rights.[72] Furthermore, in 1961, the Supreme Court declared in *Monroe v. Pape*[73] that the "under color of law" requirement of 42 U.S.C. section 1983 extended not only to actions taken by state officials pursuant to state law, but also to misconduct by state officials.[74] Ten years later, the Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[75] that officials acting under the color of federal law could be sued directly under the Constitution for deprivations of federal rights.[76] *Monroe* and *Bivens* both served to open the courthouse doors to prisoners alleging violations of their federal rights.

Over time, as the courts took a more active role in supervising the nation's prisons, they began to recognize that prisoners, despite their status, retained many of their constitutional rights. As the Supreme Court stated ten years ago in *Hudson v. Palmer*:[77] "We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other. . . . Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[78] Occasionally, however, states have argued that the courts should stay out of the business of prison administration, but these arguments largely have been rejected.[79]

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70. *Id.* § 1.03, at 9.

71. *See id.* § 1.03, at 9-11.

72. *Id.* § 1.03, at 11.

73. 365 U.S. 167 (1961).

74. *See id.* at 183-87.

75. 403 U.S. 388 (1971).

76. *Id.* at 389. At issue in *Bivens* was whether narcotics agents who, without search or arrest warrants, searched Bivens's apartment, arrested him, and required him to submit to a strip search, could be held liable for violating his Fourth Amendment right against unreasonable search and seizure. *Id.* The Court held that the complaint stated a cause of action and that Bivens was entitled to damages for the injuries he suffered. *Id.* at 390-97.

77. 468 U.S. 517 (1984).

78. *Id.* at 523.

79. For example, in Bounds v. Smith, 430 U.S. 817, 832 (1977), North Carolina argued that the federal courts should refrain from "'sit[ting] as co-administrators of state prisons'" and that the district court had "'exceeded its powers [by putting] itself in the place of the [prison] administrators.'" (quoting the Brief of the Petitioners). The Supreme Court acknowledged that the courts should exercise restraint when dealing with cases involving prison administration, but it held that such restraint could not be used to refuse to entertain the constitutional claims of prisoners. *Id.*

One of the key rights the courts recognized that prisoners retained was the right of access to the courts.[80] The Supreme Court first determined that prisoners retained this right in Ex parte *Hull* in the limited context of applications for writs of habeas corpus.[81] In *Hull*, the Court addressed the legality of a Michigan prison regulation requiring that all legal documents of prisoners be screened through the legal investigator of the state parole board prior to filing.[82] Hull had attempted to file a petition for a writ of habeas corpus, only to have the legal investigator return it with comments that it was technically deficient in several respects.[83] Striking down the regulation, the Court held that states and their officials may not obstruct prisoners from exercising their right to seek a writ of habeas corpus.[84] The Court added that the federal courts alone have the power to decide whether a habeas corpus petition is defective.[85]

After *Hull*, the Court once again confronted the right of prisoners to seek writs of habeas corpus in *Johnson v. Avery*.[86] At issue in *Johnson* was the validity of a Tennessee prison regulation barring prisoners known as "writ writers" from helping other prisoners prepare petitions for writs of habeas corpus.[87] The Court observed that Tennessee's prison system, like the prison systems of most other states, had a high percentage of illiterate or functionally illiterate prisoners.[88] Because there is no general right to court-appointed counsel while pursuing post-conviction relief, and since in the federal system counsel ordinarily is not appointed until after an initial judicial evaluation, a prisoner is often left to his own devices when first seeking post-conviction relief.[89] For indigent and illiterate prisoners, the only source of help may be other prisoners knowledgeable in the process of drafting habeas corpus petitions.[90] Without the assistance of other prisoners, indigent and illiterate prisoners effectively would be denied access to the courts to present their petitions.[91] The Court held that so long as a state fails to provide "some reasonable alternative" to the assistance of "writ writers," states may not categorically prohibit prisoners from assisting other prisoners, although reasonable time, place, and manner regulations are per-

80. *See id.*
81. 312 U.S. 546 (1941).
82. *Id.* at 547.
83. *Id.* at 547-48 n.1. Hull eventually had his father smuggle a subsequent petition out of the prison and file it with the Supreme Court. *Id.* at 548.
84. *Id.* at 549.
85. *Id.*
86. 393 U.S. 483 (1969).
87. *Id.* at 484, 488.
88. *Id.* at 487.
89. *Id.* at 487-88.
90. *Id.* at 488.
91. *Id.*

missible.[92] On its face, *Johnson* applied only to writs of habeas corpus. However, in *Wolff v. McDonnell*,[93] the Court applied the holding of *Johnson* to section 1983 suits brought by prisoners.[94]

The Court in *Johnson* suggested that the states could avoid permitting "writ writers" from assisting other prisoners if it provided "reasonable alternatives" such as assistance by public defenders and advanced law students.[95] However, it was still unclear what else might satisfy the "reasonable alternatives" requirement, and moreover, whether prisoners had a constitutional right to one or more of those alternatives.

The Court began to tackle this issue in *Younger v. Gilmore*, decided in 1971.[96] In *Gilmore*, the Court heard an appeal from a three judge district court decision that the restricted law libraries California permitted its prisoners to use violated their right of access to the courts.[97] California Department of Corrections Regulation 330.041 permitted law libraries in prisons to contain only certain enumerated "basic codes and references."[98] The district court was particularly dismayed by the fact that the regulations permitted virtually no federal materials and very few California materials.[99] The court emphasized the lack of federal materials would make it extremely difficult for prisoners to compose and file petitions for writs of habeas corpus.[100] The district court opined that California's concern with "economy and standardization" was insufficient to override the rights of the prisoners to adequate law libraries.[101] In a terse two paragraph per curiam opinion, the Supreme Court affirmed the district court, citing only *Johnson* for support.[102] As one commentator observed, this "cryptic cite to *Johnson*" caused much confusion in the circuits over whether *Johnson* required that states provide adequate law libraries to their prisoners as part of the constitutional right of access to the courts.[103]

The Court revisited the issue of whether prisoners have the right to a law library in the landmark case of *Bounds v. Smith*.[104] *Bounds* arose out of

92. *Id.* at 490.
93. 418 U.S. 539 (1974).
94. *Id.* at 577-580.
95. *Johnson*, 393 U.S. at 489-90.
96. 404 U.S. 15 (1971) (per curiam).
97. Gilmore v. Lynch, 319 F. Supp. 105, 110-11 (N.D. Cal. 1970), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).
98. *Id.* at 107. The authorized materials are listed *id.* at 107 n.2. The regulation provided that materials in prison law libraries that were not authorized in the regulation were to be "removed and destroyed." *Id.*
99. *Id.* at 110.
100. *Id.*
101. *See id.* at 111.
102. *Gilmore*, 404 U.S. at 15.
103. Hill, *supra* note 65, at 965 & n.53 (collecting cases).
104. 430 U.S. 817 (1977).

a section 1983 suit filed by several prisoners incarcerated in North Carolina who alleged various constitutional violations.[105] Among the alleged violations was the state's failure to supply the inmates with "legal research facilities."[106] Finding the state's only prison library "severely inadequate" for legal research, the district court granted the inmates' motion for summary judgment on the claim of lack of access to law libraries, citing *Gilmore* as support.[107] Pursuant to the district court's decision, the state proposed establishing several regional prison law libraries, to which inmates could have access by appointment.[108] Ruling against the inmates' objections, the district court found the proposed library arrangements adequate and rejected the inmates' request for a law library at every prison.[109] The Court of Appeals affirmed, and the Supreme Court granted certiorari.[110]

In an opinion written by Justice Marshall, the Court began by asserting that "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts."[111] Rejecting the state's *Johnson*-based claim that it only was obligated to permit inmates to seek the assistance of "writ writers," the Court stated that it had not attempted in *Johnson* to outline the full scope of the right of access to the courts; nor did the Court believe that *Johnson* prevented it from determining whether "additional measures" might be necessary to assure inmates of meaningful access to the courts.[112] The Court then stated that it has long required the states to assume "affirmative obligations" to ensure the right of prisoners to "meaningful access to the courts":[113]

> It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. . . . This is not to

105. *Id.* at 818.

106. *Id.*

107. *Id.*

108. *Id.* at 819. The state proposed to include basic North Carolina materials (the North Carolina General Statutes, the North Carolina Reports and Court of Appeals Reports, Strong's North Carolina Index, and the North Carolina Rules of Court); United States Code titles pertinent to federal criminal law, civil rights law, and court procedure; the Supreme Court Reporter, the Federal Reporter, Second Series, and the Federal Supplement dating from 1960; and several treatises and hornbooks germane to habeas corpus and civil rights actions. *Id.* at 819 n.4. The Court noted that the proposed collections met the minimum standards recommended for prison law libraries with the notable omission of Shepard's citations, certain other treatises, and the local rules of court. *Id.*

109. *Id.* at 820.

110. *Id.* at 821.

111. *Id.*

112. *Id.* at 823-24.

113. *Id.* at 824.

> say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial.[114]

The Court reiterated that civil rights actions and habeas corpus petitions hold a place of "'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."[115] The Court therefore held that as part of the constitutional right of access to the courts, prison officials must assist inmates in preparing and filing "meaningful legal papers" by either establishing "adequate law libraries" or permitting prisoners to obtain "adequate assistance from persons trained in the law."[116]

Although there is no express constitutional basis for the right of access to the courts, a point Justice Rehnquist emphasized in his dissent in *Bounds*,[117] the courts have stated that the right emanates from several provisions of the Constitution, in particular, the First Amendment,[118] the Privileges and Immunities Clauses of Article IV Section 2 and Section 1 of the Fourteenth Amendment,[119] and the Due Process Clauses of the Fifth and Fourteenth Amendments.[120] Furthermore, several courts have indicated that an added basis for the right of access is the implicit grant of other rights—were prisoners not permitted to seek redress of those rights in the courts, those rights would be "meaningless."[121] In this vein, the right of access to the courts is merely incident to the more substantive rights the courts have recognized that prisoners possess.

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114. *Id.* at 824-25.

115. *Id.* at 827 (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969); Wolff v. McDonnell, 418 U.S. 539, 579 (1974)).

116. *Bounds*, 430 U.S. at 828. The Court emphasized that establishing prison law libraries was only one way states could satisfy their constitutional obligations, noting that approximately one-half of the states and the District of Columbia had established programs that provided prisoners with legal assistance. *Id.* at 830-31.

117. *See id.* at 837 (Rehnquist, J., dissenting) ("There is nothing in the United States Constitution which requires that a convict serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a 'right of access' to the federal courts in order to attack his sentence.").

118. California Motor Transp. Co v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

119. In Chambers v. Baltimore & Ohio R.R., the Supreme Court wrote, "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . ." 207 U.S. 142, 148 (1907).

120. Wolff v. McDonnell, 418 U.S. 539, 579 (1974); *see* Simmons v. Dickhaut, 804 F.2d 182, 183 (1st Cir. 1986) (per curiam); Ryland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983).

Although it is often invoked by prison inmates, the right of access to the courts protects persons generally and not just prisoners. *See California Motor Transp.*, 404 U.S. at 509-16; *Chambers*, 207 U.S. at 146-51.

121. *E.g.*, Laaman v. Perrin, 435 F. Supp. 319, 327-28 (D.N.H. 1977); Hooks v. Wainright, 352 F. Supp. 163, 167-68 (M.D. Fla. 1972).

In keeping with the Supreme Court's decision in *Bounds*, the lower courts have declared that the right of access to the courts is a "fundamental" constitutional right.[122] However, *Bounds* made clear that the right requires that states ensure only "meaningful" and "adequate" access to the courts.[123] In fact, *Bounds* only required the states to provide an adequate law library *or* adequate legal assistance, but not both.[124] If a state chooses to provide law libraries, those libraries need only be adequate for legal research; they need not contain the full complement of legal materials normally found in law libraries of law schools.[125] Additionally, states need not allow prisoners to have unlimited access to prison law libraries; reasonable time, place, and manner restrictions on law library usage are permissible.[126] Regarding legal assistance, prisoners have no right to assistance by an attorney but may be assisted by paralegals,[127] law students,[128] and even "jailhouse lawyers" if more adequate assistance is not available.[129]

The courts have construed the right of access to the courts to include the right to basic supplies needed to prepare personal legal materials.[130] As the Supreme Court stated in *Bounds*, states must supply indigent prisoners with basic writing materials so that they may enjoy their right of access to the courts.[131] However, the courts have, in keeping with the holding in

122. *E.g.*, Morello v. James, 810 F.2d 344, 347 (2d Cir. 1987) (citing Johnson v. Avery, 393 U.S. 483, 485 (1969)); Jackson v. Procunier, 789 F.2d 307, 310 (5th Cir. 1986); *see also* Gilmore v. Lynch, 319 F. Supp. 105, 109 (N.D. Cal. 1970) (commenting that "[r]easonable access to the courts is a constitutional imperative. . . ."), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

123. *See* Bounds v. Smith, 430 U.S. 817, 823, 828 (1977).

124. *Id.* at 828, 830; *see also* Hill, *supra* note 65, at 971 n.90 (citing cases reiterating that *Bounds* does not require that states provide both law libraries and legal assistance).

125. *See, e.g.*, Blake v. Berman, 877 F.2d 145, 147-48 (1st Cir. 1989) (holding that a Massachusetts prisoner transferred to the federal penitentiary at Leavenworth, Kansas, was not denied his right of access to the court by lack of Massachusetts legal materials because of the availability of legal assistance through a program at the Kansas School of Law); Sahagian v. Dickey, 827 F.2d 90, 98-99 (7th Cir. 1987) (holding that a federal prisoner was not denied his right of access to the courts by the law library's lack of Wisconsin legal materials, especially when he had the assistance and counsel of a public defender while pursuing a *pro se* petition for discretionary review to the Wisconsin Supreme Court); Brown v. Sielaff, 363 F. Supp. 703, 705 (W.D. Pa. 1973) (holding that right of access to courts not denied by lack of the most current legal materials).

126. For example, in Flittie v. Solem, 827 F.2d 276, 280 (8th Cir. 1987), the Eighth Circuit held that reasonable regulations on access to prison law libraries are permissible. The plaintiff in that case was permitted to use the library three days a week, which the court believed was not an unreasonable restriction, especially given the fact that the plaintiff had filed six other lawsuits prior to the present case. *Id.*

127. *See* Knop v. Johnson, 977 F.2d 996, 1006 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993); Morrow v. Harwell, 768 F.2d 619, 624 (5th Cir. 1985).

128. *See Blake*, 877 F.2d at 147-48.

129. *See* Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979).

130. *See generally* 2 MUSHLIN, *supra* note 65, § 11.08, at 60-65 (discussing prisoners' right to writing supplies).

131. Bounds v. Smith, 430 U.S. 817, 824 (1977).

Bounds that access to the courts only be "meaningful" and "adequate," permitted prison officials to put reasonable restrictions on this right. Indigent prisoners have no right to unlimited supplies of paper,[132] nor do they have the right to unlimited free postage[133] or photocopying.[134] Furthermore, prisoners have no constitutional right to use a typewriter to prepare legal documents.[135] The main justification given for this rule is that inmates are not prejudiced by filing handwritten documents.[136]

Confiscation or other deprivation of legal materials by prison officials has been held to state a claim under section 1983.[137] However, in order to state successfully a claim for relief, a prisoner must allege not only that he was deprived of his legal materials, but additionally that the deprivation interfered with his right of access to the courts; bare allegations of confiscation are insufficient.[138] Moreover, deprivation of legal materials for short

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132. *See* Morgan v. Nevada Bd. of State Prison Com'rs, 593 F. Supp. 621, 624 (D. Nev. 1984) (holding that the state was required to supply a reasonable amount of paper and envelopes to indigent prisoners for legal work, but temporary deprivations for lack of supplies might not prejudice prisoner's rights); *see also* Conklin v. Wainwright, 424 F.2d 516, 517 (5th Cir. 1970) (per curiam) (holding that prison did not obstruct a prisoner's right of access to the courts by supplying him with only ten sheets of bond paper per day).

133. *E.g.*, Twyman v. Crisp, 584 F.2d 352, 359 (10th Cir. 1978) (citing Bach v. Coughlin, 508 F.2d 303 (7th Cir. 1974)).

134. *E.g.*, Harrell v. Keohane, 621 F.2d 1059, 1061 (10th Cir. 1980) (holding that lack of free photocopying privileges did not deny inmate access to the U.S. Supreme Court, especially given the availability of "suitable alternatives" to photocopying).

135. *E.g.*, American Inmate Paralegal Assoc. v. Cline, 859 F.2d 59, 61 (8th Cir.), *cert. denied sub nom.* Tyler v. Cline, 488 U.S. 996 (1988); Twyman, 584 F.2d at 358; Wolfish v. Levi, 573 F.2d 118, 132 (2d Cir. 1978), *rev'd on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979); Eisenhardt v. Britton, 478 F.2d 855, 855-56 (5th Cir. 1973); Stubblefield v. Henderson, 475 F.2d 26, 27 (5th Cir. 1973); Sprouse v. Moore, 476 F.2d 995, 995-96 (5th Cir. 1973); Williams v. U.S. Dept. of Justice, Bureau of Prisons, 433 F.2d 958, 959 (5th Cir. 1970); *see also* Durham v. Blackwell, 409 F.2d 838, 839 (5th Cir. 1969) (holding that withdrawal of free typing by library staff did not deprive inmate of his right of access to the courts).

136. *Twyman*, 584 F.2d at 358 (citing Tarlton v. Henderson, 467 F.2d 200 (5th Cir. 1972)). Despite the refusal of courts to find that inmates have a constitutional right to typewriters, federal prisoners are permitted by regulation to use typewriters to prepare legal documents. 28 C.F.R. § 543.15(h) (1993).

137. Morello v. James, 810 F.2d 344, 346 (2d Cir. 1987); Simmons v. Dickhaut, 804 F.2d 182, 183-84 (1st Cir. 1986) (per curiam); Carter v. Hutto, 781 F.2d 1028, 1031-32 (4th Cir. 1986); Jackson v. Procunier, 789 F.2d 307, 312 (5th Cir. 1986); Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (per curiam); Slie v. Bordenkircher, 526 F. Supp. 1264, 1265 (N.D. W. Va. 1981); Tyler v. "Ron" Deputy Sheriff, 574 F.2d 427, 428-29 (8th Cir. 1978) (per curiam); Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975) (per curiam); Sigafus v. Brown, 416 F.2d 105, 107 (7th Cir. 1969); DeWitt v. Pail, 366 F.2d 682, 685-66 (9th Cir. 1966).

Because the right of access to the courts is based on the federal constitution, federal prisoners may sue directly under the Constitution when federal officials deprive them of the right. *See* Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 391 (1971). Although the court in *Bryant* seemed to treat Bryant's case as a § 1983 action, *see Bryant*, 994 F.2d at 1086, the case was actually a *Bivens* action, since Muth and Robbins were acting under the color of federal law, not state law.

138. *E.g.*, Tyler v. "Ron" Deputy Sheriff, 574 F.2d 427, 429 (8th Cir. 1978) (per curiam).

periods of time has usually been held not to have prejudiced complaining prisoners.[139] Courts typically hold that deprivation of legal materials for long periods of time or wilful destruction of legal materials is a violation of the inmate's right of access to the courts.[140]

Although federal and state officials may be sued for violating prisoners' right of access to the courts, officials may be entitled to invoke the defense of qualified immunity. Qualified immunity is an affirmative defense that an official accused of infringing a constitutional or statutory right of a person may invoke in defense against a suit for damages proximate to the deprivation.[141] The defense insulates officials performing discretionary functions from liability for their conduct so long as their conduct did not violate a "clearly established statutory or constitutional right[ ] of which a reasonable person would have known."[142] The plaintiff overcomes the defense if he demonstrates that the right he accuses the official of infringing was "clearly established at the time of the conduct at issue."[143] The "contours of the right must [have been] sufficiently clear that a reasonable official would [have understood] that what he [did] violate[d] that right."[144] Furthermore, a "necessary concomitant" to ascertaining whether a right was "clearly established" is whether the plaintiff has alleged that the defendant infringed a constitutionally recognized right.[145]

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139. *E.g.*, Vigliotto v. Terry, 873 F.2d 1201, 1202-03 (9th Cir. 1989); *Tyler*, 574 F.2d at 429.

140. *E.g.*, Carter v. Hutto, 781 F.2d 1028, 1031-32 (4th Cir. 1986); Wright v. Newsome, 795 F.2d 964, 965, 968 (11th Cir. 1986) (per curiam); Sigafus v. Brown, 416 F.2d 105, 106-07 (7th Cir. 1969); Steinberg v. Taylor, 500 F. Supp. 477, 478-80 (D. Conn. 1980).

141. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Qualified immunity may not be invoked where the relief sought is a declaratory judgment or an injunction; the defense may be invoked only where the defendant stands to be found liable for monetary damages. *See* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 117 n.11 (1991).

142. *Harlow*, 457 U.S. at 818. Before *Harlow*, the Court had held that the defense of qualified immunity had both an "objective" and a "subjective" component. *Id.* at 815 (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)). However, the *Harlow* Court concluded that the subjective element of the defense has become "incompatible" with the stated object of the defense to prevent frivolous and unsound cases from proceeding to trial. *Id.* at 815-17. Thus, the Court declared that naked allegations of malicious conduct on the part of government officials would not be sufficient to overcome summary judgment. *Id.* at 817-18. Rejecting the subjective component of the test for qualified immunity, the Court then stated that consideration of the merits of the defense should "turn primarily on objective factors." *Id.* at 819.

Two years later, in Davis v. Scherer, 468 U.S. 183, 191 (1984), the Court made clear that *Harlow* had scuttled the subjective component of the test in favor of a purely objective test. Through Justice Powell, the Court declared in *Davis* that *Harlow* "rejected the inquiry into state of mind in favor of a wholly objective standard." *Id.* The Court went on to hold that the only relevant issue in a qualified immunity determination is whether the official's conduct was objectively reasonable under clearly established law at the time. *Id.*

143. *Davis*, 468 U.S. at 187.

144. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

145. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991).

Qualified immunity is a threshold issue that must be dealt with on summary judgment and prior to any discovery.[146] The scope of qualified immunity is the same for state officials sued under section 1983 and for federal officials sued in *Bivens* actions.[147] As Professor Kinports states, the primary rationale behind recognizing the defense is that "subjecting public officials to liability for every error of judgment might unfairly penalize them for good faith mistakes, divert their attention from their public duties, prevent them from independently exercising their discretion in the public interest, and discourage qualified persons from seeking public office at all."[148]

Against this backdrop, the Fourth Circuit's ruling in *Bryant* appears problematic for several reasons. The court's decision turned on whether Muth and Robbins were entitled to qualified immunity, and that determination turned on the primary issue of whether Muth and Robbins infringed Bryant's constitutional right of access to the courts by not supplying Bryant with a hard copy of his legal materials for approximately twenty-one months.[149] Clearly, the court's holding that Muth and Robbins did not violate Bryant's constitutional rights is driven by its conclusions that Bryant's access to the computers on which he prepared his legal materials was not authorized,[150] and that the disks on which he stored his legal materials were contraband.[151] The court's preoccupation with these two points caused it to ignore the vast body of law regarding the constitutional right of access to the courts, resulting in the erroneous decision that Bryant had no right to the legal materials he had stored on the disks.

First, the court's analysis of whether Bryant's computer disks and the legal materials stored thereon were contraband is flawed. Federal regulations distinguish between "hard contraband" and "nuisance contraband."[152] "Hard contraband" are those items that "pose[ ] a serious threat to the security of the institution and which ordinarily [are] not approved for possession by an inmate or for admission into the institution."[153] The regulation gives three examples of hard contraband: "weapons, intoxicants, and currency (where prohibited)."[154] "Nuisance contraband" comprises those items that do not fall into the category of hard contraband but either are not

146. *Harlow*, 457 U.S. at 818.

147. *See id.* at 819 n.30; Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984). For a recap of *Bivens* actions, *see supra* notes 75-76, 137 and accompanying text.

148. Kinports, *supra* note 142, at 120-21.

149. *See Bryant*, 994 F.2d at 1086-87.

150. *Id.* at 1083.

151. *See id.* at 1084-87. The court emphasized this point by repeatedly referring to the disks as "contraband computer disks." *See id.*

152. 28 C.F.R. § 553.12(b) (1993).

153. *Id.* § 551.12(b)(1).

154. *Id.*

authorized for possession or are possessed in such quantities as to pose a safety risk to the institution.[155] If prison officials seize an item suspected to be contraband, the regulations state that the "[s]taff *shall* dispose of [the item] in accordance with [set] procedures."[156] Government property is to be returned to the "institution's issuing authority," unless it is needed as evidence.[157] Personal property must be inventoried, and the inmate must be presented with a copy of the inventory as soon as possible.[158] The regulation provides further as follows:

> The inmate shall have seven days following the receipt of the inventory to provide staff with evidence of ownership of the listed items. A claim of ownership may not be accepted for an item made from the unauthorized use of government property. Items obtained from another inmate (for example, through purchase, or as a gift) without staff authorization may be considered nuisance contraband for which a claim is not ordinarily accepted.[159]

If ownership is established but the item is contraband, then the staff is to mail the item, provided that it is not hard contraband, to a place of the inmate's choosing and at the inmate's expense, except where the inmate lacks the funds to pay for the shipment, in which case the warden may authorize the prison to pay shipping costs.[160] If ownership is not established, then the staff is to make "reasonable efforts" to determine who owns the item prior to any decision to destroy the property.[161] Hard contraband is to be forwarded to law enforcement authorities if it is needed for a criminal prosecution; otherwise, it is to be destroyed.[162]

In *Bryant*, the court quoted a portion of the foregoing regulation[163] and concluded that it was inconsequential whether the disks were stolen government property or a gift from another inmate: they were contraband subject to seizure by prison officials.[164] The explicit conclusion that the disks constituted some form of "contraband" appears correct. However, the court's implicit conclusion that Muth and Robbins were then entitled under BOP regulations to reformat the disks does not follow from its explicit conclusion that the disks were contraband.[165] Since the regulations require that "government property contraband" be treated differently from "personal

155. *Id.* § 553.12(b)(2).
156. *Id.* § 553.13(b) (emphasis added).
157. *Id.* § 553.13(b)(1).
158. *Id.* § 553.13(b)(2)(i).
159. *Id.* § 553.13(b)(2)(ii).
160. *Id.* § 553.13(b)(2)(iii).
161. *Id.* § 553.13(b)(2)(iv).
162. *Id.* § 553.13(c).
163. *Bryant*, 994 F.2d at 1084.
164. *Id.*
165. The court wrote:

property contraband," determining which type of contraband the disks constituted is crucial. From the available facts, the most reasonable conclusion is that the disks were not stolen government property. The testimony of Bryant and Lopez at the hearing strongly suggests that the disks were a gift from Lopez to Bryant and not stolen from FCI Butner's education department.[166] Accordingly, the disks could have qualified as "personal property contraband,"[167] in which case the prison staff would have been obligated to mail the disks to an address chosen by Bryant, and the contents of the disks could have been printed out and mailed back to Bryant.[168] Instead, the prison officials continued to treat the disks as stolen government property despite their own satsifaction that the disks were not stolen, and they continued to allow Muth and Robbins to exercise control over them.[169]

At least two objections could be made to the conclusion that the disks were "personal property contraband" and should have been treated as such. The first objection is that under the regulation, "[i]tems obtained from another inmate (for example, through purchase, or as a gift) without staff authorization may be considered nuisance contraband for which a claim of ownership is not ordinarily accepted."[170] Accordingly, the court might argue that Bryant would have been unable to establish the claim of ownership required by the regulations in order for the property to be treated as "per-

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> The day after the disks were seized, they were turned over to appellant Muth. In conformity with BOP regulations Muth treated the disks as contraband and ordered appellant Robbins to reformat them.
>
> Bryant had no right to any materials, placed without authority and in violation of BOP regulations, on contraband computer disks. Therefore, Muth and Robbins followed correct BOP procedures when they confiscated both Bryant's contraband computer disks and the materials stored on them.

Id. at 1084, 1087.

166. *See id.* While stating that prison officials had confiscated Bryant's disks because they believed that they were stolen from the Education Department, the court observed in a footnote that disks authorized for use on computers in the Education Department were etched with a serial number and that Bryant's disks lacked an etched serial number. *Id.* at 1083 & n.1. The court's placement of the footnote suggests that it believed that disks issued for use on prison computers were etched prior to issuance, thus suggesting that the disks were in fact stolen. *See id.* However, Bryant's attorneys argued that the lack of etched serial numbers on the disks strongly suggested that the disks were not stolen government property. Appellant's Opening Brief at 15, *Bryant* (No. 91-6672). Since computer disks are fragile and sensitive to pressure, it seems highly unlikely that Education Department officials would themselves etch serial numbers upon blank disks prior to issuing them. More likely than not, the prison purchased disks pre-etched at the factory with serial numbers. If this was in fact the case, then the lack of etched serial numbers indicates that the disks were not stolen government property, but rather Bryant's personal property.

167. *See* 28 C.F.R. § 553.13(b)(2)(iii); Petition for Certiorari at 20 n.13, *Bryant* (No. 93-5842).

168. 28 C.F.R. § 553.13(b)(2)(iv); Petition for Certiorari at 20 n.13, *Bryant* (No. 93-5842).

169. *See* 28 C.F.R. § 553.13(b)(1); *see supra* note 19 and accompanying text.

170. *Id.* § 553.13(b)(2)(ii).

sonal property contraband."[171] This regulation can be read in two different ways, but neither interpretation supports the court's conclusion that Muth and Robbins were entitled to retain the disks and reformat them if they so chose. One way to read the regulation is to read it *in pari materia* with the requirement that staff make reasonable efforts to locate the owner if the inmate is unable to establish a claim of ownership.[172] Under this alternative reading, the regulation primarily contemplates situations in which the inmate makes a naked assertion that another inmate gave or sold the property to him, when in fact the inmate may have stolen the property from another inmate.[173] Under those circumstances, it is eminently reasonable not to accept a claim of ownership and to return the property to its true owner. However, in Bryant's case, Lopez testified that he gave the disks to Bryant as an unconditional gift, thus negating any suspicion that Bryant stole the disks from Lopez.[174]

The other way to read the above quoted regulation is to treat the phrase in parentheses literally and allow prison officials to refuse to accept claims of ownership of property received from other inmates by purchase or by gift. However, since prison officials evidently refused to accept Bryant's claim of ownership, the regulations then required the officials to take reasonable steps to locate the owner of the property (presumably so the property could be returned to its owner) before destroying the item.[175] Despite the apparent preemptive effect it would have on state law principles regarding the transfer of title to personal property, the second reading of the regulation would seem to require that the officials return the disks to Lopez (who might then help his friend by sending them to another of Bryant's friends outside the prison), not to Muth and Robbins as the court suggests.

Lastly, on its face, the regulation permits prison officials to accept a claim of ownership to property received from other inmates, even though such claims are ordinarily not accepted.[176] In contrast, a claim of ownership may *never* be accepted for stolen government property.[177]

The second possible objection is that even if the disks were "personal property contraband" under the regulations, Bryant still had no claim to the

171. *See id.* § 553.13(b)(2)(iii).

172. *Id.* § 553.13(b)(2)(iv).

173. *See id.* § 553.13(b)(2)(ii).

174. *Bryant*, 994 F.2d at 1084.

175. 28 C.F.R. § 553.13(b)(2)(iv) (1993).

176. The regulation states: "Items obtained from another inmate (for example, through purchase or as a gift) without staff authorization *may* be considered nuisance contraband for which a claim of ownership is *ordinarily* not accepted." 28 C.F.R. § 553.13(b)(2)(ii) (1993) (emphasis added).

177. "Staff *shall* return to the institution's issuing authority any item of government property seized as contraband. . . ." *Id.* § 553.13(b)(1) (emphasis added).

legal materials on the disks since they were produced through unauthorized use of government property, namely the computers in the prison's education department. The response to this objection is that the regulations treat legal materials separately from other inmate property,[178] and furthermore, the constitutional right of access to the courts requires that inmate legal materials be treated differently from other inmate property.[179] To the extent that "items made from the unauthorized use of government property" can be construed to cover an inmate's personally prepared legal materials, the regulation may be unconstitutionally overbroad.[180] Thus, *legal materials* prepared through unauthorized access to prison computers cannot lightly be brushed off as "items made from the unauthorized use of government property."[181]

Even more problematic than the court's analysis of the contraband issue is its conclusion that Bryant had no right to the legal materials on the disks. As previously noted, the Fourth Circuit had decided two cases involving inmate legal materials: *Carter v. Hutto*[182] and *Oxendine v. Williams*.[183] In *Carter*, prison officials seized and destroyed "legal materials relating to [Carter's] application for a writ of habeas corpus."[184] In *Oxendine*, the Fourth Circuit considered whether an inmate's allegations of denial of the right of access to the courts warranted a hearing on the merits.[185] The *Bryant* court summarily distinguished *Carter* and *Oxendine* by holding that those cases dealt with "handwritten legal materials" and "the denial of writing supplies," or more simply, that the underlying medium in

178. *See id.* § 553.11(d).

179. *See infra* notes 203-07 and accompanying text.

180. *Cf.* Procunier v. Martinez, 416 U.S. 396, 413 (1974), in which the Supreme Court held that prison regulations authorizing the censoring of prisoner mail must, in order to be valid, "further an important or substantial governmental interest unrelated to the suppression of expression," and must limit First Amendment liberties no more "than is necessary or essential to the protection of the particular governmental interest involved." The Court also held that a limitation on inmate correspondence might further a substantial or important governmental interest but still be invalid if its scope is excessively broad. *Id.* at 413-14.

181. 28 C.F.R. § 553.13(b)(2)(ii) (1993).

One might argue that not treating Bryant's legal materials as contraband "would allow him to benefit from the fruits of his unauthorized activity." *Bryant*, 994 F.2d at 1087. However, as Bryant's attorneys argued to the Supreme Court, it would not have been inconsistent for prison officials to have punished Bryant for his unauthorized use of prison computers while at the same time providing him with a hard copy of his legal materials. Petition for Certiorari at 27, *Bryant* (No. 93-5842). Since the Constitution gives special protection to prisoner's legal materials, *see infra* notes 198-202 and accompanying text, the court's "fruits analysis" seems to be inappropriate.

182. 781 F.2d 1028 (4th Cir. 1986).

183. 509 F.2d 1405 (4th Cir. 1975) (per curiam).

184. *Carter*, 781 F.2d at 1030.

185. *Oxendine*, 509 F.2d at 1407.

those cases was paper and not computer disks.[186] However, the court's holdings in *Carter* and *Oxendine* do not appear to have turned on the fact that the legal materials had been prepared on paper. In *Carter*, for example, the court clearly stated that it was the prisoner's allegation of deprivation of his "legal materials, some of which were irreplaceable" that triggered the constitutional violation.[187] In a footnote, the court mentioned that the materials included "Carter's handwritten notes of his trial, the basis of his habeas corpus attack on his conviction."[188] Moreover, the footnote appears after the word "irreplaceable,"[189] indicating that the court was primarily concerned with the fact that the materials contained Carter's personal recollections of his trial which he needed for his habeas corpus application.[190] Likewise, in *Oxendine*, the court decided that, based on affidavits filed by prisoners attesting that prison officials had denied them writing materials, there was a "possibility of unreasonable interference with access to the courts," and thus summary judgment was inappropriate.[191] Although *Oxendine* dealt with the unavailability of writing supplies, the court's reasoning does not suggest that it was the writing supplies *qua* writing supplies that triggered the possible violation, but rather the potential effect the deprivation stood to have on the prisoners' right of access to the courts.[192]

The courts seem to be in agreement that to state a claim for deprivation of the right to access through the confiscation or destruction of legal materials, a prisoner must only allege that he was deprived of his legal materials and that the deprivation prejudiced his court actions.[193] Instead of adhering to this well-established body of law, the *Bryant* court engrafted upon it a requirement that the legal materials must have been "legally prepared and retained" in order to qualify for protection under the right of access to the courts.[194] Accordingly, in the court's opinion, "Bryant's *legal materials* composed and stored on disks *were contraband.*"[195] Although the court's conclusion that the disks constituted some sort of contraband has merit, the court's holding that the *legal materials* on the disks were contraband is not justified under current law. The court cited no authority for its holding in this regard.[196] Furthermore, no authority for the holding appears to exist.[197] In fact, what authority there is strongly suggests otherwise. For example, in

186. *Bryant*, 994 F.2d at 1087.
187. *Carter*, 781 F.2d at 1032.
188. *Id.* at 1032 n.4.
189. *Id.* at 1032.
190. *Id.*
191. *Oxendine*, 509 F.2d at 1407 (citation omitted).
192. *See id.*
193. *See supra* notes 137-40 and accompanying text.
194. *Bryant*, 994 F.2d at 1087.
195. *Id.* (emphasis added).
196. Petition for Certiorari at 16, *Bryant* (No. 93-5842).

his concurring opinion in *Hudson v. Palmer*,[198] Justice Stevens observed that "the Constitution prohibits a State from treating letters and legal materials as contraband."[199] Additionally, the Eleventh Circuit stated in *Wright v. Newsome* that "[i]t is the fact that [the plaintiff] was denied his *legal* materials and *law* books, and not the deprivation, that brings this claim within the scope of constitutional protection."[200] The D.C. Circuit also stated in *Crawford-El v. Britton* that an official violates a prisoner's right of access to the courts if he deprives a prisoner of his legal materials with the specific intent to interfere or with deliberate indifference to the interference the deprivation might cause.[201] Thus, it is apparent that the courts have regarded inmate legal materials as a distinct class of property entitled to heightened constitutional protection.[202] Absent a clearer statement from the Supreme Court or other circuits as to how legal materials prepared with

197. After a thorough search, the author of this Note has not been able to locate any case that suggests that the court's holding in this regard is justified. Bryant's attorneys were also unsuccessful in finding authority that would support Judge Chapman's conclusion that an inmate forfeits his right to his legal materials by preparing them through unauthorized use of government property, regardless of the impact loss of the materials would have on his legal actions. *See* Petition for Certiorari at 16-17, *Bryant* (No. 93-5842).

Furthermore, in his treatise on prisoner's rights that was published shortly before the court decided *Bryant*, Mushlin states that there were no reported decisions regarding inmate use of computers. 2 MUSHLIN, *supra* note 65, § 11.08, at 62 n.329. The only reported case involving a computer-like device is Sands v. Lewis, 886 F.2d 1166 (9th Cir. 1989). In *Sands*, prison officials refused to permit a prisoner to take possession of a typewriter with a forty character memory. *Id.* at 1168. Prison regulations prohibited prisoners from possessing typewriters with memories in excess of twenty-eight characters. *Id.* Sands argued, *inter alia*, that denial of the typewriter infringed on his right of access to the courts. *Id.* Adopting the Third Circuit's reading of *Bounds v. Smith*, 430 U.S. 817 (1977), the court held that Sands had not alleged that the deprivation of the typewriter actually interfered with his right of access to the courts. *Id.* at 1171. However, the court remanded the case so that Sands could have the opportunity to amend his complaint to allege actual interference. *Id.* at 1172.

198. 468 U.S. 517 (1984).

199. *Id.* at 548 (Stevens, J., concurring in part and dissenting in part); *see also* Vigliotto v. Terry, 873 F.2d 1201, 1202 (9th Cir. 1989) (implicitly rejecting the defendants' contention that seized legal materials containing newspaper clippings concerning the prisoner's trial, law review articles, and photocopied cases were "contraband," but going on to hold that deprivation of those materials for 3 days at the most did not violate the prisoner's right of access to the courts).

Federal regulations do permit prison officials to put limits on the amount of legal materials prisoners may keep in their cells in order to prevent the materials from becoming safety hazards. 28 C.F.R. § 553.11(d) (1993).

200. Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (per curiam).

201. Crawford-El v. Britton, 951 F.2d 1314, 1318 (D.C. Cir. 1991).

202. *Cf.* Parratt v. Taylor, 451 U.S. 527, 530, 543-44 (1981) (holding that a prisoner's deprivation of a hobby kit through the negligence of prison staff did not rise to the level of a constitutional deprivation of due process and that the prisoner's sole remedy would be an action in the state's court of claims for tortious deprivation of property), *overruled in part on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986). *See also* Morello v. James, 810 F.2d 344, 348 (2d Cir. 1987) (stating that "[i]ntentional, substantive violations of constitutional rights are not subject to the rule of *Parratt*").

unauthorized use of government property should be treated, the court should not have been so quick to label Bryant's legal materials as "contraband."

Notwithstanding the lack of authority for the court's conclusion that Bryant's legal materials were contraband, the practical implications of this holding stand to frustrate the right of access to the courts. As Bryant's attorneys argued to the Supreme Court:

> Taken to its logical conclusion, the Fourth Circuit's ruling would permit prison officials to seize and destroy a prisoner's complaint merely because it was contained in a briefcase which the prisoner was not authorized to possess. Or, prison officials could seize a habeas corpus petition simply because it was written with a pen the inmate improperly obtained from the supply room. If a prisoner used the prison library during an unauthorized period, prison officials could completely deny that prisoner's ability to prepare a complaint by confiscating over a year's worth of that inmate's legal work prepared during the unauthorized time.[203]

Other scenarios come to mind as well. For instance, prisoners have occasionally resorted to preparing pleadings and other court documents on toilet paper.[204] A case is imaginable where, because prison officials failed to supply appropriate writing materials, a prisoner might be forced to prepare a complaint on prison-issued toilet paper, using a pen carelessly dropped by a prison guard, alleging deprivation of his right of access to the courts because of the lack of adequate writing materials.[205] Under the *Bryant* court's holding, prison officials could seize and destroy this complaint. Prison officials could argue under *Bryant* that toilet paper is issued to prisoners only for hygienic purposes, not for preparing court documents. Accordingly, by using toilet paper and a pen belonging to the government to prepare his complaint, the prisoner converted government property to an unauthorized use and produced an "item" through unauthorized use of government property. He therefore was entitled to claim no right of ownership to the complaint so drafted and, therefore, was not deprived of his right of access to the courts. Whether or not prison officials deprived him of adequate writing materials would be an entirely different question that the prisoner could take to court, provided he could prepare and file a complaint using author-

203. Petition for Certiorari at 26, *Bryant* (No. 93-5842).

204. *See* Procup v. Strickland, 760 F.2d 1107, 1115 (11th Cir. 1985), *on reh'g*, 792 F.2d 1069 (11th Cir. 1986); Conklin v. Wainwright, 424 F.2d 516, 517 (5th Cir.) (per curiam), *cert. denied*, 400 U.S. 965 (1970).

205. This scenario is similar to the situation in *Conklin*, where a prisoner prepared and filed a complaint on four and one half feet of toilet paper. *Conklin*, 424 F.2d at 517. However, the court was unimpressed with what it deemed an attention-getting tactic, especially in light of evidence that the prison provided prisoners with ten sheets of white bond per day. *Id.*

ized means. As should be clear, the result *Bryant* would arguably compel in this hypothetical case would completely frustrate the right of access to the courts, a right the courts have considered "fundamental."[206]

The Fourth Circuit's resolution of the issue regarding whether Muth and Robbins had deprived Bryant of his right of access to the courts is very much intertwined with its conclusion that Muth and Robbins were entitled to qualified immunity. Since the court concluded that Bryant had no right to his legal materials as the law stood in 1987, it naturally follows that Muth and Robbins could not have violated any "clearly established" right of Bryant's.[207] However, it is not the case that Bryant had no clearly established right to his legal materials despite the fact that the disks upon which he had stored them were contraband. By 1987, it was "clearly established" that prisoners had a constitutional right of access to the courts and that intentional or knowing deprivation of legal materials that interfered with a prisoner's access to the courts could constitute a violation of that right.[208] Moreover, reasonable officials well-versed in prison regulations and procedures[209] should have known that their actions stood to infringe that right. Muth and Robbins were keenly aware that the disks contained Bryant's

206. *See supra* note 122 and accompanying text.

207. *See Bryant*, 994 F.2d at 1087.

208. *See, e.g.*, Morello v. James, 810 F.2d 344, 345-48 (2d Cir. 1987) (holding that a prisoner whose legal materials were confiscated during transfer could state a claim under § 1983 for infringement of this right of access to the court); Simmons v. Dickhaut, 804 F.2d 182, 183 (1st Cir. 1986) (per curiam) (stating that "[m]any courts have found a cause of action for violation of the right of access . . . where it was alleged that prison officials confiscated and/or destroyed legal materials or papers"); Carter v. Hutto, 781 F.2d 1028, 1031-32 (4th Cir. 1986) (holding that a prisoner's allegations that prison officials "confiscated and/or destroyed" legal materials described as "irreplaceable" stated a claim under § 1983 for deprivation of the right of access to the courts); Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (per curiam) (holding that seizure and destruction of prisoner's legal materials by prison officials states a claim under § 1983 for infringement of right of access to the courts); Tyler v. "Ron" Deputy Sheriff, 574 F.2d 427, 429 (8th Cir. 1978) (per curiam) (stating that depriving prisoners of legal materials states a claim under § 1983 if that deprivation results in interference with the right of access to the courts); Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) (per curiam) (maintaining that a prisoner stated a claim under § 1983 for deprivation of right of access to courts by alleging confiscation of legal materials); Bonner v. Coughlin, 517 F.2d 1311, 1320 (7th Cir. 1975) (holding that intentional deprivation of prisoner's trial transcript stated a § 1983 claim for deprivation of the right of access to the courts); Sigafus v. Brown, 416 F.2d 105, 106-07 (7th Cir. 1969) (holding that confiscation and destruction of legal materials necessary for post-conviction evidentiary hearing stated a claim under § 1983 for infringement of right of access to the courts); DeWitt v. Pail, 366 F.2d 682, 685-86 (9th Cir. 1966) (holding that a prisoner states a claim under § 1983 for deprivation of the right of access to the courts by alleging confiscation of his trial transcript by prison officials); Slie v. Bordenkircher, 536 F. Supp. 1264, 1265 (N.D. W. Va. 1981) (holding that under *Oxendine*, a prisoner states a claim under § 1983 for deprivation of right of access to the courts by alleging confiscation of prisoners' "court papers"); Steinberg v. Taylor, 500 F. Supp. 477, 480 (D. Conn. 1980) (holding that confiscation and destruction of a prisoner's legal materials, labeled as such, impeded the prisoner's court actions, and thus interfered with his right of access to the courts).

209. *See Bryant*, 994 F.2d at 1087-88.

legal materials and that Bryant had requested a hard copy of those documents.[210] Despite their knowledge that the disks contained Bryant's legal materials, they treated the disks and the materials on them with callous disregard for Bryant's rights.[211] The court maintained that "[u]nder *Harlow*[, Muth and Robbins] . . . may not be held to the standard of constitutional lawyers."[212] However, there is no need to hold Muth and Robbins to the standard of "constitutional lawyers" in order to find that they, as reasonable persons familiar with prison regulations, ought to have known that they were infringing on Bryant's right of access to the courts. Because Muth and Robbins were sufficiently attentive to be cognizant of prison regulations, they should have been attentive enough to their constitutional responsibility not to interfere with an inmate's right of access to the courts.

One commentator has stated that courts deciding cases after *Harlow* involving qualified immunity generally have followed three methods to determine whether a right was "clearly established."[213] Under the first approach, courts look for a "strict factual correspondence" between cases at bar and other cases in the jurisdiction where a right was found to be clearly established.[214] Under the second approach, the courts require defendants to take heed of analogous situations in other cases establishing the right.[215] In the third approach, the courts require defendants to anticipate future legal

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210. *See supra* notes 21-25 and accompanying text.

211. *See supra* notes 26-28 and accompanying text.

212. *See Bryant*, 994 F.2d at 1087-88 (stating that "Muth and Robbins followed correct BOP procedure when they confiscated both Bryant's contraband computer disks and the material stored on them" and that "[i]n confiscating Bryant's computer disks, Muth and Robbins were carrying out the clear mandate of the BOP Manual").

213. Comment, Harlow v. Fitzgerald: *The Lower Courts Implement The New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 923 (1984) [hereinafter *Qualified Immunity under Section 1983*].

214. *Id.* The commentator discussed Calloway v. Fauver, 544 F. Supp 584 (D.N.J. 1982) as an example of this approach. At issue in *Calloway* was whether prison officials deprived prisoners of their due process rights by placing them in protective custody without a hearing. *Qualified Immunity Under Section 1983*, *supra* note 213, at 924 (citing *Calloway*, 544 F. Supp. at 588-92). Ruling against the prisoners, the court found that the right that the prisoners claimed prison officials violated was not clearly established at the time of the alleged violation. *Id.* at 925. The court found that the Supreme Court had not addressed the "specific issue of whether an inmate was entitled to periodic hearings regarding the continuation of involuntary, long-term, protective custody." *Id.* (citing *Calloway*, 544 F. Supp. at 607). The court also rejected a line of cases in other circuits deciding related issues, an Eighth Circuit case regarding hearings for prisoners in protective custody, and recent decisions in other districts that were directly on point. *Id.* (citing *Calloway*, 544 F. Supp. at 607).

The commentator concluded that "[t]he court apparently required [mandatory authority] exactly, or nearly exactly, on point." *Id.* at 925 (footnote omitted). Criticizing the decision, the commentator stated that the court required "an unrealistically high and generally unattainable degree of certainty in the applicable law" that could lead to the granting of qualified immunity in every conceivable case. *Id.* at 926 (footnote omitted).

215. *Qualified Immunity Under Section 1983*, *supra* note 213, at 927-30 (discussing Anderson v. Central Point School District No. 6, 554 F. Supp. 600 (D. Or. 1982)).

developments which may in retrospect demonstrate that their conduct was unconstitutional.[216]

The court's opinion in *Bryant* represents most closely the first of the three approaches to deciding whether a right was "clearly established" since it distinguishes *Carter* and *Oxendine* on the particularly narrow grounds that the underlying medium of the legal materials in those cases was paper. Although the Supreme Court in *Harlow* emphasized that one of the policies behind qualified immunity was protecting officials from baseless lawsuits,[217] another policy the Court expressed was that court action may be the only way to protect constitutional rights.[218] The narrow approach employed by the Fourth Circuit stands to undermine the latter policy judgment, and additionally the entire scheme for redress of constitutional rights under section 1983 and *Bivens*.[219]

The court also makes much of its belief that Muth and Robbins were merely following prison regulations in treating the disks in the way they did.[220] However, officials accused of depriving prisoners of their constitutional rights are not entitled to claim the protection of rules if the official knew or reasonably should have known that following the rules would result in the violation of a constitutional right.[221] Furthermore, by not treating the disks as personal property contraband, it is arguable that Muth and Robbins were not actually adhering to the rules they claimed to be following.[222] Accordingly, Muth and Robbins should not have been entitled to qualified immunity for depriving Bryant of his legal materials for almost two years.

Finally, at the end of the opinion in *Bryant*, the court posited the following arguments for restricting inmate access to computers:

> In the future, an inmate engaging in the unauthorized access to prison computers could learn to access prison records and computer monitored security systems. Unauthorized inmate access to computers linked with computers outside the prison could create even greater chaos. It is therefore imperative that the rules per-

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216. *Id.* at 930-32 (discussing Forsyth v. Kleindienst, 551 F. Supp. 1247 (E.D. Pa. 1982)).

217. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

218. *Id.* at 814; *Qualified Immunity under Section 1983*, *supra* note 213, at 926.

219. *See id.* at 926.

220. *Bryant*, 994 F.2d at 1084, 1087-88.

221. As the Eighth Circuit wrote:

> An official's actions are not immunized because they were taken according to orders or regulations if the defendant still knew or should have known that he was violating [the] plaintiff's constitutional rights.... [T]he appropriate inquiry, apart from any justification of following orders or regulations, is whether reasonable persons in the defendants' position should have known that their conduct violated clearly established constitutional rights.

J.H.H. v. O'Hara, 878 F.2d 240, 244-25 n.4 (8th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990).

222. *See supra* notes 153-81 and accompanying text.

> taining to inmate use of prison computers be vigorously enforced.[223]

While these are generally valid concerns, they do not justify the result the court reaches. First, the facts indicate that the computers Bryant used in this case were not equipped with modems, nor were they otherwise networked with each other or with any other computers outside the Education Department.[224] Furthermore, the facts indicate that the prisoners using the computers were not engaged in malicious or illegal activities.[225] Bryant used the computers only for word processing—hardly an activity that could be characterized as computer crime. Lastly, the court's fears simply do not comport with common sense. As a simple matter of security, any computer to which an inmate could conceivably have access would not be networked with systems controlling prison security or with computers outside the prison. Ideally, any computer to which an inmate could have access should either not be on a network or should be networked only with a local file server that would hold programs and other files only for the inmate computer facility. Furthermore, networked systems should be configured to allow inmate users to run only specified programs on the file server.[226]

Overall, the analysis above leads to the conclusion that the Fourth Circuit decided *Bryant* wrongly, and thus, allowed to go unremedied the violation of an important constitutional right. The court overly concerned itself with the fact that Bryant's access to the computers in the Education Department was unauthorized under prison regulations, and it ignored a vast body of law regarding the right of access to the courts when ruling that Bryant had no right to his legal materials. The court's overly narrow distinguishing of *Carter* and *Oxendine* is unwarranted, and the court's emphasis on the fact that Muth and Robbins were merely following prison regulations sounds an ominous tone that the court may be reverting to the purportedly rejected "hands-off" doctrine.

After *Bryant*, federal prisoners in Bryant's situation must hope for some major changes in policies concerning the use of computers by prison inmates. First, no promulgated federal regulations exist regarding inmate

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223. *Bryant*, 994 F.2d at 1088.

224. *See supra* note 20.

225. *See supra* note 20.

226. For example, *Microsoft Windows Version 3.1* easily can be configured to permit a user to execute only a certain set of programs. The procedure involves building in a "restrictions" section into the PROGMAN.INI initiation file read by the Windows Program Manager on startup. Restrictions that can be placed on users include disabling of the "Run" and "Exit Windows" commands under the File menu, preventing the user from altering and/or saving changes to the Program Manager's program groups or other icons, and disabling the File menu completely. *See* MICROSOFT CORPORATION, MICROSOFT WINDOWS RESOURCE KIT: COMPLETE TECHNICAL INFORMATION FOR THE SUPPORT PROFESSIONAL FOR THE MICROSOFT WINDOWS OPERATING SYSTEM VERSION 3.1 221, 276 (1992); FRED DAVIS, THE WINDOWS 3.1 BIBLE 122 (1993).

use of computers.[227] The only standards that govern inmate access to computers are outlined in the unpublished BOP Statement 1237.6, relied upon heavily by the court in *Bryant*. The BOP should propose, receive comments on, and promulgate federal regulations regarding the use of computers by inmates through the normal administrative rulemaking process. Furthermore, with regard to inmate use of computers for legal work, those regulations should be more reasonable than the standards outlined in the existing policy statement. According to the policy statement,

> [a]ccess and use of any computer resource by inmates must be carefully monitored and controlled to prevent misuse, fraud or abuse. While inmates may have access to microcomputers for vocational training, educational or FPI programs, no other access or use of computers is permitted except as indicated below.
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> . . . .
>
> [I]nmates may not be permitted the use of computer equipment for . . . legal work without specific written authority on an individual basis from the CEO [Chief Executive Officer].
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> . . . .
>
> [D]isks or tapes, if provided, remain the property of the institution and may not be permitted as approved personal property.[228]

In drafting regulations governing inmate use of computers, the BOP should take the following considerations into account. First, requiring inmates to seek approval of the warden before using computers for legal work is simply not reasonable.[229] The regulation should permit officials more closely associated with computing resources to issue authorizations or at least make clear that the warden may delegate the authority to issue authorizations to subordinate officials. Second, prisoners should be permitted to purchase disks at reasonable prices from the prison for use in the inmate computer facility. As a security matter, the BOP might require prisoners who have purchased disks to allow the computer staff to keep the disks in a secure location in the computer lab to prevent the introduction of computer viruses or programs that might present a threat to prison security. Inmates would be permitted to use the disks while in the computer lab, but the disks would have to be locked up while not in use. While prison staff would be responsible for safeguarding the disks against destruction, tampering, or theft, prison staff would be barred from inspecting the data on the disks absent a bona fide suspicion that the disks contained unauthorized information or

227. *See* 28 C.F.R. §§ 500.1-553.15 (1993).

228. *Bryant*, 994 F.2d at 1083 n.2 (quoting BOP Statement 1237.6).

229. Federal regulations state that the warden is the chief executive officer of a Federal Corrections Institute. 28 C.F.R. § 500.1 (1993).

programs.[230] Third, inmates would have access to computers at reasonable times to perform their legal work subject to computing needs with higher priorities, such as classroom instruction and the needs of other inmate users. Fourth, the BOP might reasonably limit the programs that an inmate could use to those germane to legal work, the most obvious example being a word processing package. Lastly, the policy regarding inmate use of computers for legal work should be made known to all inmates who might desire such services.

Given the fact that federal regulations already permit prisoners to use typewriters for legal work,[231] no legitimate reason exists for putting excessively tight restrictions on inmate computer access for similar undertakings. Indeed, allowing inmates to keep voluminous legal work on computer disks rather than reams of paper in prisoners' cells reduces the risks of fire and other safety hazards.[232] One of the reasons the controversy in *Bryant* developed was that prison officials had not indicated that they had any policy regarding inmate use of computers for personal and legal purposes, and furthermore, inmates apparently thought they were generally permitted to use the computers after hours.[233] The controversy easily could have been avoided had the BOP promulgated regulations such as those suggested above and made those regulations known to the prison population. Until the BOP does so, a situation similar to the one in *Bryant* is likely to arise again.

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230. Of course, inmates should be entitled to remove their disks from the computer facility upon release or transfer from the institution in which they are confined.

231. 28 C.F.R. § 543.11(h) (1993).

232. *See supra* note 199 and accompanying text.

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

The Convergence of Plain Error and Lesser Included Offense Rules in *State v. Collins*

Should our criminal justice system give defendants a second chance when their lawyers mishandle their defenses? This Note explores this question by examining the convergence, in a recent North Carolina Supreme Court decision, of two rules of North Carolina's criminal law: the plain error rule[1] and the lesser included offense rule.[2] The Note begins with a summary[3] of the court's holding in *State v. Collins*.[4] After exploring the relevant background law,[5] the Note observes that the *Collins* decision clarifies the law of plain error and lesser included offenses.[6] The Note concludes that North Carolina appropriately answers the question raised above. Although North Carolina courts are willing to give criminal defendants a second chance when their lawyers mishandle their defenses, the courts will do so only under narrow circumstances; this restrained approach conserves judicial resources and prevents miscarriages of justice.

At a party on December 20, 1992, several witnesses saw Jehue Collins shoot David Brown in the chest with a .22 caliber rifle. Brown later died.[7] The State charged Collins with murder. At trial, he asserted two defenses: he maintained that someone else shot had Brown and that, alternatively, even if he shot Brown, the gunshot wound did not cause Brown's death.[8] To buttress this second defense, Collins called North Carolina's longtime Chief Medical Examiner, Dr. Page Hudson. Dr. Hudson testified that, in his expert opinion, the gunshot wound was not the proximate cause of

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1. The plain error rule permits criminal defendants to appeal errors even if they failed to bring the errors to the trial court's attention. State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

2. The lesser included offense rule requires a trial court to instruct the jury on a lesser included offense if the evidence supports a verdict on the offense. State v. Powell, 277 N.C. 672, 677, 178 S.E.2d 417, 420 (1971). Criminal defendants may also seek relief for their attorneys' mishandling of their cases under the constitutional right to effective assistance of counsel. *See generally* IRVING JOYNER, CRIMINAL PROCEDURE IN NORTH CAROLINA 834-36 (1989) (highlighting the obligation of attorneys to file "no merit" briefs to allow appellate review); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 562-95 (2d ed. 1992) (providing that ineffective assistance of counsel may be based upon state interference, attorney conflict of interest and lawyer incompetence). This Note does not address this issue, because the defendant did not raise it on appeal. Record at 45-50, State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993) (No. 366A92).

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

4. 334 N.C. 54, 57, 431 S.E.2d 188, 190 (1993).

5. *See infra* notes 33-46 and accompanying text.

6. *See infra* notes 47-88 and accompanying text.

7. *Collins*, 334 N.C. at 57, 431 S.E.2d at 190.

8. *Id.*

Brown's death. He suggested instead that a pre-existing gallbladder disease caused Brown's death.[9]

Pursuant to the State's indictment, and without objection from Collins, the trial court instructed the jury on murder.[10] Facing the choice of acquitting Collins of all wrongdoing or convicting him of murder, the jury convicted him.[11] Collins appealed directly to the North Carolina Supreme Court.[12]

A critical basis for Collins's appeal[13] was that the trial court committed reversible error by failing to instruct the jury that they could find Collins guilty of lesser included offenses if they did not reach a guilty verdict on murder.[14] Even though he did not ask for instructions on attempted murder and felonious assault, Collins argued that the trial court should have instructed the jury on these two lesser included offenses.[15]

The North Carolina Supreme Court partially agreed with Collins. It found that attempted murder was a lesser offense within the offense of murder,[16] but that felonious assault was not.[17] Based on this finding, the court held that the trial court committed reversible error by failing to submit the charge of attempted murder to the jury.[18]

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9. *Id.* at 61, 431 S.E.2d at 192.

10. *Id.* at 61, 431 S.E.2d at 193. The trial court gave the following instruction: "Now as you know, ladies and gentlemen, in this case the defendant has been accused of first degree murder. Under the law and evidence of this case, it is your duty to return one of the two following verdicts: guilty of first degree murder or not guilty. . . ." Transcript at 149, State of North Carolina General Court of Justice, Superior Court Division, Forsyth County (No. 92-CRS-3345). Although Collins did not object to the trial court's instructions on murder, he did object to the court's instructions on proximate cause. The court overruled this objection. Record at 29.

11. *Collins*, 334 N.C. at 56, 431 S.E.2d at 190.

12. *Id.*

13. Other errors that Collins assigned included the denial of funds to hire an investigator; the sustainment of numerous objections by the state; and a lay witness's testimony about the victim's excellent health prior to the shooting. Defendant-Appellant's Brief at i-ii.

14. *Collins*, 334 N.C. at 57, 431 S.E.2d at 190.

15. *Id.*

16. *Id.* at 59, 431 S.E.2d at 191.

17. *Id.* at 63, 431 S.E.2d at 193-94. The court found, based on "[a] proper regard for the doctrine of stare decisis," that felonious assault was not a lesser offense within the offense of murder. *Id.* at 63, 431 S.E.2d at 194. The court reached this conclusion in State v. Gibson, 333 N.C. 29, 38-39, 424 S.E.2d 95, 100 (1992) and State v. Whiteside, 325 N.C. 389, 402, 383 S.E.2d 911, 918 (1989). As the court explained, "an indictment charging that defendant unlawfully, willfully and feloniously and of malice aforethought did kill and murder [the victim] is insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill because such murder indictment does not specify a murder accomplished by assault." *Collins*, 334 N.C. at 63, 431 S.E.2d at 194 (quoting *Whiteside*, 325 N.C. at 403, 383 S.E.2d at 919) (internal quotations omitted).

18. *Collins*, 334 N.C. at 63, 431 S.E.2d at 193. Because the court reached its result on state law grounds, it refused to reach the question of whether Collins's federal constitutional rights were violated. *Id.* at 58, 431 S.E.2d at 190.

To reach this decision, the court had to address the failure of Collins's counsel to object to the trial court's jury instructions.[19] Under North Carolina law, counsel must object at trial to errors in jury instructions; the purpose of this rule is to give the trial court a chance to cure those errors.[20] Absent objection, a party waives his right to appeal an alleged jury instruction error.[21] Under the plain error exception to this general rule, however, North Carolina appellate courts will hear assignments of error if the error is "so fundamental as to amount to a miscarriage of justice or [if the error] probably resulted in the jury reaching a different verdict than it otherwise would have reached."[22]

The *Collins* court found a case of plain error.[23] According to the court, the jury confronted an impermissible dilemma: They could convict Collins of murder or they could let him go free.[24] Although the jury chose the former, the court speculated that, given the choice, the jury would have preferred to convict Collins of attempted murder.[25] In short, if the trial court had instructed the jury on attempted murder, the jury would have reached a different verdict, suggesting that the failure to so instruct amounted to plain error.[26]

Justice Meyer concurred in the majority's holding that attempted murder was a lesser included offense of murder.[27] He dissented, however, from the majority's holding that the trial court committed plain error by failing to instruct the jury on attempted murder.[28] Justice Meyer believed Collins made a tactical decision not to ask for an instruction on attempted murder.

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19. *Id.* at 61, 431 S.E.2d at 193.

20. LAFAVE & ISRAEL, *supra* note 2, at 1158. This so-called "raise-or-waive" rule has a number of other rationales:

> [I]t is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; . . . fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; . . . the rule promotes efficient trial proceedings; . . . reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; . . . there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. . . .

Id. (quoting State v. Applegate, 591 P.2d 371, 373 (Or. App. 1979)).

21. N.C. R. APP. P. 10(b)(2).

22. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193 (quoting State v. Bagley, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citing State v. Walker, 316 N.C. 33, 37, 340 S.E.2d 80, 82 (1986); State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)), *cert. denied*, 485 U.S. 1036 (1988)).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 62-63, 431 S.E.2d at 193.

27. *Id.* at 64, 431 S.E.2d at 194 (Meyer, J., concurring in part and dissenting in part).

28. *Id.* (Meyer, J., concurring in part and dissenting in part).

He speculated that Collins believed Dr. Hudson's testimony would lead the jury not to convict on murder.[29]

In Justice Meyer's opinion, Collins gambled on acquittal and lost.[30] He believed Collins should suffer the consequences of this gamble. To find otherwise, Justice Meyer reasoned, would permit criminal defendants to hope for acquittal and then, upon conviction, to raise on appeal matters that should have been remedied at trial.[31] Justice Meyer also noted that an unintended consequence would flow from the majority's decision. Because future trial courts would be forced to instruct juries on all lesser included offenses supported by the evidence, defendants could no longer waive submission of these instructions; thus, defendants would be deprived of the "all or nothing" strategy that Justice Meyer believed Collins used at his trial.[32]

Two lines of North Carolina case law help explain *Collins*. The first deals with the plain error rule; the other, with jury instructions on lesser included offenses. North Carolina adopted the plain error rule in *State v. Odom*.[33] The *Odom* court grafted the plain error rule onto Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure.[34] That rule states:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.[35]

The defendant in *Odom* failed to state his objections at trial pursuant to Rule 10(b)(2), but urged the Supreme Court to adopt a plain error rule exception to the rule.[36] The court did so, modelling its exception on a federal rule providing that: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[37]

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29. *Id.* at 64-65, 431 S.E.2d at 194-95 (Meyer, J., concurring in part and dissenting in part).

30. *Id.* (Meyer, J., concurring in part and dissenting in part). No evidence in the record supports the inference that Collins refrained, as a trial tactic, from asking for instructions on the lesser included offense. *See infra* notes 77-79 and accompanying text.

31. *Id.* at 65, 431 S.E.2d at 195 (Meyer, J., concurring in part and dissenting in part).

32. *Id.* at 66-67, 431 S.E.2d at 196 (Meyer, J., concurring in part and dissenting in part).

33. 307 N.C. 655, 300 S.E.2d 375 (1983).

34. *Id.* at 660, 300 S.E.2d at 378.

35. N.C. R. App. P. 10(b)(2).

36. *Odom*, 307 N.C. at 659, 300 S.E.2d at 378.

37. Fed. R. Crim. P. 52(b). The court noted that Rule 10(b)(2) was "virtually the same" as Rule 30 of the Federal Rules of Criminal Procedure. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Federal courts could, however, mitigate the harshness of Rule 30 by invoking Rule 52(b) of the Federal Rules of Criminal Procedure.

The *Odom* court thought this exception a sensible way to mitigate the harshness of Rule 10(b)(2).[38]

The *Odom* rule did not negate Rule 10(b)(2).[39] Defendants must meet a high standard to convince a court to overturn a conviction under the plain error rule. The *Odom* court listed the kinds of cases that would meet such a standard: cases involving "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done"; situations in which a "grave error . . . amounts to a denial of a fundamental right of the accused"; errors that result "in a miscarriage of justice or in the denial to appellant of a fair trial"; errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings"; or cases in which "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."[40] Having set a high standard for the plain error rule, the *Odom* court correctly predicted that it would rarely use the rule to overturn criminal convictions.[41] Beginning with *Odom* itself,[42] North Carolina courts have rejected numerous defendants' pleas to overturn criminal convictions based on the plain error rule.[43]

The lead North Carolina case on lesser included offenses is *State v. Powell*.[44] In that case, the North Carolina Supreme Court held that a trial

38. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. The plain error rule is now codified at N.C. R. APP. P. 10(c)(4).

39. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

40. *Id.* (quoting United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982) (citations omitted)).

41. *Id.* at 660-61, 300 S.E.2d at 378.

42. *Id.* at 661-62, 300 S.E.2d at 379 (finding no plain error when trial court failed to instruct jury on a lesser included offense, but the record strongly suggested defendant was guilty of the greater offense).

43. *E.g.*, State v. Loftin, 322 N.C. 375, 381-82, 368 S.E.2d 613, 617 (1988) (finding no plain error when trial court failed to instruct the jury on accident in a murder prosecution, because the defendant's testimony was contradicted and the defendant's credibility was impeached); State v. Bagley, 321 N.C. 201, 212, 362 S.E.2d 244, 251 (1987) (finding no plain error when trial court failed to instruct jury on attempted sexual offenses, because the evidence did not support such an instruction), *cert. denied*, 485 U.S. 1036 (1988); State v. Lilley, 318 N.C. 390, 394, 348 S.E.2d 788, 791 (1986) (finding no plain error when, in an instruction on assault with a deadly weapon, the trial court failed to instruct the jury that the defendant had no duty to retreat to his home); State v. Walker, 316 N.C. 33, 39-40, 340 S.E.2d 80, 84 (1986) (finding no plain error when the prosecution cross-examined the defendant about his silence after he was arrested, because the record as a whole indicated that the prosecution's tactics did not cause the jury to reach a decision that it would not have reached otherwise); State v. Morgan, 315 N.C. 626, 646, 340 S.E.2d 84, 96 (1986) (finding no plain error when the trial court failed to instruct the jury on the defendant's right to stand his ground if he was not the aggressor, because the record as a whole cast doubt on the importance of the trial court's failure); State v. Harris, 315 N.C. 556, 564, 340 S.E.2d 383, 388 (1986) (finding no plain error when trial court failed initially to instruct the jury on a theory of acting in concert but corrected the instruction on the jury's second day of deliberation). *But see* State v. Bell, 87 N.C. App. 626, 635-36, 362 S.E.2d 288, 293-94 (1987) (finding plain error when the trial court failed to instruct the jury on a lesser included offense).

44. 277 N.C. 672, 178 S.E.2d 417 (1971).

court need not instruct a jury on a lesser included offense, unless there is evidence to support a verdict on that offense.[45] On the other hand, a long line of cases prior and subsequent to *Powell* established that, if this evidence existed, a trial court has a duty to instruct the jury on the lesser included offense, even if the defendant failed to ask for such an instruction.[46]

The plain error rule and the lesser included offense rule converge in three decisions, *State v. Odom*,[47] *State v. Bell*,[48] and *State v. Liner*.[49] In *Odom*, the jury convicted David Ambrose Odom of attempted robbery with a firearm.[50] On appeal, Odom argued that the trial court erred by failing to submit the lesser included offense of simple assault to the jury.[51] The

45. *Id.* at 677, 178 S.E.2d at 420 (citing State v. Williams, 275 N.C. 77, 88, 165 S.E.2d 481, 488 (1969); State v. Lentz, 270 N.C. 122, 126, 153 S.E.2d 864, 868, *cert. denied*, 389 U.S. 866 (1967); State v. Bridges, 266 N.C. 354, 355, 146 S.E.2d 107, 108 (1966); State v. Hicks, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954)); *cf.* State v. Strickland, 321 N.C. 31, 42, 361 S.E.2d 882, 887 (1987) (holding that trial court need only submit second-degree murder to the jury when defendant shows sufficient evidence to negate specific intent of first-degree murder).

46. State v. Wallace, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983); State v. Ferrell, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980); State v. Moore, 300 N.C. 694, 699, 268 S.E.2d 196, 201 (1980); State v. Dooley, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); State v. Riera, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970); State v. Gray, 58 N.C. App. 102, 106, 293 S.E.2d 274, 276, *cert. denied*, 306 N.C. 746, 295 S.E.2d 482 (1982); State v. Lang, 58 N.C. App. 117, 118, 293 S.E.2d 255, 256, *cert. denied*, 306 N.C. 747, 295 S.E.2d 761 (1982); State v. Little, 51 N.C. App. 64, 67, 275 S.E.2d 249, 251 (1981); State v. Williams, 51 N.C. App. 397, 399, 276 S.E.2d 715, 716, *cert. denied*, 303 N.C. 319, 281 S.E.2d 658 (1981).

47. 307 N.C. 655, 300 S.E.2d 375 (1983). This is, of course, the same case that adopted the plain error rule in North Carolina. *See supra* notes 35-43 and accompanying text.

48. 87 N.C. App. 626, 362 S.E.2d 288 (1987).

49. 98 N.C. App. 600, 391 S.E.2d 820, *disc. rev. denied*, 327 N.C. 435, 395 S.E.2d 693 (1990).

50. *Odom*, 307 N.C. at 656, 300 S.E.2d at 376.

51. *Id.* at 658-59, 300 S.E.2d at 377. The trial court's instructions to the jury were as follows:

> COURT: Members of the Jury, this is a criminal case wherein the defendant, [David Ambrose Odom], is charged with the crime of . . . attempted robbery with a firearm.
>
> . . . .
>
> So, then, Members of the Jury, I charge you that if you find from the evidence . . . that . . . the defendant . . . intended to rob William Streater, and in furtherance of this intent, he possessed a firearm which he used or threatened to use in such a manner as to endanger or threaten the life of William Streater, and that this was an act designed to bring about the robbery and which, in the ordinary course of things, would have resulted in robbery, had it not been stopped or thwarted, it would be your duty to return a verdict of guilty as charged of attempted robbery with a firearm.
>
> However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.
>
> Any further requests by the State?
>
> MR. MURPHY: No, Your Honor.
>
> THE COURT: For the defendant?
>
> MR. ACTON: No further requests, Your Honor.

Record at 12-16, State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983) (No. 551A82).

North Carolina Supreme Court rejected Odom's argument and sustained his conviction.[52] The court noted that, under the plain error rule, it was proper to consider Odom's assignment of error even though he did not object to the jury instructions at trial.[53] Nevertheless, the court explained, "[i]n deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the *entire record* and determine if the instructional error had a probable impact on the jury's finding of guilt."[54]

Looking at the entire record, the *Odom* court found no plain error. It pointed out that Odom's victim identified him and that a witness corroborated the victim's testimony. The court contrasted this evidence with Odom's uncorroborated testimony that he was not present at the crime scene, and it pointed out that the State contradicted and impeached this testimony.[55] In sum, the *Odom* court found the trial court erred by failing to instruct the jury on simple assault; however, in light of the entire record, this error did not amount to plain error.

In *State v. Bell*,[56] the State indicted Dwight Bell on two offenses: assault with a deadly weapon with intent to kill and discharging a firearm into an occupied vehicle. After instructions on these charges,[57] the jury convicted Bell of assault with a deadly weapon with intent to kill.[58] Bell appealed his conviction and argued that the trial court erred by failing to submit to the jury a lesser included offense, simple assault.[59]

The North Carolina Court of Appeals agreed with Bell's argument and granted him a new trial.[60] The court began its discussion by noting that "[b]ecause the defendant failed to object at trial to the instruction given, our review is limited to whether the omission constitutes 'plain error.'"[61] The court next explained that "to obtain relief under [the plain error] doctrine, defendant must establish that the omission was error, and that, *in light of the record as a whole*, the error had a probable impact on the verdict."[62]

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52. *Odom*, 307 N.C. at 662, 300 S.E.2d at 379.

53. *Id.* at 661, 300 S.E.2d at 378.

54. *Id.* at 661, 300 S.E.2d at 378-79 (citing United States v. Jackson, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978)) (emphasis added).

55. *Id.* at 661-62, 300 S.E.2d at 379.

56. 87 N.C. App. 626, 362 S.E.2d 288 (1987).

57. Neither defense nor prosecution counsel requested instructions on lesser included offenses. Defendant-Appellant's Brief at app. 39a-41a, State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987) (No. 8714SC186).

58. *Bell*, 87 N.C. App. at 627, 362 S.E.2d at 289. At the end of the state's case, the trial court dismissed the second charge against Bell: discharging a firearm into an occupied vehicle. *Id.*

59. *Id.* at 627-28, 362 S.E.2d at 289.

60. *Id.* at 635-36, 362 S.E.2d at 293-94.

61. *Id.* at 634, 362 S.E.2d at 293.

62. *Id.* at 635, 362 S.E.2d at 293 (citing State v. Sams, 317 N.C. 230, 241, 345 S.E.2d 179, 186 (1986)) (emphasis added).

Looking at the entire record, the *Bell* court found plain error. It noted there was evidence from which the jury could have found the defendant guilty of simple assault. Specifically, there was conflicting evidence about whether Bell used a firearm when he assaulted the victim.[63] The *Bell* court distinguished *Odom* by pointing out that, in *Odom*, "the State's evidence of guilt was clear and the defendant's evidence [was] neither credible nor corroborated."[64]

In *State v. Liner*,[65] the State indicted and tried Barry Dean Liner on second-degree murder charges. In the course of the charge conference, the judge questioned Liner and found that he willingly elected not to have lesser included offenses submitted to the jury.[66] The jury subsequently convicted Liner of murder.[67] Liner appealed his conviction and argued that the trial court erred by failing to submit involuntary manslaughter to the jury.[68]

The North Carolina Court of Appeals rejected Liner's argument and sustained his conviction.[69] The court said that although the trial judge must submit lesser included offenses when supported by the evidence, prior cases did not establish that a "defendant cannot waive his right to have verdicts of lesser included offenses submitted to the jury even though the evidence

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63. *Id.* at 635, 362 S.E.2d at 293.

64. *Id.* at 636, 362 S.E.2d at 293.

65. 98 N.C. App. 600, 391 S.E.2d 820, *disc. rev. denied*, 327 N.C. 435, 395 S.E.2d 693 (1990).

66. *Id.* at 608-09, 391 S.E.2d at 824. The charge conference went as follows:

> MR. HUNT [defendant's counsel]: . . . If I might ask the Court to inquire—I don't know if this is proper, but I discussed lesser included offenses also with my client, as to whether or not he wanted me to request that, and he has indicated, and I have a signed statement to that effect, that he is aware of the circumstances and has elected only to request that the Court submit it on second degree murder or not guilty, and I just wanted the record to reflect that, and if the Court wanted to inquire, I have no objection.
>
> COURT: Mr. Liner, if you would stand, please, sir.
>
> Mr. Liner, you have conferred with your attorney, Mr. Hunt, as to your election not to request this Court [to] submit to the jury the lesser included offenses of voluntary manslaughter and involuntary manslaughter, is that correct?
>
> MR. LINER: Yes, your Honor.
>
> COURT: Has he explained to you those charges?
>
> MR. LINER: Yes.
>
> COURT: . . . and you have asked him any questions you desired?
>
> MR. LINER: Yes, sir.
>
> COURT: And is it your decision after conferring with your attorney not to request this Court to instruct on involuntary manslaughter and voluntary manslaughter?
>
> MR. LINER: Yes, your Honor.

Id. (quoting Brief for the State at 26-27, State v. Liner, 98 N.C. App. 600, 391 S.E.2d 820, *disc. rev. denied*, 327 N.C. 435, 395 S.E.2d 693 (1990) (No. 8915SC888) (quoting Transcript at 292-93, State of North Carolina General Court of Justice, Superior Court Division, Alamance County (No. 88-CRS-21207))).

67. *Id.* at 604, 391 S.E.2d at 822.

68. *Id.* at 608, 391 S.E.2d at 824.

69. *Id.* at 609-10, 391 S.E.2d at 825.

might give rise to such verdicts."[70] Instead, defendants may knowingly, intelligently, and voluntarily waive instructions on lesser included offenses.[71] Based on this rule, the court then held that Liner had "knowingly, intelligently, and voluntarily waived"[72] his right to submit the lesser included offenses to the jury.

Liner and *State v. Collins*[73] are distinguishable. In *Liner*, the trial court expressly asked the defendant if he wanted an instruction on a lesser included offense;[74] in *Collins*, the trial court did not. During the *Collins* charge conference, the trial court never expressly asked the defendant if he wanted an instruction on a lesser included offense—in this case, attempted murder. The trial court asked only if the defendant had "any requests for special instructions, or any recommended alternative verdicts to be submitted."[75] Later, after charging the jury on murder, the trial court again failed to ask the defendant if he wanted an instruction on attempted murder.[76] Thus, the record discloses that Collins's counsel did not make clear whether Collins wanted to waive his right to submit the lesser included offense to the jury. *Collins* and *Liner* are distinguishable on this basis, as Liner did make clear his intention to waive his right.[77]

The distinction between *Collins* and *Liner* is a sensible one. Under *Collins*, a trial judge must clarify the defendant's waiver of jury instructions on a lesser included offense. Unless such a waiver appears on the record, an appellate court will grant the defendant a new trial so that a jury can consider whether the defendant is guilty of the omitted lesser offense. This

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70. *Id.* at 609, 391 S.E.2d at 825.

71. *Id.* at 609-10, 391 S.E.2d at 825.

72. *Id.*

73. 334 N.C. 54, 431 S.E.2d 188 (1993).

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

75. Brief for the State at 29.

76. Record at 28-29. The conversation between the trial court and defense counsel went as follows:

> THE COURT: Ms. Sunshine [prosecutor], Mr. Saunders [prosecutor], Mr. Siskind [defense counsel], before sending this verdict form into the jury and allowing them to begin their deliberations, I'll now consider any requests for corrections to the charge or any additional matter that any of you may feel is necessary or appropriate to submit a proper charge to the jury.
>
> On behalf of the State, are there any specific requests for corrections or additions to the charge?
>
> MS. SUNSHINE: No, sir.
>
> THE COURT: Mr. Siskind, on behalf of the defendant are there any specific requests or additions to the charge?
>
> MR. SISKIND: Your Honor, I still object to the footnoted portion that you gave on proximate cause.
>
> THE COURT: All right. Objection overruled. Please hand the verdict [form] in to the jury, please.

Id.

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

rule reflects a sensible policy: Courts should not allow criminal defendants to waive their rights unless they fully understand the consequences of waiving those rights.[78]

The distinction also sheds light on *State v. Bell*.[79] In *Bell*, as in *Collins*, the trial judge failed to elicit properly the defendant's waiver of jury instructions on a lesser included offense. The *Bell* court consequently overturned the defendant's conviction and granted him a new trial so a jury could consider whether he was guilty of the omitted lesser offense.[80]

Although one can harmonize *Collins* with *Liner* and *Bell*—two of the cases in which the plain error rule and the lesser included offense rule converge—harmonizing *Collins* with *State v. Odom*[81] is more difficult. In *Odom*, as in *Collins* and *Bell*, the trial court failed to elicit the defendant's waiver of jury instructions on a lesser included offense; the *Odom* court, however, refused to find plain error.

On closer examination, though, *Odom* is distinguishable from *Collins* and *Bell* in light of one important factor: "In deciding whether a defect in the jury instruction constitutes 'plain error,' [an] appellate court must examine the *entire record* and determine if the instructional error had a probable impact on the jury's finding of guilt."[82] The complete *Odom* record suggested that the trial court's failure to instruct the jury on a lesser included offense did not result in plain error, because the State presented a very strong case, and the defendant a weak one.[83] Even absent the error, the jury likely would have convicted the defendant. In contrast, the *Bell* court found strong evidence from which the jury could have found the defendant guilty of the lesser offense and innocent of the greater offense.[84] Absent the error, it is likely the jury would *not* have convicted the defendant of the greater offense.

Similarly, the entire *Collins* record suggested that the trial court's failure to instruct the jury on attempted murder resulted in plain error. The *Collins* court stressed Dr. Hudson's service as North Carolina's Chief Medical Examiner[85] and noted Dr. Hudson's unequivocal conclusion that a pre-

78. *Cf.* State v. Roux, 263 N.C. 149, 155-58, 139 S.E.2d 189, 193-95 (1964) (holding that defendants may waive a right only after intelligent consideration of the consequences of this waiver).

79. 87 N.C. App. 626, 362 S.E.2d 288 (1987).

80. *See supra* notes 62-66 and accompanying text.

81. 307 N.C. 655, 300 S.E.2d 375 (1983).

82. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79 (citing United States v. Jackson, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978)) (emphasis added).

83. *See supra* notes 56-57 and accompanying text.

84. *See supra* notes 62-63 and accompanying text.

85. "Dr. Page Hudson [was] a forensic pathologist of impeccable medical credentials who had performed approximately 5,000 autopsies and who had taught forensic pathology at several nationally recognized medical colleges . . . ." *Collins*, 334 N.C. at 62, 431 S.E.2d at 193.

existing gallbladder disease, not a gunshot wound, caused the victim's death.[86] The strength of Dr. Hudson's evidence, coupled with the trial court's failure to give the instruction on attempted murder, led the *Collins* court to find plain error.[87]

After *Collins*, the relationship between the plain error rule and the lesser included offense rule is clearer. First, *Collins* suggests that the North Carolina Supreme Court is ready to use both rules to aid criminal defendants. After refusing, in earlier cases, to overturn convictions based on the rules,[88] the court showed that, under proper circumstances, it would use the rules to overturn convictions.

Second, *Collins* reveals that, although the court will use the rules, it will do so only in limited circumstances: when the entire trial record indicates that the jury could reasonably have reached a different verdict. This standard puts a heavy burden on defendants seeking to use the rules to overturn convictions.

Finally, *Collins* indicates that the court will not easily find that defendants have waived their rights to instructions on lesser included offenses. The court will demand that defendants make their waivers expressly and that the trial court get these waivers on the record. At first glance, this rule seems overly technical; upon closer examination, however, the rule is sensible. Courts should not allow criminal defendants to waive their rights unless they fully understand the consequences of waiving those rights. By demanding that defendants expressly waive their rights on the record, courts will ensure that full understanding is reached.

Collins thus establishes that criminal defendants should, under narrow circumstances, get a second chance when their lawyers mishandle their defenses at trial. This narrowly tailored rule conserves judicial resources and prevents miscarriages of justice.

JOSEPH E. SMITH

86. The court found that "[t]he testimony of Dr. Hudson was substantial evidence tending to show that no action by the defendant either caused or directly contributed to the death of the victim." *Collins*, 334 N.C. at 61, 431 S.E.2d at 192. The court further found that "the testimony of Dr. Page Hudson . . . clearly and unequivocally tended to show that the defendant's action in shooting the victim had nothing to do with the victim's death." *Id.* at 62, 431 S.E.2d at 193.

87. *Id.* at 62, 431 S.E.2d at 193.

88. *See supra* notes 56-57 and accompanying text.

Crawford v. Air Line Pilots Association: The Fourth Circuit Determines What Expenses a Union May Charge to Nonunion Workers

Tension between the competing policies of labor empowerment and the workers' right to dissent from union policies has been an enduring feature of the law of organized labor. The United States Supreme Court generally has supported both "union shop" agreements,[1] under which all employees are required to join the union,[2] and "agency-shop" agreements,[3] which require nonunion employees to pay union dues.[4] However, the Court has determined that the First Amendment limits the purposes for which a union may use compulsory fees.[5] Unfortunately, the Court has been anything but clear in its delineation of which purposes are permissible.[6]

The United States Court of Appeals for the Fourth Circuit recently confronted the issue of compulsory fees in *Crawford v. Air Line Pilots Ass'n*,[7] a case decided under the federal Railway Labor Act (RLA).[8] The

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1. Railway Employees Dep't v. Hanson, 351 U.S. 225, 235 (1956).

2. Abood v. Detroit Bd. of Educ. 431 U.S. 209, 217 n.10 (1977) (stating that a union-shop provision in a collective bargaining agreement requires employees to join the union within a certain period of time and to pay all dues and fees uniformly required by the union).

3. *Id.* at 225-26.

4. *Id.* at 211 (stating that an agency-shop agreement requires all employees either to join the union or to pay to the union an agency fee for the union's services in representing them in collective bargaining with the employer). For further comparison of the union shop and the agency shop, see ROBERT A. GORMAN, LABOR LAW 642 (1976).

5. *E.g.*, Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1957 (1991) ("To force employees to contribute . . . to the promotion of [social, political, and ideological] positions implicates core First Amendment concerns."); *Abood*, 431 U.S. at 222 ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."); *see also infra* notes 66-125 and accompanying text. The *Lehnert* Court cited Wooley v. Maynard, 430 U.S. 705, 714 (1977), which established that "[t]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." The state action that implicates the First Amendment in this context is the statutory authorization of compulsory fees. Communications Workers v. Beck, 487 U.S. 735, 760 (1988); *Abood*, 431 U.S. at 226; *Hanson*, 351 U.S. at 232.

The issues of mandatory membership and dues also arise in the legal profession. *See* David F. Addicks, *Renovating the Bar After* Keller v. State Bar of California: *A Proposal for Strict Limits on Compulsory Fee Expenditure*, 25 U.S.F. L. REV. 681, 681-82 (1991); Mary Bannister, Keller v. State Bar of California: *Freedom from Ideological Association for Members of Integrated Bar Associations*, 35 ST. LOUIS U. L.J. 903, 903 (1991).

6. *See infra* notes 151-61 and accompanying text.

7. 992 F.2d 1295 (4th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 195 (1993).

8. *See id.* at 1297 (citing 45 U.S.C. §§ 151-88 (1988)). For a discussion of the origins of the RLA, see *infra* notes 60-64 and accompanying text. The RLA applies to airlines as well as railroads. 45 U.S.C. § 181 (1988). Section 2, Eleventh, of the RLA—the provision at issue in *Crawford*, *see Crawford*, 992 F.2d at 1297—expressly preempts state law. 45 U.S.C. § 152, Eleventh (1988). The RLA thus applies even in states where the "right to work" is guaranteed by the state constitution. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 228, 232-33 (1956);

court was asked to determine whether the defendant union, the Air Line Pilots Association (ALPA), could charge nonunion pilots for several categories of expenditures made to support strikes by ALPA members at other airlines.[9] It found each of the expenses to be chargeable to the nonunion workers, holding that "extra-unit bargaining expenditures are legitimate if there is 'some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization.'"[10]

This Note first discusses the competing analyses of the *Crawford* plurality, concurrence, and dissent.[11] The Note then tracks the evolution of the standard used to determine what expenses a union may charge to nonunion employees,[12] and critiques the reasoning of the *Crawford* court in light of Supreme Court precedent.[13] Finally, the Note suggests an alternative solution to the problem of expenses that promise only indirect benefits to objecting workers.[14]

The facts of *Crawford* arose from a series of strikes by ALPA pilots in the mid-1980s. During that period, ALPA represented pilots at forty-three different airlines,[15] serving as the exclusive bargaining representative for all pilots employed by the airlines—union members and nonmembers alike.[16] ALPA's "agency-shop" contracts with airline management required all pilots either to join ALPA or to pay the union an agency fee for its services as the pilots' exclusive bargaining representative.[17] The plaintiffs were nonunion pilots from eight of the airlines whose pilots ALPA represented.[18]

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cf. 29 U.S.C. § 164(b) (1988) (establishing a preserve for state right-to-work laws in the National Labor Relations Act).

9. *See infra* notes 19-31 and accompanying text.

10. *Crawford*, 992 F.2d at 1300 (plurality opinion) (quoting Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991)).

11. *See infra* notes 38-58 and accompanying text.

12. *See infra* notes 59-125 and accompanying text.

13. *See infra* notes 126-68 and accompanying text.

14. *See infra* notes 169-86 and accompanying text.

15. *Crawford*, 992 F.2d at 1297 (plurality opinion).

16. *Crawford*, 992 F.2d at 1297 (plurality opinion). "Exclusivity," the idea that the union has the sole power to negotiate for workers in a bargaining unit, "is a fundamental premise of American labor policy." WALTER E. OBERER ET AL., LABOR LAW 213 (3d ed. 1986); *see also* 45 U.S.C. § 152, Fourth (1988) (providing for election of exclusive bargaining representatives); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 65 (1975) (acknowledging "long and consistent adherence to the principle of exclusive representation."); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 194-95 (1944) (recognizing that, under the RLA, a majority of workers has the right to choose the exclusive representative); DONALD P. ROTHSCHILD ET AL., COLLECTIVE BARGAINING AND LABOR ARBITRATION 27 (2d ed. 1979) (discussing the principle of exclusivity). For a general discussion of exclusive representation, see Benjamin Aaron, *Rights of Individual Employees Under the Act, in* AMERICAN LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT 119, 122-38 (Charles J. Morris ed., 1987).

17. *Crawford*, 992 F.2d at 1297 (plurality opinion).

18. *Id.* (plurality opinion).

In 1983 Continental Air Lines filed for bankruptcy and sought to cancel its collective bargaining agreement with ALPA.[19] In response, the Continental pilots went on strike.[20] ALPA members in other airlines voted to pay a special dues assessment to support the strikers.[21] Two years later, during negotiations between ALPA and United Air Lines, the United pilots went on strike.[22] Again, ALPA provided benefits to the striking pilots.[23]

The strikes substantially reduced ALPA's financial strength.[24] Consequently, the union became concerned that its bargaining position had been weakened by the perception of the airlines' management that ALPA would be unable to sustain future strikes.[25] In late 1985, ALPA members voted to increase their dues to create a contingency fund for unforeseen fiscal needs.[26] The fund initially was used to continue the support of the striking pilots at Continental and United,[27] as well as to offset the expense of litigation associated with the strikes.[28] The fund also provided the means with which ALPA prepared for a strike at Eastern Air Lines.[29] In each instance, the expenses were charged to both nonunion and union pilots.[30]

The nonunion pilots sued, arguing that "use of agency fees for expenses related to bargaining outside the unit at the airline where a pilot works violates both the Railway Labor Act and the plaintiffs' constitutionally protected right of free association."[31] After a bench trial in the Eastern District of Virginia, the district court ruled that the expenses in question were appropriately charged to the nonunion pilots.[32] A Fourth Circuit panel affirmed.[33] The circuit subsequently granted a rehearing en

19. *Id.* at 1298 (plurality opinion).

20. *Id.* (plurality opinion).

21. *Id.* (plurality opinion).

22. *Id.* (plurality opinion).

23. *Id.* (plurality opinion).

24. *Id.* (plurality opinion).

25. *Id.* at 1299 (plurality opinion) (citing the findings of the district court).

26. *Id.* at 1298 (plurality opinion).

27. *Id.* (plurality opinion).

28. *Id.* at 1303 (Russell, J., dissenting).

29. *Id.* at 1298 (plurality opinion). The fund was also used to finance union-organizing drives, a purpose acknowledged by ALPA to be one for which nonunion pilots cannot be charged. *Id.* (plurality opinion).

30. *See id.* at 1297-98 (plurality opinion).

31. *Id.* at 1299 (plurality opinion). The Railway Labor Act authorizes the agency shop. *Compare* Act of Jan. 10, 1951, ch. 1220, 64 Stat. 1238 (codified at 45 U.S.C. § 152, Eleventh (a) (1988)) *with* Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 452 n.11 (1984) ("§ 2, Eleventh . . . may be read to authorize negotiation of an agency shop") *and* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 219 n.10 (1977) ("Under federal law, [a union shop] is the 'practical equivalent' of an agency shop.") (citation omitted).

32. *Crawford*, 992 F.2d at 1297 (plurality opinion).

33. *Id.* (plurality opinion).

banc,[34] but the decision was postponed to await the Supreme Court's disposition of a similar case, *Lehnert v. Ferris Faculty Ass'n*.[35] On rehearing, a plurality of the Fourth Circuit affirmed its earlier holding.[36] The plurality determined that a "pro rata share" of the expenses in question "may be charged to objecting agency-fee payers."[37]

The *Crawford* plurality focused on two categories of expenditures within the general classification of extra-unit costs: (1) expenses associated with strikes at other airlines, including preparations for strikes and support of striking pilots, and (2) capitalization of the major contingency fund.[38] It recognized the standard that *Lehnert* had established for determining the constitutionality of charging a nonunion worker for a particular expenditure: "Chargeable activities must '(1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free-riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.' "[39]

Although it acknowledged that certain expenses cannot be charged to nonunion workers,[40] the plurality ultimately adopted the broad statement of the *Lehnert* Court that "extra-unit bargaining expenditures are legitimate if there is 'some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of

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34. *Id.* (plurality opinion).

35. *Id.* (plurality opinion) (citing Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991)). *Lehnert* originated under state law, *Lehnert*, 111 S. Ct. at 1955, so the Supreme Court focused on the *constitutional* limitations within which the state statute was to be interpreted, *id.* at 1954-55. *Crawford*, by contrast, involved a federal cause of action under the Railway Labor Act. *Crawford*, 992 F.2d at 1297 (plurality opinion).

36. *Crawford*, 992 F.2d at 1297 (plurality opinion). Judge Butzner wrote for the plurality, and was joined by Chief Judge Ervin and Judges Hall, Phillips, and Murnaghan. *Id.* (plurality opinion).

37. *Id.* at 1301 (plurality opinion). The Supreme Court denied the pilots' petition for certiorari. 114 S. Ct. 195 (1993).

38. *Crawford*, 992 F.2d at 1299-1301 (plurality opinion). In their supplemental briefs, both parties addressed a third category of expenditures—those made to cover extra-unit litigation costs. *Id.* at 1301 (plurality opinion). The court declined to rule on the merits of the issue, finding that the plaintiffs had failed to present the question properly because there was no mention of it in the complaint, stipulations of fact, or findings of the district court. *Id.* (plurality opinion). The dissent vehemently objected to the manner in which the plurality disposed of this issue. *Id.* at 1303-04 (Russell, J., dissenting).

39. *Id.* at 1299-300 (plurality opinion) (quoting Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1959 (1991)).

40. *Id.* at 1300 (plurality opinion) ("[T]he Constitution bars 'a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally,' as well as a 'contribution by a local union to its parent' that is 'in the nature of a charitable donation.' ") (quoting *Lehnert*, 111 S. Ct. at 1961).

their membership in the parent organization.' "[41] Applying this standard, and stressing the Supreme Court's finding that the power of a national union is in many cases essential to the bargaining strength of the local units,[42] the plurality determined that expenses in preparation for and in support of extra-unit strikes were vital to the bargaining power of the units that represented the nonunion pilots.[43]

With respect to the contingency fund, the court rejected the nonunion pilots' contention that the fund constituted an impermissible " 'involuntary loan.' "[44] It acknowledged the *Lehnert* Court's holding that agency fees could not be used for an "interest-free loan" to another bargaining unit to " 'promot[e] employee rights or unionism generally.' "[45] The *Crawford* Court held, however, that the purposes of the contingency fund were not to " 'promot[e] employee rights or unionism generally,' "[46] but were "germane to collective bargaining"[47] because they "were designed to further the union's duty of representation [and thus] were by definition justified by the policies underlying the RLA."[48]

In a concurring opinion joined by Judge Wilkins,[49] Judge Wilkinson argued that *Lehnert* was not merely instructive, but direct precedent.[50] As the basis for his analysis, he reiterated the statement in *Lehnert* that an expense may be charged to nonunion workers if it might " 'ultimately enure to the benefit of the members of the local union.' "[51] Relying on the finding of the district court that " 'collective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines,' "[52] Judge Wilkinson determined that the strike expenses could " 'ultimately enure to the benefit' " of pilots other than those at the airlines whose pilots were striking.[53] As a result, and because the expenses were neither political, ideological, nor intended to foster unionism generally, he concluded that the constitutional rights of the dissenting workers had not been violated.[54]

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41. *Id.* (plurality opinion) (quoting Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991)).
42. *Id.* (plurality opinion) (citing *Lehnert*, 111 S. Ct. at 1959).
43. *Id.* (plurality opinion).
44. *Id.* (plurality opinion).
45. *Id.* (plurality opinion) (quoting *Lehnert*, 111 S. Ct. at 1961).
46. *Id.* (plurality opinion) (quoting *Lehnert*, 111 S. Ct. at 1961).
47. *Id.* (plurality opinion).
48. *Id.* at 1300-01 (plurality opinion).
49. *See id.* at 1303 (Wilkinson, J., concurring).
50. *Id.* at 1302 (Wilkinson, J., concurring).
51. *Id.* (Wilkinson, J., concurring) (quoting Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991)).
52. *Id.* (Wilkinson, J., concurring).
53. *Id.* at 1303 (Wilkinson, J., concurring) (quoting *Lehnert*, 111 S. Ct. at 1961-62).
54. *Id.* (Wilkinson, J., concurring) (citing *Lehnert*, 111 S. Ct. at 1957-58).

Judge Russell, representing five judges,[55] dissented, criticizing the court's interpretation and application of *Lehnert*.[56] He argued that the plurality and concurrence, by embracing a single sentence from the *Lehnert* opinion, had interpreted *Lehnert* too broadly, and thus misapplied the well-established standard that an objecting worker can be charged only for those expenses that are "germane" to collective bargaining in the local unit.[57] An expense is germane, he contended, only if it is "'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"[58]

Complete analysis of *Crawford* requires an understanding of its heritage. In the early part of this century, the right of an employee to contract freely was vigorously protected by the Supreme Court as a basic constitutional right.[59] Congress passed the RLA in 1926, to facilitate collective bargaining between railroad workers and their employers.[60] The original Act allowed each class of employees of a common carrier to choose, by majority vote, an exclusive representative to negotiate for the entire class.[61] However, the Act expressly proscribed agreements requiring union membership or support as a condition of employment.[62] After the Second World War, Congress became concerned with the problem of "free riders"—workers who were not union members but "obtain[ed], without cost to themselves, the benefits of collective bargaining procured through the efforts of the dues-paying members."[63] In response, Congress amended the Act in

55. *Id.* at 1318 (Russell, J., dissenting). Judges Widener, Niemeyer, Hamilton, and Luttig joined the dissent. *Id.* (Russell, J., dissenting).

56. *Id.* at 1303-18 (Russell, J., dissenting).

57. *Id.* at 1306 (Russell, J., dissenting) (citing Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977); Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 121 (1963)).

58. *Crawford*, 992 F.2d at 1310 (Russell, J., dissenting) (quoting *Ellis*, 466 U.S. at 448). Judge Russell argued that an even closer relationship to collective bargaining is necessary in the case of an activity involving "'communicative content.'" *Id.* at 1317 (Russell, J., dissenting) (quoting *Ellis*, 466 U.S. at 437).

59. *See* Lochner v. New York, 198 U.S. 45, 53 (1905); Calvin Siemer, Comment, Lehnert v. Ferris Faculty Ass'n: *Accounting to Financial Core Members: Much A-Dues About Nothing?*, 60 FORD. L. REV. 1057, 1060 n.19 (1992).

60. Act of May 20, 1926, ch. 347, 44 Stat. 577 (current version at 45 U.S.C. §§ 151-88 (1988)). The Act was amended to include airlines in 1936. Act of April 10, 1936, ch. 166, 49 Stat. 1189 (current version at 45 U.S.C. § 181 (1988)).

61. 45 U.S.C. § 152 (1988).

62. *Id.*; *cf.* Communications Workers v. Beck, 487 U.S. 735, 750 (1988) (noting that the original Act required unions to protect the rights of nonunion employees, but did not require that workers join or otherwise contribute to the unions) (citing H.R. REP. No. 2811, 81st Cong., 2d Sess. 4 (1950)).

63. International Ass'n of Machinists v. Street, 367 U.S. 740, 763-64 & n.14 (1961).

1951 to permit union-shop agreements—requirements that employees join the unions.[64]

The amendment—Section 2, Eleventh of the RLA[65]—soon was subjected to constitutional challenge. In *Railway Employees' Department v. Hanson*,[66] decided in 1956, nonunion railroad employees urged the Supreme Court to hold that a union-shop agreement violated their freedoms of association and expression under the First Amendment.[67] The Court rejected the plaintiffs' argument, but with an important caveat: If the charges were "in fact imposed for purposes not 'germane' to collective bargaining, a different problem would be presented."[68]

Five years later, the Court confronted the situation posed in its *Hanson* caveat. In *International Ass'n of Machinists v. Street*,[69] union members challenged the union-shop provision of the RLA on the ground that it permitted unions to use compulsory dues to support political candidates.[70] The Court, speaking through Justice Brennan, acknowledged that the plaintiffs had presented a constitutional issue.[71] It recognized, however, that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality."[72] Noting that the narrow policy behind Section 2, Eleventh was to eliminate the "free rider,"[73] the Court construed the statute "to

64. Act of Jan. 10, 1951, ch. 1220, 64 Stat. 1238 (codified at 45 U.S.C. § 152, Eleventh (a) (1988)); *see* Railway Employees' Dep't v. Hanson, 351 U.S. 225, 231 (1956). The Court subsequently ruled that approval by Congress of the less intrusive agency shop—the type of arrangement at issue in *Crawford*—can be inferred from § 152, Eleventh. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217 n.10 (1977).

Section 152, Eleventh was modeled after an analogous provision of the Taft-Hartley amendments to the National Labor Relations Act (NLRA). *Beck*, 487 U.S. at 745-46 (citing the Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-1-1, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1988))). The Act permitted authorized arrangements requiring workers to join the union within thirty days of being hired. *See* Siemer, *supra* note 59, at 1061 & n.29 (citing S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 413 (1985)). In *Beck*, the Supreme Court found the material provisions of the RLA and NLRA to be "in all material respects identical," and thus ruled that they are controlled by the same analysis and precedent. 487 U.S. at 746.

65. 45 U.S.C. § 152, Eleventh.

66. 351 U.S. 225 (1956).

67. *Id.* at 236-37.

68. *Id.* at 235. For further discussion of *Hanson*, see GORMAN, *supra* note 4, at 655-56.

69. 367 U.S. 740 (1961).

70. *Id.* at 744-45. The union members were compelled, as a condition of employment, to pay union fees pursuant to a union-shop agreement. *Id.* at 742.

71. *Id.* at 749.

72. *Id.* The Court avoided deciding the constitutionality of the statute, however, by applying another "cardinal principle"—before reaching the issue of constitutionality, the "Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 749. The Court found an "entirely reasonable" construction which made it unnecessary to decide the constitutional issue. *Id.* at 750.

73. *Id.* at 763-64 & n.14, 767.

deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[74] The Court expressly left open the question of expenditures for purposes falling between the extremes of political costs and collective bargaining expenses.[75]

In *Abood v. Detroit Board of Education*,[76] the Court addressed a case within that gray area. The plaintiffs contended that their First Amendment rights were violated by use of compulsory fees for "'social, . . . economic, political, professional, scientific, and religious'" activities.[77] The Court recognized that coercing an employee to pay dues to a union, even if solely for collective bargaining purposes, interferes with the employee's rights under the First Amendment.[78] It affirmed, however, the holdings of *Hanson* and *Street*, in which the Court had concluded that the effect of mandatory support for collective bargaining purposes on First Amendment freedoms is justified by the congressional policy of preventing free riders.[79] Nevertheless, the Court agreed with the plaintiffs that employment could not be conditioned on contributions for ideological purposes not "germane" to the collective bargaining duties of the union.[80]

The Supreme Court has confronted the issue of mandatory union fees more frequently during the past decade. In *Ellis v. Brotherhood of Railway*

74. *Id.* at 768-69. The Court's conclusion was based on an examination of the legislative history of § 152, Eleventh. *Id.* at 749-60. *But cf.* Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 108 (1983) (arguing that the prohibition on compulsory fees for political purposes is based on "an inaccurate appraisal of congressional intent"). The phrase "over an employee's objection" is critical. A union is precluded from charging an employee for political purposes only if the employee makes known her objection to the use of her funds for such purposes. *Street*, 367 U.S. at 774; *cf.* Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 118-19 (1963) (holding that while dissent must be affirmative, it need not be specific—"it is enough that [the employee] manifests his opposition to *any* political expenditures by the union").

75. *Street*, 367 U.S. at 769. For a discussion of *Street*, see GORMAN, *supra* note 4, at 656-57. In Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963), which originated in North Carolina, the Supreme Court reaffirmed its decision in *Street* that employees who expressly object may not be charged for political expenses. *Id.* at 118. However, it held that objection does not entitle an employee to withhold all payments to the union. *Id.* at 119-20. No relief is ordinarily available, the Court ruled, until final judgment is entered in favor of the employee. *Id.* at 120. For a discussion of *Allen*, see GORMAN, *supra* note 4, at 657-58.

76. 431 U.S. 209 (1977). Unlike *Street* and *Hanson*, but like *Lehnert*, *Abood* arose in the public sector under a state statute. *See Abood*, 431 U.S. at 211. The Court determined that the same constitutional analysis applied despite the difference. *See id.* at 217.

77. *Id.* at 213 (quoting Plaintiffs' Amended Complaint). For a general discussion of the constitutional issue in the public sector, see David B. Yelin, *Constitutional Considerations Affecting the Methods of Exacting Union "Fair-Share" Collective Bargaining Fees From Non-Member Public Employees*, 3 DET. C.L. REV. 767 (1985).

78. *Id.* at 222.

79. *Id.*; *see also supra* notes 66-75 and accompanying text.

80. *Abood*, 431 U.S. at 235-36. The Court also held that a union could not avoid violation of the act by "limit[ing] the use of the actual dollars collected from dissenting employees to collective-bargaining purposes." *Id.* at 237 n.35. Such a remedy would be "of bookkeeping significance only rather than a matter of real substance." *Id.*

Clerks,[81] which arose under the RLA, the Court addressed the legality of expenses for purposes that were neither political nor directly connected to collective bargaining.[82] It reaffirmed its earlier decisions, holding that a union may charge objecting employees for expenses "'germane to collective bargaining.'"[83] More importantly, it explained the degree of relationship that "germane" was intended to describe. The Court defined "germane" expenses as those "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[84] Applying its analysis to the facts, the Court held that dissenters could not be charged for the costs of union organizing efforts.[85] It reasoned that enhancement of union strength was not within the legislative policy that prompted the passage of Section 2, Eleventh.[86] Organizing expenses, the Court determined, "can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer."[87] In contrast, the Court ruled that the union could charge dissenters for conventions, social activities, and portions of the union magazine dealing with collective bargaining issues.[88] It reasoned that those expenses were for normal activities that improved the union's effectiveness at the bargaining table by fostering communication among its officers and members.[89]

The next major case in this area was *Communications Workers v. Beck*,[90] decided in 1988. The Court again noted that the legislative purpose of Section 2, Eleventh is to eliminate free riders,[91] and reaffirmed its hold-

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For commentary on *Abood*, see Milton L. Chappell, *From* Abood *to* Tierney: *The Protection of Nonunion Employees in an Agency Shop; You've Come a Long Way*, 15 OHIO N.U. L. REV. 1, 1-3, 16 (1988).

81. 466 U.S. 435 (1984).

82. *Id.* at 440. Expenditures were made for "the quadrennial Grand Lodge convention, litigation not involving the negotiation of agreements or settlement of grievances, union publications, social activities, death benefits for employees, and general organizing efforts." *Id.*

83. *Id.* at 456 (quoting Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 122 (1963)).

84. *Id.* at 448.

85. *Id.* at 452-53.

86. *Id.* at 451-52.

87. *Id.* at 452. While the Court explained that the policy of preventing free riders does not justify charging for such expenses, *id.*, it acknowledged that

> employees [may] ultimately ride for free on the union's organizing efforts outside the bargaining unit. But the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Nonbargaining unit organizing is not directed at that employee.

Id.

88. *Id.* at 448-51.

89. *Id.*

90. 487 U.S. 735 (1988). The Supreme Court heard *Beck* on writ of certiorari from an en banc decision of the Fourth Circuit. *Id.* at 741 (citing Beck v. Communications Workers, 800 F.2d 1280 (4th Cir. 1986) (en banc)).

91. *Id.* at 762; *see also supra* notes 63-64, 73 and accompanying text.

ing in *Ellis* that the statute permits a union to charge dissenting employees only for expenses incurred by the union in its role as exclusive bargaining representative.[92] More importantly, the Court disregarded the fact that *Beck* arose under the National Labor Relations Act (NLRA), rather than the RLA.[93] It determined that the relevant portions of the statutes are "in all material respects identical" and thus deemed *Street* to be controlling.[94]

The most recent decision of the Supreme Court in this area—a decision on which the *Crawford* court heavily relied[95]—is *Lehnert v. Ferris Faculty Ass'n*.[96] *Lehnert* involved a Michigan statute that authorized agency shops in the public sector.[97] The plaintiffs alleged that their rights under the First and Fourteenth Amendments had been violated by the allocation of their dues "for purposes other than negotiating and administ[er]ing a collective-bargaining agreement" at the local level.[98] The Supreme Court, sharply divided on the issues,[99] produced four opinions, none of which was joined in full by a majority of the Court.[100]

Justice Blackmun wrote for the Court.[101] From prior cases, he derived the three-prong test that was later relied upon by the *Crawford* court: For an expense to be chargeable, its purpose "must (1) be 'germane' to collec-

92. *Id.* at 762-63 (citing Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984)).

93. *Id.* at 745-46 (citing the National Labor Relations Act, 29 U.S.C. § 141-87 (1988); Railway Labor Act, 45 U.S.C. §§ 151-88 (1988)).

94. *Id.* at 745, For more extensive examination of *Beck*, see Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51 (1990); Elena Matsis, *Procedural Rights of Fair Share Objectors after* Hudson *and* Beck, 6 LAB. LAW. 251 (1990); Rex H. Reed, *Revolution Ahead:* Communications Workers v. Beck, 13 HARV. J.L. & PUB. POL'Y 635 (1990); Lisa Rhode, Note, *Section 8(a)(3) Limitation to the Union's Use of Dues-Equivalents: The Implications of* Communications Workers v. Beck, 57 U. CIN. L. REV. 1567 (1989).

95. *See Crawford*, 992 F.2d 1295 *passim*; *see also supra* notes 35-54 and accompanying text.

96. 111 S. Ct. 1950 (1991).

97. *Id.* at 1955 (citing the Public Employment Relations Act, MICH. COMP. LAWS §§ 423.201-.216 (1978) (amended 1994)).

98. *Id.* at 1956. The defendant, Ferris Faculty Association (FFA), was a local affiliate of larger state and national organizations. *Id.* at 1955. Of the annual dues paid by FFA members, less than 10% was allotted directly to the local union. *Id.* at 1955-56.

99. *Id.* at 1950-82.

100. *Id. Lehnert* was the first case to address the agency fee issue after the retirement of Justice Brennan, who wrote the opinions of the Court in *Street*, *Allen*, and *Beck*. His replacement, Justice Souter, joined the opinion of Justice Scalia. *Id.* at 1975.

101. *Id.* at 1954. The opinion was joined in its entirety by Chief Justice Rehnquist, Justice White, and Justice Stevens. *Id.* Justice Marshall joined the opinion in selected parts, which together constituted the only majority opinion in the case. *Id.* In the discussion that follows, references to "the Court" will indicate portions of the opinion that were joined by Justice Marshall, and references to "Justice Blackmun" will indicate portions that Justice Marshall did not join, and which therefore represent the view of only four justices. It should be noted that even those portions that Justice Marshall did not join state the decision of the Court, because on those issues the votes of the plurality were aligned with those Justices who joined the opinion of Justice Scalia. *See id.* at 1975-81 (Scalia, J., concurring in the judgment in part and dissenting in part).

tive bargaining activity; (2) be justified by the government's vital policy interest in labor policy and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[102] With respect to the first prong, the Court explained that to be "germane" an expense need not directly benefit the bargaining unit of the objecting employee.[103] It stated that the connection is sufficient if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization."[104]

Although five justices agreed on the rule, a majority of the Court could not agree on how the rule should be applied to the specific expenses in question. Justice Blackmun found that unless the issue is the "ratification or implementation of a dissenter's collective bargaining agreement," lobbying expenses are insufficiently related to collective bargaining to be chargeable to the objector.[105] Applying the rule expounded by the Court, he reasoned that in such a situation the "'free-rider' concern is inapplicable," and the infringement on First Amendment rights is significant because of the public nature of the speech.[106] Justice Marshall, though he applied the same rule as Justice Blackmun, concluded that the lobbying costs in question *were* chargeable.[107] He noted that the objective of the lobbying was to increase public funding for jobs, pay, and benefits for teachers,[108] and contended that the need to prevent free-riding was as important in that context as in direct contract negotiations.[109]

Justices Blackmun and Marshall also disagreed with respect to expenditures for public-relations support of the teaching profession in general. Justice Blackmun found the connection between such expenses and the union's function as collective bargaining agent insufficient to justify "'increas[ing] the infringement of [the employee's] First Amendment rights already resulting from the compelled contribution to the union.'"[110] Justice Marshall contended that the public-relations campaign had taken place during bargaining with the union and was intended to arouse public opinion in support of a favorable contract for the teachers.[111] The campaign was within the duty of the union as bargaining representative for the employees,

102. *Id.* at 1959; *see also supra* note 39 and accompanying text.
103. *Id.* at 1961.
104. *Id.* at 1961-62.
105. *Id.* at 1959-60 (Blackmun, J., plurality opinion).
106. *Id.* at 1960 (Blackmun, J., plurality opinion).
107. *Id.* at 1968-69 (Marshall, J., concurring in part and dissenting in part).
108. *Id.* at 1967 (Marshall, J., concurring in part and dissenting in part).
109. *See id.* at 1968-69 (Marshall, J., concurring in part and dissenting in part).
110. *Id.* at 1964 (Blackmun, J., plurality opinion) (quoting Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 456 (1984)).
111. *Id.* at 1971 (Marshall, J., concurring in part and dissenting in part).

he argued, and therefore should be chargeable to the nonunion employees.[112]

A final point of disagreement was whether extra-unit litigation expenses could be charged.[113] Justice Blackmun stated that such expenses were not chargeable because (1) litigation is by nature political and expressive, and (2) extra-unit litigation is not "germane to the union's duties as exclusive bargaining representative."[114] However, Justice Marshall argued that the extra-unit litigation expenses were "germane" to the duties of the union in both collective bargaining and grievance disputes.[115]

The five Justices who applied *Lehnert's* three-prong test did agree with respect to several particular expenses. They determined that expenditures in preparation for a threatened strike by the local union are chargeable to nonunion members, even if the strike would be illegal.[116] Even mere preparation, they reasoned, is a useful bargaining tool for the union in its capacity as exclusive representative.[117] In addition, the five justices permitted the union to charge workers for portions of a union magazine that concerned "teaching and education generally."[118] Perhaps most important to the *Crawford* court, they agreed that dissenting employees can be charged for their share of the common collective bargaining costs of the national union.[119]

Justice Scalia, writing for himself and three other justices, vigorously disagreed with the rule established by the Court.[120] He suggested a narrower rule: Costs can be charged to objecting employees only if expended

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112. *Id.* at 1967, 1971 (Marshall, J., concurring in part and dissenting in part). In response to Justice Blackmun's concern about the infringement of free speech rights, Justice Marshall quoted Justice Blackmun's own language: "'[T]he extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect,'" he argued, so general promotion of the teaching profession does not significantly impinge upon the free expression of teachers. *Id.* at 1972 (Marshall, J., concurring in part and dissenting in part) (quoting *id.* at 1960 (Blackmun, J., plurality opinion)).

113. *Id.* at 1967, 1972 (Marshall, J., concurring in part and dissenting in part).

114. *Id.* at 1963-64 (Blackmun, J., plurality opinion) (citing *Ellis*, 466 U.S. at 453; NAACP v. Button, 371 U.S. 415, 431 (1963)).

115. *Id.* at 1973 (Marshall, J., concurring in part and dissenting in part). For a discussion of the *Crawford* court's treatment of extra-unit litigation expenses, see *supra* note 38.

116. *Id.* at 1965.

117. *Id.*

118. *Id.* at 1964.

119. *Id.* at 1963.

120. *Id.* at 1975-81 (Scalia, J., concurring in the judgment in part and dissenting in part). Justices O'Connor and Souter, and Justice Kennedy in part, joined Justice Scalia's opinion. Justice Scalia argued that the Court's test offers little or no guidance to lower courts and potential litigants, *id.* at 1976 (Scalia, J., concurring in the judgment in part and dissenting in part), and that the test is not, as the Court claimed, suggested by prior cases, *id.* at 1975 (Scalia, J., concurring in the judgment in part and dissenting in part).

for the purpose of *directly* providing "a tangible benefit"[121] affecting "the union's statutory duties as exclusive bargaining agent."[122] Such duties, he contended, do not include strike preparation or magazine articles concerning "teaching and education generally."[123] Nor do they include costs incurred by the national union in dispensing collective bargaining support services, except for services "*actually provided*" to the local union.[124] The duties are limited, he argued, to "'negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances.'"[125]

The *Crawford* plurality and concurrence cited *Lehnert*'s three-part test and applied it to the facts with little reference to the reasoning employed by the cases that preceded *Lehnert*.[126] Since the *Lehnert* Court professed to do no more than clarify the holdings of earlier cases,[127] complete examination of the *Lehnert* test requires analysis of those cases.

The ban on charging dissenters for expenses not germane to collective bargaining has been part of RLA jurisprudence since *Hanson*,[128] when the Court first addressed the constitutionality of compulsory fees under the stat-

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121. *Id.* at 1981 (Scalia, J., concurring in the judgment in part and dissenting in part).

122. *Id.* at 1975 (Scalia, J., concurring in the judgment in part and dissenting in part).

123. *Id.* at 1979-81 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *id.* at 1964 (Blackmun, J., plurality opinion)). Justice Kennedy wrote separately to disagree with Justice Scalia regarding the strike expenses, which he considered "indistinguishable in substance from other expenses of negotiating a collective bargaining agreement." *Id.* at 1981 (Kennedy, J., concurring in the judgment in part and dissenting in part). With the exception of that single issue, he joined in full the opinion of Justice Scalia. *Id.* (Kennedy, J., concurring in the judgment in part and dissenting in part).

124. *Id.* at 1980-81 (Scalia, J., concurring in the judgment in part and dissenting in part).

125. *Id.* at 1978 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting Abood v. Detroit Bd. of Ed., 431 U.S. 209, 221 (1977)). Prior to *Crawford*, only one other circuit had interpreted the *Lehnert* decision. In Pilots Against Illegal Dues v. Air Line Pilots Association, 938 F.2d 1123 (10th Cir. 1991), the Tenth Circuit Court of Appeals noted the *Lehnert* proposition that an expense may be charged if it might ultimately benefit the members of the local union, and concluded that the expense must assist the unit in its bargaining with the employer. *Id.* at 1128 (quoting Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991)). It explained, however, that the expenditures in question—used to cover "negotiating and administrative expenses incurred outside of the . . . bargaining unit"—were permissible because they were used to create a "bargaining tool" for the local bargaining unit. *Id.* For a more extensive analysis of *Pilots Against Illegal Dues*, see Craig Negler, *Tenth Circuit Survey: Transportation*, 69 DENV. U. L. REV. 1097, 1102-03 (1992).

For further analysis of the *Lehnert* decision, see generally Joseph A. Ciucci, *Defining the Permissible Uses of Objecting Members' Agency Dues: Is the Solution Any Clearer After* Lehnert v. Ferris Faculty Ass'n?, 70 U. DET. MERCY L. REV. 89 (1992); Charles J. Ogeka, Comment, *Respecting Nonunion Member Employees' Rights While Avoiding a Free Ride,* Lehnert v. Ferris Faculty Ass'n, 10 HOFSTRA LAB. L.J. 349 (1992); Siemer, *supra* note 59.

126. *See supra* notes 38-54 and accompanying text.

127. *Lehnert*, 111 S. Ct. at 1959; *see also supra* note 102 and accompanying text.

128. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); *see also supra* notes 66-68 and accompanying text.

ute.[129] The *Hanson* Court allowed the fees only because "[t]he financial support required relate[d] . . . to the work of the union in the realm of collective bargaining."[130] Since *Hanson*, the Court repeatedly has reaffirmed that standard and attempted to clarify its meaning.[131] The *Ellis* Court applied the test liberally, ruling that to be germane an expense need not *directly* affect collective bargaining.[132] However, the Court was careful to qualify its holding by reiterating that the expense must be within "the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[133]

That qualification by the *Ellis* Court is consistent with the legislative policy that underlies Section 2, Eleventh—the prevention of free riders.[134] That policy, in turn, applies only in the context of the broader policy of the RLA—the facilitation of collective bargaining.[135] The Court has made clear that compelling agency fees *always* infringes on the First Amendment rights of the employee, even when the fees are used solely to finance the services of the union at the bargaining table.[136] It has permitted such infringement only because of the importance of the underlying legislative policies.[137] Following this line of reasoning, an expense that does not encourage workers to free ride on the union's advocacy vis-à-vis the employer, and thus is not supported by legislative policy, should *never* be charged to dissenting workers. That a union expense may benefit workers is irrelevant if the benefit is not of the type that Congress intends unions to foster—increased leverage "in dealing with the employer on labor-management issues."[138]

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129. *Hanson*, 351 U.S. at 231-38.

130. *Id.* at 235.

131. *See supra* notes 69-125 and accompanying text.

132. Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984).

133. *Id.*; *see also supra* note 84 and accompanying text.

134. *See supra* notes 63-64, 73 and accompanying text.

135. *See* Herbert R. Northrup, *The Railway Labor Act—Time for Repeal?*, 13 HARV. J.L. & PUB. POL'Y 441, 442 (1990); William E. Thomas & Frank J. Dooley, *Collective Bargaining Under the Railway Labor Act*, 20 TRANSP. L.J. 275, 275 (1992); Beth S. Adler, Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U. L. REV. 1003, 1004-05 (1986); *cf.* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 n.32 (1985) ("The Railway Labor Act . . . seeks to provide a means by which agreement may be reached . . . .") (citing Terminal R.R. Ass'n v. Railroad Trainmen, 318 U.S. 1, 6-7 (1943)). The text of the RLA does not address union activities other than dealings with management. *See* 45 U.S.C. §§ 151-88 (1988).

136. *Ellis*, 466 U.S. at 455 ("[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).

137. *See* Communications Workers v. Beck, 487 U.S. 735, 762 (1988); *Ellis*, 466 U.S. at 455-56; *Abood*, 431 U.S. at 222.

138. *Ellis*, 466 U.S. at 448; *accord Beck*, 487 U.S. at 762-63; *see also supra* notes 58, 133 and accompanying text.

Subtly, but with significant impact on the *Crawford* court, the Supreme Court in *Lehnert* shifted away from its previous emphasis on the nexus between the expense and collective bargaining. Unlike its predecessors, *Lehnert* did not stress that the benefit to the unit must be in the area of collective bargaining[139] or labor-management issues.[140] Its statement that for an expense to be charged "[t]here must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union"[141] implies that the benefit to the worker need *not* be in the form of increased leverage against the employer.

Although the Court's decision with respect to several expenses certainly comports with the notion that expenses must result in a benefit at the bargaining table,[142] one expense that the Court considered chargeable was related to the bargaining position of the union only very remotely, if at all. The Court allowed the union to charge dissenters for the costs of producing portions of the union magazine that consisted of general information about the teaching profession.[143] Its justification was curious: "[T]hese expenditures are for the benefit of all and we discern no *additional* infringement of First Amendment rights that they might occasion."[144] The Court made no effort to link the expenses to the collective bargaining policies underlying the statute, even though it previously had held that such a link is required to justify the First Amendment infringement caused by compulsory charging of *any* expense.[145] Clearly, the Court placed great weight on its statement that an expense may be charged if it "may ultimately enure to the benefit of

139. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

140. *Ellis*, 466 U.S. at 448. The *Lehnert* Court focused on the necessity of a benefit to the local unit in general, without specifying the nature of that benefit. Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991). The Court allowed an expense to be charged if it offered "some tangible benefit to the dissenters' bargaining unit," even if "not actually expended on that unit in any particular membership year," or "not performed for the direct benefit of the objecting employees' bargaining unit." *Id.*

141. *Lehnert*, 111 S. Ct. at 1961-62; *see also supra* note 104 and accompanying text.

142. The Court ruled that ALPA can charge dissenters for collective bargaining at other bargaining units, preparations for a strike at another unit, and even the national union convention. *Id.* at 1963-66. All of those expenses have the potential to benefit the local unit in its negotiations with the employer, if only indirectly.

143. *Id.* at 1964; *see also supra* note 118 and accompanying text; *cf.* Gerald D. Wixted, Note, *Agency Shops and the First Amendment: A Balancing Test in Need of Unweighted Scales*, 18 RUTGERS L.J. 833, 862 (1987) (arguing that courts should not permit compulsory fees for "'social' expenditures such as conventions and newspapers, which primarily aggrandize the union's position and relate to collective bargaining only in the sense that all union activities can be said to relate to collective bargaining").

144. *Lehnert*, 111 S. Ct. at 1964 (emphasis added).

145. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977); *see also supra* note 78 and accompanying text. Even the *Lehnert* Court's own test appears to dictate such an inquiry. *Cf. supra* note 102 and accompanying text.

the members of the local union,"[146] and little weight on the relationship of the benefit to the collective bargaining function.

The *Lehnert* test acknowledges a second, independent requirement in addition to the condition that an expense be germane to the collective bargaining function: Even germane expenses are not chargeable if they infringe on the First Amendment rights of dissenters more than is justified by the recognized legislative policies.[147] The previous cases did not express this requirement separately, but incorporated it into their germaneness inquiries. In those cases, activities that the Court found to involve excessive First Amendment infringement were deemed not to be germane to collective bargaining.[148] Such analysis served only to confuse the issues. As noted by the *Lehnert* defendants, even expressive activities can have significant effects on collective bargaining;[149] to deny the connection is disingenuous. The problem with activities such as lobbying, litigation, and union organization is not that they are unconnected to collective bargaining, but that they are unavoidably intertwined with First Amendment considerations.[150]

Nevertheless, despite recognizing First Amendment infringement as a separate prong of its test,[151] the *Lehnert* Court's analysis failed to distinguish adequately between expenses that are not germane to collective bargaining and those that are germane but pose too great a burden on the speech rights of the dissenters. Consider, for example, the Court's treatment of the portions of the union magazine that provided general information about the teaching profession.[152] The Court reached the third-prong issue of whether the expenses created "additional infringement" of the dissenters' rights[153] without first addressing the relationship of the expenses to collective bargaining.[154]

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146. *See supra* note 104 and accompanying text.

147. *See Lehnert*, 111 S. Ct. at 1964.

148. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 (1961); *see also supra* notes 69-80 and accompanying text.

149. Brief for Respondents at 29-31, Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (No. 89-1217) (1991); *see also Lehnert*, 111 S. Ct. at 1967, 1971 (Marshall, J., concurring in part and dissenting in part) (arguing that a public-relations campaign was intended to influence collective bargaining); *see also supra* notes 111-12 and accompanying text; *cf.* Charles B. Craver, *The National Labor Relations Act Must be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 429 (1992) (arguing that the NLRA should be amended to permit unions to charge for their advocacy of the political interests of workers).

150. *Cf. Lehnert*, 111 S. Ct. at 1964 (Blackmun, J., plurality opinion) (discussing lobbying and public-relations support for unions); *see also supra* notes 106, 110 and accompanying text.

151. *Lehnert*, 111 S. Ct. at 1959; *see also supra* note 102 and accompanying text.

152. *See supra* notes 118, 143-45 and accompanying text.

153. *Lehnert*, 111 S. Ct. at 1964.

154. *See supra* notes 143-45 and accompanying text.

Similarly revealing is the Court's reasoning with respect to extra-unit litigation expenses.[155] At first, the Court's treatment of the issue appears to acknowledge a distinction between "germane[ness]" and "additional infringement."[156] The Court stated: "While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, . . . [w]e long have recognized the important political and expressive nature of litigation."[157] Restated in the terminology of the Court's own test, the quoted language appears to mean that the expenses at issue are "germane to collective bargaining," but that they cannot be charged because they cause "additional infringement" above that which is inherent in the agency shop.[158] That is not, however, the resolution the Court reached. It did not refer to the "additional infringement" prong of its test,[159] but held instead that the extra-unit litigation expenses were not "germane to the union's duties as exclusive bargaining representative."[160] In sum, while distinguishing between the two concepts in stating its rule, the Court did not give effect to the distinction in its application of the rule to the expenses in question.

The *Lehnert* Court's failure to specify the type of benefit that an expense must provide[161] made its mark on the *Crawford* court. The *Crawford* plurality acknowledged the importance of the actual bargaining function, resting its decision on the finding that the purposes of the expenses in question constituted " 'reasonable bargaining tools.' "[162] The concurrence, however, did *not* recognize the necessity that the expense be intended to increase leverage against the employer. Instead, it contended that *Crawford* was controlled by the statement in *Lehnert* that an expense is chargeable if it might " 'enure to the benefit of the members of the local union.' "[163]

Lehnert's failure to distinguish adequately between "germaneness" and "additional infringement"[164] proved less problematic for the *Crawford* court, but it caused disagreement nonetheless. The *Crawford* plurality rec-

155. *See supra* notes 113-15 and accompanying text.

156. *Lehnert*, 111 S. Ct. at 1963.

157. *Id.*

158. *Id.* at 1959, 1964; *see also supra* note 102 and accompanying text.

159. *Id.* at 1963-64 (Blackmun, J., plurality opinion) (citing Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 453 (1984)); NAACP v. Button, 371 U.S. 415, 431 (1963)); *see also supra* note 114 and accompanying text.

160. *Lehnert*, 111 S. Ct. at 1964.

161. *See supra* notes 139-46 and accompanying text.

162. *Crawford*, 992 F.2d at 1300 (quoting *Lehnert*, 111 S. Ct. at 1961-62).

163. *Id.* at 1302 (Wilkinson, J., concurring) (quoting *Lehnert*, 111 S. Ct. at 1961-62). In dissent, Judge Russell rebuked the plurality and the concurrence for unduly stressing this phrase. *Id.* at 1306 (Russell, J., dissenting) (citing *Ellis*, 466 U.S. at 448; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977); Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 121 (1963)); *see also supra* note 51 and accompanying text.

164. *See supra* notes 151-60 and accompanying text.

ognized the distinction in its analysis of the major contingency fund. It first determined that the purposes of the fund were "germane to collective bargaining," and only subsequently that the "burden to constitutional rights . . . [was not] heightened."[165] The concurrence only acknowledged that an expense that may "enure to the benefit" of the bargaining unit is nevertheless not chargeable if "assessed to promote either the cause of unionism in general or political positions that a union leadership might support but to which individual members might take vigorous exception."[166] The dissent, consistent with the *Lehnert* Court's own application of its test, intertwined the two concepts. It did not interpret additional infringement on constitutional rights to be a condition that can preclude the charging of a germane expense. Instead, it contended that additional infringement only raises the issue of the *degree* of germaneness necessary for the expense to be chargeable.[167] Because no majority of the Fourth Circuit agreed on how to apply *Lehnert*, *Crawford* offers no clearer guidance to district courts than *Lehnert* provides to the circuits.[168]

The *Lehnert* test should be modified to clarify both the meaning of germane and the significance of additional infringement on dissenters' rights. The ambiguity in the germaneness inquiry is manifest in its separation of three inextricably intertwined factors: (1) the causal relation between an expense and its potential benefit to the dissenter's unit,[169] (2) the nature of the possible benefit,[170] and (3) the degree to which charging the expense to dissenters is necessary to prevent free riders.[171] *Any* expense that is not charged to dissenting workers, but from which they benefit, encourages free riding.[172] To discuss the free-rider issue in isolation overemphasizes its importance, and thereby reinforces the idea that any expense is chargeable if it benefits the dissenter's bargaining unit in any way. Furthermore, any expense that may bolster the position of the local unit *vis-à-vis the employer* is by definition one that may benefit the members of the unit. It is, therefore, sufficient to require that an expense potentially augment,

165. *Crawford*, 992 F.2d at 1300-01 (plurality opinion).

166. *Id.* at 1303 (Wilkinson, J., concurring).

167. *See id.* at 1317 (Russell, J., dissenting); *see also supra* notes 56-58 and accompanying text.

168. How the Supreme Court will apply the *Lehnert* test in future cases, or whether it will retain the test at all, will be influenced greatly by the changing composition of the Court. The inability of the *Lehnert* Court to assemble a clear majority may be attributable in part to the retirement of Justice Brennan, who wrote the opinions in *Street*, *Allen*, and *Beck*. *See* B. Glenn George, *Visions of a Labor Lawyer, The Legacy of Justice Brennan*, 33 WM. & MARY L. REV. 1123, 1164-65 (1992). Furthermore, three of the five Justices who voted to establish the *Lehnert* test have since retired, including the author of the opinion of the Court, Justice Blackmun.

169. Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991).

170. The *Lehnert* plurality did not discuss this factor at all. *See id.* at 1954-66.

171. *Id.* at 1960.

172. *Cf. supra* note 63 and accompanying text.

directly or indirectly, the ability of the union to carry out its duties as exclusive bargaining representative.

Although it may appear similar, this definition of germane is not the "statutory duties" test advanced by Justice Scalia.[173] His test is much narrower, for it would permit unions to charge only the *direct* costs of collective bargaining.[174] Even the costs of a strike by the dissenter's own unit would not be charged.[175] Such a rule would force the union into a narrow choice between two equally unattractive options: (1) refrain from acting to improve its workers' bargaining position except through activities in which it is duty-bound to engage, or (2) advocate zealously on all fronts, but without the support of dissenting workers. To forego a valuable tool such as the possibility of a strike would undoubtedly damage the bargaining power of a union.[176] Yet strikes are expensive, and some workers surely would consider withholding support of a strike if they could nevertheless reap its benefits. Such a scenario is precisely the type that Congress sought to prevent when it adopted Section 2, Eleventh: If the expense is not charged to dissenters, they will be encouraged to free-ride on the efforts of the union to negotiate a more beneficial employment contract.[177]

The new test should be expressed as follows: A union can charge a dissenting employee for an extra-unit expense only if its purpose (1) is germane to strengthening, directly or indirectly, the *bargaining position* of the employee's own bargaining unit "in dealing with the employer in labor-management issues,"[178] and (2) does not "significantly add to the burdening of free speech that is inherent" in compelling dissenters to pay for the union's performance of its statutory duties as exclusive bargaining repre-

173. *Lehnert*, 111 S. Ct. at 1976 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also supra* notes 121-22 and accompanying text.

174. *Id.* at 1981 (Scalia, J., concurring in the judgment in part and dissenting in part).

175. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Scalia argued that: "In conducting a strike, a union does not act in its capacity as the government-appointed bargaining agent for all employees. . . . [F]or that reason, nonmembers cannot be assessed the costs of the strike." *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). Like the Michigan statute at issue in *Lehnert*, Public Employment Relations Act, MICH. COMP. LAWS §§ 423.201-.216 (1978) (amended 1994); *see also supra* note 97 and accompanying text, the RLA does not expressly authorize unions to strike, *see* 45 U.S.C. § 151-88 (1988); Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378-81 (1969). It appears, therefore, that Justice Scalia would reach the same conclusion under the RLA.

176. *See Crawford*, 992 F.2d at 1300 (plurality opinion); PAID v. Air Line Pilots Ass'n, 938 F.2d 1123, 1131 (10th Cir. 1991); *cf. Lehnert*, 111 S. Ct. at 1965 (stating that "preparations for a potential strike serve as an effective bargaining tool").

177. *See supra* notes 63, 73 and accompanying text. Under the test proposed in this Note, dissenting workers *would* be charged for the costs of strikes during collective bargaining, even strikes at other airlines. Despite the indirect relation between the strikes and the benefit to the local unit, the costs would be chargeable because the benefit itself is in the form of a bargaining tool for use in negotiations with the local employer. *See supra* note 52 and accompanying text.

178. Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984).

sentative.[179] An expense should be required to satisfy both prongs of the test independently, so that neither prong colors the determination made under the other.

In the context of *Crawford*, this test would apply as follows. Strikes at other airlines would satisfy both prongs of the test. First, since a strike is a valuable bargaining tool,[180] and the district court found that bargaining at other airlines "directly affect[s]" bargaining within the unit,[181] such strikes are germane to strengthening the bargaining positions of the plaintiffs' own units. Second, because the message of a strike is directed toward the employer, and relates directly to issues on which unions are statutorily authorized to speak for nonunion employees, compulsory charging of strike expenses does not significantly increase the burden on free speech that is inherent to the agency shop.

Capitalization of the major contingency fund also would be chargeable under the suggested test. The district court found that "ALPA [had] lost its credibility with management because the other airlines knew it could not financially sustain a long strike. . . . [T]he creation of the fund [was] a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit.'"[182] Thus the fund was germane to strengthening the bargaining position of each unit. Furthermore, because the purpose for which the fund was to be used—strike support—is itself permissible under the test, capitalization of the fund caused no *additional* burden on free speech. Thus, had the *Crawford* court applied the test suggested by this Note, its decisions on the merits would have been the same.[183] It might have avoided, however, the disjointed result it produced: the rendering of three opinions, none of which represented a majority of the court.[184]

The proposed test gives a union leeway to charge dissenters for almost any activity designed to enhance the *bargaining position* of the workers it represents. It excludes a beneficial expense only in two situations: (1) when the potential to benefit collective bargaining, if it exists at all, is too remote to justify even the minimal infringement of dissenters' rights that is necessary to carry out the legislative policy, and (2) when the infringement is so great that it cannot be justified by the advancement of that policy, even if the expense would significantly add to the unit's bargaining power. Per-

179. *See Lehnert*, 111 S. Ct. at 1959.

180. *See id.* at 1965.

181. *Crawford*, 992 F.2d at 1302 (Wilkinson, J., concurring); *see also supra* note 52 and accompanying text.

182. *Id.* at 1299.

183. *See id.* at 1299-301; *see also* notes 43-48 and accompanying text.

184. *Id.* at 1297; *id.* at 1303 (Wilkinson, J., concurring); *id.* at 1318 (Russell, J., dissenting); *see also supra* notes 36, 49, 55, and accompanying text.

haps most importantly, it deemphasizes the highly speculative exercise of determining whether an expense may eventually "enure to the benefit" of a dissenting worker,[185] and refocuses the inquiry on the First Amendment concerns from which the charging issue originated.[186]

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185. Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1961-62 (1991); *see also supra* note 104 and accompanying text.

186. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 236-38 (1956); *see also supra* notes 66-68 and accompanying text.

There's Too Much Confusion Here, and I Can't Get No Relief:[1] Alcoholic Employees and the Federal Rehabilitation Act in *Little v. FBI*

In 1973, Congress passed the Federal Rehabilitation Act (FRA) "to promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment."[2] The Act implements affirmative action programs for the handicapped among the various federal agencies[3] and prohibits discrimination on the basis of disability by federal employers,[4] contractors,[5] and recipients of federal aid.[6] Congress intended for the Act to make the federal government a leader in employment of the handicapped.[7] The FRA also served as the model for the Americans with Disabilities Act of 1990 (ADA).[8] The two Acts incorporate many of the same ideas and were designed to work together.[9] Interpretation of the provisions of the FRA, however, has been clouded by imprecise congressional drafting and inconsistent treatment by the federal judiciary.[10]

A recent Fourth Circuit case, *Little v. FBI*,[11] is the latest installment in a line of judicial interpretations of the FRA focusing on the needs of em-

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1. BOB DYLAN, *All Along the Watchtower*, *on* JOHN WESLEY HARDING (Columbia Records 1971).

2. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 355, 357 (codified at 29 U.S.C. § 701-797 (1988 & Supp. IV 1992)).

3. 29 U.S.C. § 791 (1988 & Supp. IV 1992).

4. 29 U.S.C. § 791(b) (Supp. IV 1992).

5. 29 U.S.C. § 793 (1988 & Supp. IV 1992).

6. 29 U.S.C. § 794 (1988 & Supp. IV 1992).

7. 124 CONG. REC. 30,347 (1978) (statement of Sen. Cranston).

8. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12,101-12,213 (Supp. III 1991)).

9. 42 U.S.C. § 12,201(a) (Supp. III 1991). The ADA also expressly calls for coordination of effort between agencies that are called upon to enforce both acts in order to ensure uniformity of treatment and avoid duplication of effort. 42 U.S.C. § 12,117(b) (Supp. III 1991).

10. One commentator has noted:

> The inconsistent application of section 504 to employment disputes, . . . is more properly regarded as the product of an unresolved conflict . . . about the meaning of discrimination and the measures we as a society, will undertake to alleviate it. The critical failing of section 504 is not that it reflects ambivalence about fundamental value choices, but rather that it represents a wholesale refusal to confront those choices. The provision's indeterminate language devolves responsibility for policy choice on courts and administrative agencies and leaves them to make ad hoc selections from among competing conceptions of discrimination. These tribunals, therefore, make the actual decisions about what constitutes discrimination against the handicapped. As a result of this congressional default, handicapped persons and their actual or potential employers remain without meaningful legal guidelines for interaction.

Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 999 (1984) (citations omitted).

11. 1 F.3d 255 (4th Cir. 1993).

ployers and narrowing the Act's protection for individuals with disabilities.[12] The FRA's protection of alcoholic employees, as construed in *Little*, has been particularly narrow. This Note examines the reasoning of the *Little* court[13] and explores alternate readings of the FRA by other courts.[14] The Note then contrasts the two main interpretations of the FRA that have emerged and examines the legitimacy of each.[15] Finally, the Note proposes clarifications to the FRA designed to aid courts in reaching more uniform results.[16]

Charles E. Little, Jr. was fired on January 14, 1991, after seven years as a special agent with the FBI.[17] Little was likely suffering from alcoholism during his entire period of employment with the FBI.[18] Although his superiors knew of his alcohol problem, they consistently rated Little's performance as at least "fully satisfactory."[19] Little was involved in several alcohol-related incidents prior to December 1989, but all of these occurred while he was off duty.[20] In December 1989 Little was charged with driving while intoxicated, off duty, which prompted him to request help from his supervisor in getting professional treatment for his alcoholism.[21] Although the FBI operated an Employee Assistance Program (EAP) to help employees with disabilities, including alcoholism, Little's superiors referred him to a private physician.[22] This physician directed Little to an outpatient alcohol rehabilitation program, which he completed in March 1990.[23]

Little began drinking again after he returned to active duty, and on May 16, 1990 he had to be escorted home by fellow agents after he became

12. *See, e.g.*, Butler v. Thornburgh, 900 F.2d 871 (5th Cir.) (discussed *infra* notes 79-83), *cert. denied*, 498 U.S. 998 (1990); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) (discussed *infra* notes 90-96); *see also* Crewe v. United States Office of Personnel Management, 834 F.2d 140 (8th Cir. 1987) (denying a former federal employee reemployment because of a history of alcoholism that seriously impacted his job performance); Shields v. City of Shreveport, 579 So. 2d 961 (La. 1991) (holding that FRA did not prohibit termination of officers with alcohol problems because they were not "individuals with handicaps" and were not dismissed "solely by reason of" their disability).

13. *See infra* notes 17-45 and accompanying text.

14. *See infra* notes 60-104 and accompanying text.

15. *See infra* notes 105-168 and accompanying text.

16. *See infra* notes 169-76 and accompanying text.

17. *Little*, 1 F.3d at 256.

18. *Id.*

19. *Id.*

20. Little was involved in three alcohol-related incidents prior to December 1989. *Id.* The third such incident occurred in July 1988, and resulted in Little's conviction for driving while intoxicated. *Id.* Little was placed on 18 months probation as a result of this conviction, and tried unsuccessfully on his own to stop drinking. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* While he was undergoing treatment, Little's superiors placed him on "limited duty status," but did not inform him of the terms and conditions of limited duty. *Id.* He was returned to full active status on May 4, 1990. *Id.*

intoxicated.[24] Realizing the seriousness of his condition, Little enrolled in and completed an inpatient alcohol treatment program.[25] The day after Little completed the rehabilitation program, his superiors asked him to resign from the FBI.[26] Little refused to resign, and his superiors told him that he would be treated like a clerk rather than a full-fledged agent.[27] On January 14, 1991, Little received a "Notification of Personnel Action," giving him formal notice of his termination.[28] The notification stated that he was being removed because of his "inability to conform to the FBI's established standards that special agents must remain mentally and physically fit for duty at all times."[29] Little responded to his removal by filing suit against his former employer, alleging claims under the FRA, the Privacy Act, and *Bivens*.[30] The FBI moved to dismiss, and the trial court granted the motion.[31]

On appeal Little argued only that he had stated a claim under sections 501 and 504 of the FRA.[32] Section 501 imposes affirmative action standards on Federal employers to ensure the presence of the handicapped in the workplace,[33] and section 504 protects handicapped employees from discrimination on the basis of their handicap.[34]

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24. *Id.*

25. *Id.*

26. *Id.*

27. Little was given exclusively clerical duties from this point until his eventual termination. *Id.*

28. *Id.* at 256-57.

29. *Id.* at 257.

30. *Id.* A *Bivens* action is a suit brought against a governmental agency by a private party seeking compensatory damages for a violation of the plaintiff's constitutional rights. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *See generally* Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 337-38 (1989)(discussing nature and history of *Bivens* action).

31. Little v. FBI, 793 F. Supp. 652, 653 (D. Md. 1992) *aff'd*, 1 F.3d 255 (4th Cir. 1993). The District Court relied heavily on the decision in Butler v. Thornburgh, 900 F.2d 871 (5th Cir.), *cert. denied*, 498 U.S. 998 (1990). See *infra* notes 79-83 and accompanying text for a discussion of *Butler*. The district court found that "an FBI Special Agent who is an alcoholic and who manifests such conduct on duty is not within the protection of the Rehabilitation Act, because he is not 'otherwise qualified.' " *Little v. FBI*, 793 F. Supp. at 654.

32. *Little*, 1 F.3d at 257.

33. 29 U.S.C. § 791 (1988 & Supp. IV 1992). Section 501 provides in pertinent part:

> Each department, agency and instrumentality in the executive branch shall submit to the Commission an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met.

29 U.S.C. § 791(b) (Supp. IV 1992).

34. Section 504 is codified at 29 U.S.C. § 794 (1988 & Supp. IV 1992) and provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

District Judge Michael, writing for a unanimous panel of the Fourth Circuit Court of Appeals, identified the reason for Little's termination as the "heart of the appeal."[35] He wrote that "in our view, the case turns on whether Little was terminated because of his alcoholism or because of his misconduct."[36] Little alleged that he was fired because of his alcoholism, and the FBI argued that it fired Little because he was intoxicated while on duty.[37]

The court of appeals noted that to warrant protection under section 504 of the Rehabilitation Act a handicapped person must be "otherwise qualified" for the position.[38] The court also examined the federal regulations implementing the FRA to determine the correct application of the Act in the context of misconduct. Noting that the Attorney General regarded an alcoholic or drug addict as a "handicapped individual" under the Act, the court of appeals determined that alcoholics are handicapped under the terms of the Act, but are not protected from the "consequences of their misconduct."[39] Finally, the court stated that the FBI regulations governing the

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program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Due to its broader nature and its applicability to a wider variety of employers, § 504 is more often relied on by handicapped persons. *See* Roger M. Sullivan, Jr., Comment, *Balancing the Rights of the Alcoholic Employee with the Legitimate Concerns of the Employer: Reasonable Accommodation v. Undue Hardship*, 46 MONT. L. REV. 401, 403 (1985); *see also infra* notes 48-51 and accompanying text.

35. *Little*, 1 F.3d at 257. Judge Michael, of the Western District of Virginia, was sitting by designation. *Id.* at 255.

36. *Id.*

37. *Id.*

38. 29 U.S.C. § 794 (1988 & Supp. IV 1992). The court of appeals then referred to two Supreme Court decisions that defined that phrase. In Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979), the Supreme Court characterized an "otherwise qualified" individual as one "who is able to meet all of a program's requirements in spite of his handicap." The court also cited School Board v. Arline, 480 U.S. 273, 287 n.17 (1987), for the proposition that "an otherwise qualified person is one who can perform the 'essential functions' of the job in question, or one who would be able to do so if 'reasonable accommodation' were provided by the employer." 1 F.3d at 257.

39. *Id.* at 258. The court of appeals noted that "the Attorney General stated that the Act does not 'prevent the application to persons suffering from alcoholism or drug addiction of reasonable rules of conduct, such as prohibitions against the possession or use of alcohol or drugs' at the location of the employment or the federally assisted project." *Id.* (citing 43 Op. Att'y Gen. No. 12, 1977 WL 17,999, at *1). The court wrote that the Secretary of Health, Education, and Welfare had cited the Attorney General's opinion in a discussion of regulations implementing §§ 501 and 504. *Id.* The Secretary had stated that an employer "may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism." 42 Fed. Reg. 22,686 (1977). Another discussion stated that an alcoholic employee could be fired "if there is a nexus between such [alcohol or drug] abuse or use and the nature of the employment or if the symptoms resulting from the use of these substances may be so severe that such use, in and of itself, will be sufficient to justify an adverse suitability determination." 43 Fed. Reg. 12,294

treatment of alcoholic employees provide that the existence of programs for the rehabilitation of alcoholic agents "should not be construed as a relaxation of FBI standards of conduct. FBI policy continues to require that *employees should never cause themselves to be mentally or physically unfit for duty.*"[40]

The court of appeals cited several cases from other districts to support its distinction between termination of an employee for misconduct and dismissal based upon the employee's alcoholism.[41] The court inferred from the weight of authority and "common sense" that it was "clear that an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped."[42] Based upon the facts on the record, the court found that Little's termination was a result of his misconduct, not his alcoholism.[43]

The court of appeals then upheld the district court's dismissal of the case on not one, but two grounds. First, the court found that Little was not otherwise qualified for his work and therefore was not under the protection

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(1978). The court of appeals recognized that these statements were not binding, but accorded them "considerable deference." *Little*, 1 F.3d at 258 (citation omitted).

40. *Little*, 1 F.3d at 258 (citing the FBI's Manual of Administrative Operations and Procedures (MAOP) § 15.-3.3(2)). The court of appeals also remarked that "while it is generally required that 'rehabilitative efforts be made before disciplinary action for unsatisfactory job performance can be taken,' those efforts 'do not preclude agency action if . . . other actions or activities are present and constitute employee misconduct.' " 1 F.3d at 258 (citing MAOP § 15-3.3(3)). An exhaustive list of what constitutes misconduct is difficult to formulate and probably unnecessary, but as one commentator has written:

> Employers discharge or discipline employees for many reasons, among them absenteeism, tardiness, loafing, early quitting, sleeping on the job, assault and fighting among employees, insubordination, threat or assault of a management representative, abusive language to supervisors, dishonesty, theft, negligence, damage to or loss of machinery or materials, incompetence or low productivity, refusal to work overtime, abusive behavior toward clients, and other misconduct. In the case of an alcoholic employee, discharge for any of these reasons may also be related to alcoholism.

Wendy K. Voss, Note, *Employing the Alcoholic Under the Americans with Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895, 941 (1992).

41. *Little*, 1 F.3d at 258 (citing Taub v. Frank, 957 F.2d 8, 11 (1st Cir. 1992) (upholding the discharge of an alcoholic postal worker because of criminal conduct); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1149 (3d Cir. 1988) (finding a police officer not "otherwise qualified" because of his illegal drug use), *cert. denied*, 490 U.S. 1004 (1989); and Richardson v. United States Postal Serv., 613 F. Supp. 1213, 1215 (D.D.C. 1985) (holding that an alcoholic postal worker "was discharged for his criminal conduct, not because of alcoholism or poor job performance due to alcohol")).

42. *Id.* at 259.

43. The court reasoned that since Little's superiors had known of his condition for some time, the fact that he was terminated only after he was intoxicated on duty strongly indicated that his misconduct was the reason for his termination. *Id.*

of the Rehabilitation Act.[44] Second, the court held that because the FRA applies only when the handicapped person is terminated or discriminated against "solely by reason of his handicap," the finding that Little's termination stemmed from his *misconduct*, rather than his disability, precluded him from stating a claim under the Act.[45] The Fourth Circuit thus distinguished situations in which employee misconduct was the reason for termination from those in which alcohol-related disability was the cause of discharge and held that the protection of section 504 did not extend to the former scenario.

Congress passed the Federal Rehabilitation Act of 1973 to allow handicapped persons the opportunity to participate in the workforce.[46] Section 501 of the Act mandates an "affirmative action" plan in the hiring practices of the federal government's executive agencies.[47] Section 503 directs employers under contract with the federal government to take "affirmative action to employ and advance in employment qualified handicapped individuals."[48] Section 504 prohibits the recipients of federal aid from discriminating on the basis of an employee's disability.[49] The relevant portion of the section provides:

> No otherwise qualified [handicapped person] in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or any program or activity conducted by any executive agency or by the United States Postal Service.[50]

Congress intended section 504 to reach "the tragically overdue goal of full integration of the handicapped into normal community living, working and service patterns,"[51] and to "firmly establish the right of these [handicapped] Americans to dignity and self-respect as equal and contributing

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44. *Id.* The court of appeals did not elaborate on how it reached the determination that Little was not otherwise qualified, perhaps because it reasoned that the facts of the case rendered the determination self-evident. The district court reached this conclusion on the grounds that the special responsibilities of Little's job prevented an alcoholic from being qualified. *Id.*

45. *Id.* The court of appeals reasoned that since Little was outside the protection of the Rehabilitation Act, he could not claim the benefits of the Fourth Circuit's procedure for federal agencies in dealing with alcoholic employees, articulated in Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989). For a full discussion of the *Rodgers* decision, see *infra* notes 84-91 and accompanying text.

46. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 355 (codified at 29 U.S.C. § 701-797 (1988 & Supp. IV 1992)).

47. *Id.* § 501 (codified at 29 U.S.C. § 791(b) (Supp. IV 1992)).

48. *Id.* § 503 (codified at 29 U.S.C. § 793(a) (Supp. IV 1992)).

49. *Id.* § 504 (codified at 29 U.S.C. § 794 (1988 & Supp. IV 1992)).

50. *Id.*

51. 118 CONG. REC. 3320 (1972) (statement of Sen. Williams).

members of society, and to end the virtual isolation of millions of children and adults from society."[52]

To state a claim under the FRA, a plaintiff "must establish: (1) that he suffers from a handicapping condition; (2) that he is qualified for the position in spite of his handicap;[53] and (3) that he was terminated from the position because of his handicap."[54] The threshold question is whether an alcoholic suffers from a handicapping condition. Although nothing in the original text of the Rehabilitation Act evidenced an intent to include alcoholics and drug addicts within the definition of "individuals with handicaps," the Attorney General's interpretation of the Act so included them.[55] In 1978, Congress passed a group of amendments designed to clarify the Rehabilitation Act.[56] The 1978 amendments exclude from the definition of handicapped individuals current drug and alcohol abusers whose use of drugs or alcohol either prevents them from performing their jobs or would render them a threat to the safety or property of others if they remained employees.[57] The legislative history of the amendments suggests that they were passed to reassure employers that employees who either could not function as employees or were a danger were not protected by the Act.[58] According to the 1978 amendments, a non-federal employee who is an alcoholic or drug addict must be either rehabilitated or currently in rehabilitation in order to receive the protections of section 504.[59]

The Supreme Court first addressed the second element of an FRA claim—that the plaintiff be "otherwise qualified" for the position in spite of his handicap—in *Southeastern Community College v. Davis*.[60] The plaintiff in *Davis* was barred from enrolling in a nursing program because of her

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52. *Id.* at 32,310 (statement of Sen. Humphrey).

53. Gallagher v. Catto, 778 F. Supp. 570, 577 (D.D.C. 1991) (footnotes omitted); *see also* Sullivan, *supra* note 34, at 406 (defining elements of a § 504 claim).

54. *Gallagher*, 778 F. Supp. at 577; *see also infra* notes 63-64 and accompanying text.

55. *See supra* note 39.

56. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (codified as amended at 29 U.S.C. § 706 (1988)).

57. The amendments added to the original definition of "handicapped individuals":

> For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id. sec. 122 (amending 29 U.S.C. § 706(6) (1976).

58. Reese J. Henderson, Jr., Note, *Addiction as Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713, 728 (1991).

59. Sally Gross-Farina, *Fit for Duty? Cops, Choirpractice, and Another Chance for Healing*, 47 U. MIAMI L. REV. 1079, 1120 (1993).

60. 442 U.S. 397 (1979).

hearing problems.[61] Davis brought suit against the college and alleged violations of section 504 and a denial of equal protection and due process.[62] The Supreme Court overturned the judgment of the Fourth Circuit Court of Appeals, which had held that the college violated section 504 by taking Davis' handicap into account when considering her application.[63] The Court held that "an 'otherwise qualified' person is one who is able to meet all of a program's requirements in spite of his handicap."[64] The Court also considered what type of "reasonable accommodation" the college was required to make for Davis.[65] Noting that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory," the Court nevertheless found that the college's unwillingness to make "major adjustments" in its program was not discrimination.[66] Justice Powell, writing for a unanimous Court, stated that section 504 did not impose any requirement "upon an educational institution to lower or effect substantial modifications of standards to accommodate a handicapped person."[67]

Six years later, the Supreme Court clarified the *Davis* holding in *Alexander v. Choate*,[68] a case brought by Tennessee Medicaid recipients charging that a proposed limitation on inpatient coverage discriminated against the disabled.[69] The decision interpreted *Davis* as striking a balance be-

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61. *Id.* at 401. Davis hoped to gain admission to the associate degree nursing program at Southeastern Community College in North Carolina. *Id.* at 400. In the course of an admission interview, it became apparent to a member of the nursing faculty that Davis was having problems hearing. *Id.* After a visit to an audiologist, Davis was told that a new hearing aid would improve her hearing, but would not enable her to discern spoken words unless she was looking "directly at the talker." *Id.* at 401. Upon a determination that it would be unsafe for Davis to practice as a nurse, Southeastern denied her admission to the program. *Id.* at 401-02.

62. *Id.* at 402-03.

63. *Id.* at 406. Concerning the court of appeals' interpretation of § 504, the Supreme Court said:

> The court below . . . believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling.

Id.

64. *Id.*

65. *Id.* at 407-12.

66. *Id.* at 412-13.

67. *Id.* at 413.

68. 469 U.S. 287 (1985).

69. *Id.* at 289. To reduce costs, the directors of the Tennessee Medicaid program reduced the number of inpatient hospital days covered by the program from 20 to 14. *Id.* at 289. The plaintiffs in *Alexander* brought a class action for declaratory and injunctive relief. *Id.* They argued that the change from 20 to 14 days of coverage would have a disproportionate impact on the disabled and was thus discriminatory. *Id.* at 290. The claimants demanded a repeal of any annual limitation on the number of covered inpatient days and suggested that the program revert to a "per-stay" basis providing more flexibility for the number of days covered. *Id.* at 290-91.

tween the rights granted to the handicapped and the interests of federal employers.[70] Although recipients of federal funds would not be required to make "fundamental" or "substantial" changes in order to accommodate the disabled, the court held that they could be required to make "reasonable" modifications.[71] Applying this interpretation of section 504 to the situation in *Alexander*, the Court found that the coverage changes did not deny the plaintiffs "meaningful access" to the benefits offered by the Medicaid program.[72]

Davis and *Alexander* established that employers must make reasonable accommodations for the disabled if those changes would allow the handicapped individual to qualify for employment.[73] The determination of whether a handicapped individual is "otherwise qualified" under section 504 therefore includes consideration of the changes the employer is required to make, as well as the ability of the prospective employee to perform in the workplace.

The Supreme Court recently addressed the reasonable accommodation requirements that section 504 places on employers in *School Board v. Arline*.[74] The plaintiff in *Arline* was a schoolteacher with tuberculosis, dismissed because of the contagiousness of her disease.[75] After determining that a person with a contagious disease qualified as a handicapped individual under the FRA, the Court considered whether the plaintiff was "other-

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70. *Id.* at 300.

71. *Id.*

72. *Id.* at 302. In the course of interpreting *Davis*, the Court stated:

> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled: to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Id. at 301. The Court determined that the requirement of "meaningful access" to federal benefits did not require Tennessee to alter its program to the extent that it would favor the illnesses of the disabled above those suffered by other citizens, and therefore it held that the proposed limitations on coverage did not discriminate against the handicapped. *Id.* at 302-04.

73. *See* Evelynn M. Gentemann, Comment, *After* School Board of Nassau County v. Arline: *Employees with AIDS and the Concerns of the "Worried Well,"* 37 AM. U. L. REV. 867, 888 (1988) (recognizing *Davis* and *Alexander* as establishing a duty of "reasonable accommodation").

74. 480 U.S. 273 (1987).

75. *Id.* at 276-77. Ms. Arline taught school in Nassau County, Florida from 1966 to 1979 and was dismissed after she suffered three lapses of tuberculosis within two years. *Id.* at 276. She brought suit under § 504 alleging that the school board had dismissed her "solely on the basis of her illness." *Id.* The district court held that Arline was not "handicapped" for the purposes of the FRA because there was no evidence that Congress had intended persons with contagious diseases to fall under the protection of the Act. *Id.* at 277. The Supreme Court disagreed. *Id.* at 286 ("[T]he fact that a person with a . . . physical impairment is also contagious does not suffice to remove that person from coverage under § 504.").

wise qualified."[76] The Court decided that in most cases a district court should make an "individualized inquiry" into the relevant facts of each particular case to answer this question. Only after such an inquiry would a court be able to make a decision on the "otherwise qualified" component of section 504.[77] Thus, the Court remanded the case for such a factual finding.[78]

The district court's dismissal of *Little* rested on *Butler v. Thornburgh*.[79] *Butler* was factually apposite to *Little*, as it involved another alcoholic FBI Agent suffering from alcoholism who brought suit under the Federal Rehabilitation Act after he was fired.[80] Applying the language of section 501 to the case, the court found that Butler was unable to "perform the essential functions of the position in question without endangering the health and safety of the individual or others."[81] The Court stated that the extreme sensitivity and danger inherent in a special agent's job were particularly inappropriate for alcoholics.[82] Although the result in *Butler* appears reasonable given the nature of the plaintiff's job, the court's reasoning provided little guidance in interpreting the FRA.[83]

Little argued unsuccessfully on appeal that the district court had erred in following *Butler* and finding that he was not entitled to the "reasonable accommodation" provided by *Rodgers v. Lehman*,[84] an earlier Fourth Cir-

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76. *Id.* at 287-89.

77. *Id.* The Court stated:

> Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

Id.

78. *Id.* at 288-89. The Court held that after that inquiry, "[t]he next step in the 'otherwise qualified' inquiry is for the court to evaluate . . . whether the employer could reasonably accommodate the employee under the established standards for that inquiry." *Id.* at 288. The Court also further interpreted "otherwise qualified" to mean that such a person could perform "all the essential functions" of the job in question. *Id.* at 287 n.17 (citing 45 C.F.R. § 84.3(k) (1985)).

79. Butler v. Thornburgh, 900 F.2d 871 (5th Cir.), *cert. denied*, 498 U.S. 998 (1990).

80. *Id.* at 872. Appellant Butler was an alcoholic employed by the FBI as a special agent for 14 years. *Id.* Butler's problem did not affect his work until he had been a special agent for five years, when he received several reprimands for his behavior and sought treatment several times. *Id.* In February 1987, Butler became intoxicated and was unable to remember where he left his Bureau vehicle. *Id.* Butler then checked into an inpatient program for the first time and received an excellent prognosis for recovery upon discharge. *Id.* Despite his progress after the incident, and although he had abstained from drinking since the incident, Butler was dismissed from FBI service in November 1987. *Id.* at 873. Butler brought suit alleging violations of the Due Process Clause of the Fifth Amendment, FBI regulations, and § 501 of the FRA. *Id.* at 873. See *supra* note 33 for the text of § 501.

81. *Butler*, 900 F.2d at 876 (internal quotations omitted).

82. *Id.* at 876.

83. *See infra* notes 149-52 and accompanying text.

84. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).

cuit case. In *Rodgers*, two plaintiffs consolidated complaints against the Army and Navy for termination due to alcohol-related incidents.[85] Both men had attended outpatient rehabilitation programs at the request of their supervisors, but were eventually dismissed because of their inability to perform as employees.[86] The plaintiffs alleged that their former employers had failed to make reasonable accommodations for them under section 504.[87]

At the urging of the government, the *Rodgers* court articulated a standard for determining the requirements of the "reasonable accommodation" element of section 504.[88] Drawing upon directives issued by the Office of Personnel Management (OPM), the three judge panel stated that when dealing with alcoholic employees, an employer subject to the FRA must follow a five-step procedure: 1) the employee must be informed of available counseling services as soon as a problem is recognized; 2) if unsatisfactory performance continues, the agency must then present the employee with a "firm choice" between treatment and discipline; 3) unless it is apparent that inpatient treatment is immediately required, an opportunity to participate in outpatient treatment must be given, although progressive discipline may be administered to an employee who continues to drink; 4) if the outpatient treatment is unsuccessful, and the employee continues to drink and is guilty of job-related misconduct, an opportunity to participate in inpatient treatment must be offered before a decision to terminate may be made; 5) if inpatient treatment is unsuccessful, an employer may reasonably terminate the employee.[89] The *Rodgers* court found that because the plaintiffs were not offered an opportunity to participate in inpatient treatment, they had successfully stated a claim under the FRA and were entitled to compensation.[90] The court justified its holding as striking a balance between the needs of employers and society's interest in treating alcoholics effectively.[91] *Rodgers* therefore seemed to represent a strong commitment by

85. *Id.* at 254-56. The first complaint in *Rodgers* was brought by John A. Rodgers, a civilian employee of the Navy. *Id.* at 254. Although Rodgers was never drunk on the job, his alcohol-related absenteeism resulted in his dismissal in 1984. *Id.* at 255-56. William Burchell, a boiler plant operator who also was repeatedly absent and was drunk at work at least once, brought the second complaint against the Department of the Army. *Id.* at 256-57.

86. *Id.* at 255-56, 257-58.

87. *Id.* at 254.

88. *Id.* at 259.

89. *Id.*

90. *Id.* at 260. Although the court recognized that both workers had been treated with "extreme tolerance and patience," it found that they had been denied the chance to obtain inpatient treatment despite the apparent likelihood that providing it would cause no appreciable hardship to their employers. *Id.* It wrote that "[i]n neither case does the record disclose any sound reason for the denial of this opportunity, and the government has suggested none on appeal." *Id.*

91. *Id.* at 259. The court analyzed the competing interests in dicta:

> On the one hand, the nature of the disease of alcoholism requires that there be a continuum of treatment and that the alcoholic be permitted some opportunity for failure in

the Fourth Circuit to providing alcoholic employees with significant opportunities for rehabilitation before a decision to terminate is made.

The *Little* court cited several cases in support of its determination that the plaintiff's misconduct was "distinct from his status as an alcoholic."[92] Of these cases, *Copeland v. Philadelphia Police Department*[93] is perhaps most instructive as to the scope of the "reasonable accommodation" required by the FRA. In *Copeland*, a police officer brought a section 504 claim against his employer after he was fired for illegal drug use.[94] He alleged that the department discriminated against him on the basis of his drug use, since alcoholic officers were usually sent to a rehabilitation program rather than dismissed.[95] The Third Circuit Court of Appeals held that Copeland was not "otherwise qualified" for his work, since the nature of a police officer's job required that the officer not engage in illegal conduct.[96] The court held that the police department had no duty to accommodate Copeland, because including a drug user in the ranks of the police would be a "substantial modification" of the character of the department and would cast doubt upon its integrity in the eyes of the public.[97] The opinion did not, however, go as far as the holding in *Little*, which found that the discharged employee was not protected by the FRA because he had not been discharged "solely by reason of his handicap."[98] Copeland's exclusion from the benefits of section 504 rested only on the findings that he was not "otherwise qualified" and that allowing him to continue to be employed would exceed "reasonable accommodation."[99]

Teahan v. Metro-North Commuter R.R.[100] illustrates the contours of the requirement that a claimant be terminated "solely by reason of" her handicap. The plaintiff in *Teahan* was frequently absent from work be-

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> order to come to the acceptance of his disease which is the critical element of his cure. On the other hand, both effective treatment and the needs of the workplace require that an alcoholic employee be firmly confronted with the consequences of his drinking. Excessive sensitivity is no more conducive to a cure than is undue rigor, and in the final analysis "reasonable accommodation" is the establishment of a process which embodies a proper balance between the two.

Id. at 259.

92. *Little*, 1 F.3d at 258.

93. 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

94. *Id.* at 1148.

95. *Id.* at 1148-49. Copeland argued that since alcoholic officers were offered rehabilitation by the Department, reasonable accommodation of his similar handicap was also possible. *Id.*

96. *Id.* at 1149.

97. *Id.*

98. *Little*, 1 F.3d at 259; *see also supra* note 45 and accompanying text.

99. *Copeland*, 840 F.2d at 1149.

100. 951 F.2d 511 (2d Cir. 1991). The claimant in *Teahan* was an alcoholic employed by the defendant as a telephone and telegraph maintainer from 1983 to 1988. *Id.* at 513. Teahan was disciplined a number of times for absenteeism. *Id.* After his discharge, Teahan sued his employer, a recipient of federal funds, under § 504. *Id.* at 514.

cause of his alcoholism, and the court stated that the "initial question" in the case was whether he was fired "solely by reason of" his handicap.[101] The court did not summarily dismiss the issue even though it was uncontested that the claimant had been chronically absent from work:

> [I]t does not inevitably follow that termination for *conduct* resulting from a handicap is not termination "solely by reason of" that handicap. By equating the employer's motivation for firing with the employee's conduct, the relevant section 504 inquiry collapses; that is to say, absenteeism resulting from alcoholism is a factor that bears on whether an employee is "otherwise qualified" for the position, but absenteeism is irrelevant to whether he was terminated in the first place "solely by reason of" his handicap.[102]

This analysis directs the inquiry to the motivation of the employer rather than to the behavior of the employee. The *Teahan* court placed the burden on the employer to show that any consideration of the handicap in the decision to terminate was related to the employee's qualifications for the job.[103] This approach to the "solely by reason of" element prevents employers from justifying dismissal by citing any misconduct related to a type of disability and thereby "avoid[ing] the burden of proving that the handicap is relevant" to the requirements of the job.[104]

The decision in *Little* is squarely in accord with a line of cases focusing on the rights of the federal employer or grantee rather than on the needs of alcoholic employees.[105] This interpretation of the Federal Rehabilitation Act stems, in part, from the 1978 Amendments, which were intended to reassure employers subject to the Act that alcoholics and drug users whose problems impeded their ability to function on the job were not protected by

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101. *Id.* at 515.

102. *Id.* at 515-16.

103. *Id.* at 516. The *Teahan* court ruled that the district court erred in holding that because the employer disclaimed any reliance on Teahan's disability in making the decision to terminate and could point to a non-discriminatory reason for dismissal (absenteeism), the burden shifted to Teahan to prove whether he had been fired "solely by reason of" his disability. *Id.* at 514. The Second Circuit noted that the lower court's decision did not give the claimant an opportunity to show that he was a "handicapped individual" or that he was "otherwise qualified" for his position. *Id.*

104. *Id.* at 517. The court offered the following example to illustrate the faulty reasoning of the lower court: If an employee had a handicap that caused him to limp, and the limp caused him to make a thumping noise when he walked, an employer could fire the employee on the basis of the thump and successfully maintain that dismissal was not "solely by reason of" the handicap (the limp). *Id.* at 516-17. Logically, an employer could, under this test, fire the employee on the basis of the thump as long as it could show that the two were not causally related. The *Teahan* court cited the decision in *Rodgers* as support "at least implicitly" for the proposition that conduct that is a manifestation of the disability is relevant in determining whether the claimant is otherwise qualified, but not in discerning the reason for the termination. *Id.* at 517.

105. *See supra* note 12.

the Act.[106] Although no mention is made of handicapped employees undergoing rehabilitation, the legislative history of the Act reveals that Congress intended to include "rehabilitated" and "rehabilitating" alcoholics, but not those who need rehabilitation.[107] The decisions in *Little* and *Butler* construed the protection of section 504 as inapplicable to employees who had exhibited unacceptable conduct, even if they later had undergone successful treatments for their disabilities.[108] These decisions avoided any analysis of whether "reasonable accommodation" of the employee was possible by determining that the employee was not otherwise qualified and therefore not protected by the Act.[109] The alternate construction of the FRA, as evidenced in the cases similar to *Rodgers*,[110] incorporates a broader vision of the responsibilities of employers to employees, making the issue of "reasonable accommodation" relevant to whether a claimant falls under the protection of the Act.[111]

Case law supports the *Little* court's stance on the scope of the FRA's protection.[112] Also, the commentary of the various federal agencies cited in *Little* states that an alcoholic employee is not protected from the consequences of his misconduct, even if it is related to his alcoholism.[113] Although the FRA clearly does not require employers to endure ineffective and potentially dangerous employees regardless of the failure of treatment, dismissing an employee for a single incident of misconduct without provid-

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106. Sullivan, *supra* note 34, at 404.

107. *See* Anna P. Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 167 n.126 (1988) (citing H.R. Rep. No. 1149, 95th Cong., 2d Sess. 22-23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7312, 7333-34).

108. *See Little*, 1 F.3d at 256-57; Butler v. Thornburgh, 900 F.2d 871, 872 (5th Cir. 1990).

109. *Little*, 1 F.3d at 259; *Butler*, 900 F.2d at 876.

110. A partial list of the cases following the reasoning in *Rodgers* includes: Teahan v. Metro-North Commuter R.R., 951 F.2d 511 (2d Cir. 1991) (imposing the burden on the employer to relate misconduct to the qualifications for the job and to afford an employee another chance at employment after successful completion of treatment before firing him); Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (adopting the five-step procedure in *Rodgers* for dealing with alcoholic employees); Gallagher v. Catto, 778 F. Supp. 570, 577-82 (D.D.C. 1991) (applying a "reasonable accommodation" analysis in a case involving drunken misconduct); Whitlock v. Donovan, 598 F.Supp. 126, 134 (D.D.C. 1984) (holding that an employer must present an alcoholic employee with a "firm choice" between discipline and termination before dismissal), *aff'd sub nom.* 790 F.2d 964 (D.C Cir. 1986).

111. The *Little* court deemed *Rodgers* inapplicable because Little fell outside the protection of the FRA. *Little*, 1 F.3d at 259.

112. For example, both *Butler* and *Copeland* held that employees who were arguably on the road to recovery were not "otherwise qualified" individuals. *Butler*, 900 F.2d at 876; Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1149 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *see also* Shields v. City of Shreveport, 579 So. 2d 961, 965-66 (La. 1991) (holding that since two policemen were not "individuals with handicaps" because they were recovering alcoholics and had not been terminated "solely by reason of their handicaps," they were not protected by § 504).

113. *Little*, 1 F.3d 255, 258 (4th Cir. 1993); *see also supra* notes 39-40.

ing an opportunity for treatment may undermine the purpose of the FRA: to help disabled individuals participate in the workplace. Alcoholics are considered "handicapped individuals" under the FRA and are therefore entitled to its protection.[114] The practice of some courts in finding that "misconduct" obviates the need for a "reasonable accommodation" analysis denies an employee whose addiction causes misbehavior on the job the protection of the Act, even though he may be a far more likely candidate for successful rehabilitation than a more discreet drinker. Such a result reflects societal notions of the blameworthiness of alcoholics, as many people believe that people who arrive at work drunk deserve to be fired. This result seems incongruous, however, when placed in the context of the expansive goals of the FRA, because it denies help to those who may need it most.[115] In other words, the practice of allowing outright dismissal whenever alcoholism results in misconduct at the workplace excuses employers from their FRA duty to provide reasonable accommodation to their employees, simply because the employee's handicap manifests itself at work.[116] If the primary interest to be protected is that of the employer, then this may be the correct result. If, however, one adopts the view that the FRA was intended to create a greater level of tolerance for alcoholic employees in order to encourage rehabilitation before dismissal becomes the only available option, then the result of the *Little* line of cases becomes disturbing.

The disparity between the results of the *Rodgers* and *Little* cases stems at least in part from inconsistent interpretation of the elements of a claim under the FRA.[117] After the plaintiff makes out a prima facie case, the employer must show that it reasonably accommodated the plaintiff or, alternatively, that to do so would impose an "undue hardship."[118] The courts' different interpretations of the elements of an FRA claim correspond to their differing views of the purpose of the Act. As discussed above, the Second Circuit in *Teahan v. Metro-North Commuter R.R.* determined that conduct caused by an employee's disability is not relevant to a determination of the reason for the employee's dismissal.[119] Similarly, the *Little* court first determined that the primary issue was the reason behind the termination.[120] The *Little* court then proceeded, however, to establish that

114. *See supra* notes 39 and 55 and accompanying text.

115. *See supra* notes 46-52 and accompanying text.

116. *Rodgers* held that the FRA imposed a duty on employers to provide reasonable accommodation despite the presence of misconduct in the workplace. *Rodgers*, 869 F.2d at 259; *see also supra* notes 84-92 and accompanying text; *infra* notes 130-37 and accompanying text.

117. For a discussion of the prima facie case for an FRA claim, see *supra* notes 53-54 accompanying text.

118. Gallagher v. Catto, 778 F. Supp. 570, 578 (D.D.C. 1991).

119. *See supra* notes 101-05.

120. *Little*, 1 F.3d at 257.

misconduct was *per se* distinct from disability: "[A]n employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped."[121] Thus, although the circumstances in *Little* arguably justified the claimant's dismissal, the court neglected to impose the full burden of the Act on the employer by not requiring any showing that the disability was relevant to the employee's qualifications for the position. Although the court found that Little's alcoholism rendered him unqualified for his duties as a special agent,[122] its holding did not clearly articulate the necessary causal link between his misconduct and the qualifications of the job.

Teahan also illustrates another element of a claim under the FRA that was virtually ignored in the *Little* decision. The claimant in each of these cases successfully completed rehabilitative treatment prior to the date of his termination.[123] The *Teahan* court interpreted the term "current" substance user, as contained in the 1978 amendments, as referring to one using drugs at the time of termination.[124] The opinion noted that "it would defeat the goal of section 504 to allow an employer to justify discharging an employee based on past substance abuse problems that an employee has presently overcome."[125] The purpose of section 504 is particularly frustrated when the decision to fire an alcoholic employee is made *after* the successful completion of treatment, as in *Little*.[126] The *Teahan* court correctly determined that the relevant concern is the employer's desire to avoid changing its work environment or lowering its performance standards, neither of which is required by section 504.[127] The *Teahan* court held that the burden imposed on the defendant reasonably to accommodate an employee who had

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121. *Id.*

122. *See supra* note 44 and accompanying text. It seems likely that the claimant in *Little* would have lost under the reasoning of *Teahan* as well, since the consequences of Little's disability rendered him unqualified for his work. *See Teahan*, 951 F.2d at 516 ("If the consequences of the handicap are such that the employee is not qualified for the position then a firing because of that handicap is not discriminatory, even though the firing *is* 'solely by reason of' the handicap.").

123. Little completed an inpatient program between the time of the incident that led to his dismissal and his eventual termination, and he had not drunk since the incident. *Little*, 1 F.3d at 256. The claimant in *Teahan* completed a rehabilitation program with similar success before he was actually fired, but not before the decision to fire him was made. *Teahan*, 951 F.2d at 518. Apparently, Little completed his treatment before a decision to fire him was made, since upon his return to work he was only notified that his failure to resign would result in an assignment to clerical duties. *Little*, 1 F.3d at 256.

124. *Teahan*, 951 F.2d at 518.

125. *Id.* The court elaborated that "[t]his view best comports with the legislative purpose of ensuring that rehabilitated or rehabilitating individuals are not discriminated against on the basis of past substance abuse." *Id.*

126. *See supra* notes 57-59 and accompanying text.

127. *Teahan*, 951 F.2d at 518-19 (citing Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979) (holding that § 504 does not require "substantial" modifications to accommodate the handicapped)).

successfully completed treatment (and was therefore not excluded as a "current" alcohol abuser under the 1978 amendments) did not outweigh the FRA's intent to provide substance abusers an opportunity to "overcome their handicap[s]."[128]

The definition of "current" substance abusers used in *Teahan* may be criticized for creating a refuge for substance abusers who experience a period of delay between the behavior responsible for their termination and their actual termination. Given the reluctance of employers to expose themselves needlessly to suit, most alcoholic employees will not be terminated until a number of administrative procedures are completed, allowing them time to participate in treatment. The criticism becomes more persuasive if the employee has participated previously in treatment programs with no effect.[129] In the context of the *Little* case, however, such objections lose their force. Although Little had participated in outpatient treatment before, he had never been involved with inpatient treatment, which apparently is more successful.[130] The standard advocated in *Teahan* therefore should be responsive to the individual history of each claimant's prior rehabilitative history if the interests of the employee and employer are to be adequately balanced.

The *Little* court's holding on the issue of "misconduct" also becomes problematic when compared with earlier Fourth Circuit cases. Its reliance on decisions from outside the Fourth Circuit[131] suggests an effort to depart from the law of its own circuit as announced in *Rodgers v. Lehman.*[132] The *Little* court's treatment of the "misconduct" issue seems to contradict directly the duty of employers to provide the "opportunities for failure" mandated by *Rodgers.*[133] By holding that employers must give employees "opportunities for failure" in the form of access to treatment, the *Rodgers* court recognized that employers have a duty to tolerate a limited amount of poor performance on the part of the alcoholic employee.[134] The *Rodgers*

128. *Id.* at 519.

129. Labor arbitrators have recognized patterns in the behavior of alcoholic employees suggesting that lending too much credence to subsequent treatment might only allow the employee to avoid responsibility for his condition. Often, the alcoholic employee will, "while waiting for an arbitration hearing, . . . seem[ ] to pull himself together. He cooperates with those treating him, allows himself to be hospitalized, and may join Alcoholics Anonymous. By the time of the hearing his Union can point to his progress toward recovery. Authorities testify optimistically as to his prognosis." Voss, *supra* note 40, at 933 (quoting Pacific Northwest Bell Tel. Co., 66 Lab. Arb. (BNA) 965, 972 (1976) (Harter, Arb.)).

130. *Little*, 1 F.3d at 256.

131. *Id.* at 258-59; *see also supra* note 41 and accompanying text.

132. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).

133. *Id.* at 259; *see also supra* notes 84-92 and accompanying text (discussing *Rodgers*).

134. *Rodgers*, 869 F.2d at 259.

court also refused to distinguish between "misconduct" and disability when it held as part of its five-step procedure that

> if the employee ceases to participate in the outpatient treatment, is discharged for non-cooperation or continues to drink after completion of that treatment *and is guilty of job related misconduct,* the agency must, before discharging him, afford him an opportunity to participate in an inpatient program, using accrued or unpaid leave, unless the agency can establish that it would suffer an undue hardship from the employee's absence.[135]

Thus, the fact that an employee exhibits inappropriate behavior at work does not by itself constitute a sufficient reason for dismissal under the *Rodgers* analysis. Indeed, at least one of the plaintiffs in *Rodgers* was guilty of more egregious misbehavior than that of the FBI agent in *Little.*[136]

The *Little* holding apparently carves out an exception to the duty imposed by the *Rodgers* decision whenever "misconduct" is involved. The decision indicates that a failure to meet any of the elements of the prima facie case relieves the employer of any duty to show that reasonable accommodation was made.[137] The *Little* court found that the plaintiff was terminated because of his misconduct, and therefore he failed the third element—that he be discharged "solely by reason of" his handicap. The reasoning of the *Rodgers* line of cases, however, incorporates a broader reading of what "reasonable accommodation" entails for employers, so that a plaintiff's failure to show all the elements of the prima facie case does not necessarily end in dismissal.[138] For example, both of the plaintiffs in *Rodgers* failed to satisfy the third element of the prima facie case, because they arguably were not terminated solely on the basis of their disabilities.[139] There was ample evidence in each scenario that the dismissal stemmed from "misconduct," (i.e. unruly behavior, chronic absenteeism), yet the *employer's* failure to establish that the procedure for "reasonable accommodation" had been followed led to a holding for the employees.[140] The broader duty of "reasonable accommodation" envisioned by the *Rodgers* court therefore tolerates at least some of the "misconduct" that allowed the dismissal of Little's claims.

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135. *Id.* (emphasis added).

136. The second plaintiff in *Rodgers*, William Burchell, arrived drunk for work one day and refused to leave until a co-worker threatened to call the military police. *Id.* at 257. He was also guilty of repeated absenteeism, and once called his supervisor at 2:30 in the morning and cursed him about a disciplinary suspension. *Id.* In contrast, Little became intoxicated only to the extent that he had to be escorted home and temporarily lost track of his FBI vehicle. *Little*, 1 F.3d at 256.

137. *Id.* at 259. For a description of the elements of the prima facie case for a claimant under the FRA, see *supra* notes 53-54 and accompanying text.

138. *Rodgers*, 869 F.2d at 259. For a list of the *Rodgers* line of cases, see *supra* note 111.

139. *Rodgers*, 869 F.2d at 254-58.

140. *Id.*

The scope of the duties under section 501[141] of the FRA is another area in which the two groups of case law differ. Section 501 applies only to federal entities employing disabled individuals, not to recipients of federal funds or federal contractors.[142] The section's requirement that federal employers provide "affirmative action" toward handicapped employees suggests that the Act intended federal entities to do more than practice nondiscrimination.[143] Such an intent accords with the Act's stated goal of turning the Federal government into a model employer of the handicapped.[144] The language of section 501 partially reveals the scope of the duty it imposes. The section requires that each agency's affirmative action plan include "a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met" and "sufficient assurances, procedures, and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."[145] In contrast, section 504 only prohibits discrimination against "otherwise qualified" handicapped employees that is "solely by reason of his or her disability."[146] Section 501 makes no mention of the qualifications of the employee, and yet the requirement that there be "sufficient procedures" to enable handicapped individuals to enter the workplace gives rise to an implied duty of nondiscrimination similar to that in section 504, which applies to Federal employers as well.[147] The *Little* line of cases, however, consistently has refused to recognize or has misapplied section 501's higher standard, and instead has focused only on the employer's duty to make reasonable accommodations when section 501 has applied.[148]

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141. *See supra* note 47 and accompanying text.

142. § 501 (codified at 29 U.S.C. 791(b) (Supp. IV 1992)).

143. Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781, 788-89 (1989). Affirmative action usually refers to action seeking to remedy past discrimination, and may include the modification of hiring practices or admission criteria. *See id.* at 788-89 n.30.

144. *See supra* note 7.

145. 29 U.S.C. § 791(b) (Supp. IV 1992).

146. 29 U.S.C. § 794 (1988 & Supp. IV 1992).

147. Tate, *supra* note 144, at 792. Professor Tate keenly observes:

> Although it may seem unlikely that Congress intended for federal agencies to hire and advance unqualified persons, these phrasing distinctions, coupled with the congressional intent that federal agencies become model employers, suggests at minimum that the duties of federal employers under the Act are broader than those imposed on others. Furthermore, these statutory differences indicate that limited accommodation by a federal employer before terminating an employee is insufficient to avoid discrimination charges.

Id. at 792-93.

148. *Id.* at 788-89. Professor Tate discusses the federal judiciary's difficulty in recognizing § 501's higher standard and notes that "[t]his omission can harm the employee-plaintiff, because if a court does not require a federal employer to provide the affirmative action mandated by the Rehabilitation Act and views nondiscrimination as the employer's sole duty, the employer may

An example of the reluctance to grant section 501's provisions substantial weight is found in *Butler v. Thornburgh*.[149] The *Butler* court declined to extend the exclusions of the 1978 amendments of sections 503 and 504 to section 501,[150] but it did not analyze any of the duties section 501 placed upon the employer. The *Butler* court confined its analysis to the issue of whether the plaintiff could have performed his duties without endangering others.[151] The court therefore denied the plaintiff the full protection of section 501 by failing to address the standards imposed on employers to accommodate the handicapped. Arguably the plaintiff in *Butler* was not protected under section 504 either, because the court did not directly address the level of "reasonable accommodation" that the employer was required to provide.[152]

Cases interpreting the FRA more expansively also place a burden on the employer to identify employees in need of "reasonable accommodation." The decision in *Rodgers v. Lehman*[153] illustrates this trend. The Fourth Circuit stated that, "[w]hen *the agency* suspects that an employee's poor job performance results from alcoholism, it should inform the employee of available counseling services."[154] Thus, the federal employer is responsible for identification of handicaps, which can be difficult when the disability is alcoholism. Under the more restrictive interpretation of the FRA, no such duty exists.[155] An employer may dismiss an alcoholic employee regardless of the employer's lack of knowledge of the disability, as long as the employee is not otherwise qualified or his discharge is not solely on account of his disability. Under the *Rodgers* perspective, a discharged

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deny employees their full rights." *Id.* at 789. Another recent study of the treatment of the FRA by the federal courts has also found that the duty to provide affirmative action or impose any type of heightened standard on federal employers has not been enforced. *See* Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845, 848 (1989).

149. 900 F.2d 871 (5th Cir.), *cert. denied*, 498 U.S. 998 (1990).

150. *Id.* at 875. The 1978 amendments excluded current users of alcohol and drugs whose current use prevents them from effectively performing their jobs. *See supra* note 57 and accompanying text.

151. *Butler*, 900 F.2d at 875-76 (citing 29 C.F.R. § 1613.702(f)); *see also supra* notes 79-83 and accompanying text.

152. *See* Gross-Farina, *supra* note 59, at 1135. (criticizing the reasoning in *Butler* for being imprecise).

153. 869 F.2d 253, 259 (4th Cir. 1989); *see also* Voss, *supra* note 40, at 931 (analyzing *Rodgers* as placing the responsibility on the employer to identify alcohol problems of an employee and provide the employee a "firm choice" between discipline and treatment).

154. *Rodgers*, 869 F.2d at 259 (emphasis added).

155. In Crewe v. United States Office of Personnel Management, 834 F.2d 140, 143 (8th Cir. 1987), for example, the court held that the "[p]laintiff bears the initial burden of proof to make a facial showing that reasonable accommodation is possible."

alcoholic could easily allege that an employer did not take the appropriate steps to learn of his disability and present him with a "firm choice."[156]

The *Rodgers* decision places on employers an impracticable and unnecessary burden to identify needed accommodation. Holding employers responsible for the accommodation of disabilities of which they are not aware is unfair, and will lead to unnecessary litigation because employees presumably always can allege that the employer should have done more.[157] If employers are responsible for identifying the needs of the employees, then employers would also be responsible for any unsuccessful accommodations proposed by them.[158] Placing the burden upon the employee to notify the employer of his disability allows more efficient responses to handicaps, because an employer has the necessary information to determine the scope of the needed accommodation or whether such accommodation would constitute an "undue hardship."[159]

The most telling difference between the two interpretive trends lies in the degree of emphasis on the employer's duty of reasonable accommodation when determining if a claimant is "otherwise qualified." This requires an employer to consider whether the individual could perform the "essential functions" of the job "with or without reasonable accommodation."[160] The line of judicial thought represented by *Little* focuses almost exclusively on the ability of the employee to perform the essential functions of the job, with only a cursory analysis of the availability of reasonable accommodation. In contrast, the more expansive interpretation has imposed several duties on employers that move the issue of "reasonable accommodation" to the forefront of the discussion.

Whitlock v. Donovan illustrates the rationale of the more expansive conception of the FRA's emphasis on the employer's duty reasonably to accommodate the alcoholic employee.[161] The *Whitlock* court held that a Federal employer had not fulfilled sufficiently its duty to accommodate an alcoholic employee when it determined that the employee was medically unfit for duty, without first deciding that the employee's poor performance

156. *Rodgers*, 869 F.2d at 259.

157. Voss, *supra* note 40, at 931.

158. *Id.* at 932.

159. *Id.*

160. *See supra* notes 64-67 and accompanying text; Tate, *supra* note 144, at 797 ("This definitional circularity has led to variances in judicial outcome depending on whether a court focuses primarily on a handicapped individual's ability to perform the position's essential functions or on the availability of reasonable accommodation to assist the individual's performance.").

161. 598 F. Supp 126 (D.D.C. 1984), *aff'd sub nom.* Whitlock v. Brock, 790 F.2d 964 (D.C. Cir. 1986); *see supra* note 111-12 and accompanying text. The claimant in *Whitlock* was employed by the Department of Labor. *Id.* at 128. He was an alcoholic and was repeatedly counseled and disciplined for his excessive absenteeism. *Id.* at 134-35. He was eventually terminated and filed suit after exhausting his administrative appeals. *Id.* at 128, 136.

was due to alcoholism.[162] Thus, the agency failed to initiate procedures designed to "reasonably accommodate" the employee.[163] These procedures would have offered the claimant a chance to seek inpatient treatment while on an extended leave without pay.[164] The court noted that although an agency is not always required to offer leave without pay to an employee who has been unsuccessful in earlier treatment, if evidence exists that such a leave would be beneficial, the agency is required to evaluate whether the leave would constitute an "undue hardship."[165] Finding that the claimant had made a showing of possible accommodation, the court held that the employer violated its duty to the employee when it failed to provide the accommodation or prove that doing so would create undue hardship.[166] Thus, once the employee establishes the possibility of reasonable accommodation, *Whitlock* shifts the burden to the employer to show that no reasonable accommodation is possible before the dismissal of an employee for alcohol-related reasons is permissible.

A comparison of *Whitlock* and *Little* illustrates the shift in analysis from the employer's duty to accommodate the employee to the employee's obligation to perform all of the "essential functions" of the job. The *Little* court did not engage in any of the "reasonable accommodation" analysis performed by the *Whitlock* court, and instead distinguished misconduct from disability status.[167] Arguably, Little could have presented a credible claim that accommodation was possible, because he had successfully completed an inpatient treatment program after the incident that led to his dismissal.[168] The Fourth Circuit's emphasis on the employee's ability to perform all the essential functions of the job allowed the court to sidestep the duties identified in *Whitlock.* Although the court may have reached the correct result, its reasoning contributed to the uncertainty of how to resolve future FRA claims involving alcoholics.

The confused state of the law concerning the application of the FRA to alcoholics reflects both poor statutory drafting and excessive judicial discretion in interpreting the provisions of the Act. The two primary judicial conceptions of the Act each have strengths and weaknesses, yet the inability of the courts to settle on one or the other has robbed the law of any of its

162. *Id.* at 137. The court noted that the medical evaluation the claimant received was "seriously mishandled." *Id.* The agency "had every reason to believe that he was an alcoholic and was continuing to drink heavily." *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. The court stated that "[o]nce an employee has shown evidence that his handicap can be reasonably accommodated, the burden of persuasion is on the agency to show that it cannot accommodate the employee." *Id.*

167. *Little*, 1 F.3d at 258-59.

168. *Id.* at 256-57.

predictive value. Employees are alternately encouraged to bring suit or denied the full protection of the Act. Employers sometimes are allowed to avoid fully discharging their responsibilities towards their employees, but are left without the ability to be certain that they are in compliance with the requirements of the Act. The courts have identified correctly the relevant interests in the context of the FRA, but a uniform framework specifying the relative weight to be accorded to those interests is sorely needed.

Because the confusion regarding the FRA stems from the breadth of discretion left to the courts to interpret the Act, it is possible that a series of amendments designed to clarify the elements of an FRA claim might produce more uniform rulings. Any legislative solution to this confusion should strive to balance the rights granted to alcoholic employees by the FRA against the legitimate interests of federal employers. First, the "solely by reason of his disability" element of the claimant's prima facie case should not be allowed to be disproved merely by a showing that the employee was dismissed because of misconduct. Courts must evaluate the misconduct in the context of whether the employee was "otherwise qualified" for the position.[169] If the misconduct prevents the employee from fulfilling the requirements of the job, then dismissal may be appropriate even if the misconduct was related to a disability. This approach allows the employee to show that he was "otherwise qualified" for his position before the claim may be dismissed. Forcing the employer to prove that the employee is not "otherwise qualified" also promotes early investigation into whether "reasonable accommodation" is possible. Prompt exploration of the available alternatives will allow employers to make cost-effective choices regarding dismissal, and will perhaps ensure that more employees are successfully rehabilitated. If an alcoholic worker is quickly confronted with a firm choice between treatment and dismissal, it is less likely that the workplace will facilitate the disability and more likely that the employee will seek treatment.

Second, the term "current substance abuser" should be interpreted to force greater tolerance of employees who complete treatment before a decision to fire them is made.[170] The interests of federal employers can be adequately safeguarded if such tolerance is tempered by consideration of the prior rehabilitative history of the individual.

Third, courts must recognize that section 501 of the FRA imposes a heightened standard of accommodation on certain federal employers.[171] Because the federal government was intended to be a model employer of

169. *See supra* notes 117-22 and accompanying text.

170. *See supra* notes 123-30 and accompanying text.

171. *See supra* notes 141-52 and accompanying text.

the disabled,[172] mere analysis of reasonable accommodation may deny a claimant her full rights under the section.

The scope of the employer's burden to accommodate alcoholic employees also needs clarification, as does the weight assigned to the employer's duty in determining if an employee is "otherwise qualified." Congress should make absolutely clear that employees bear the responsibility of notifying their employers of handicaps. Placing this burden on the employee helps to protect employers and may encourage employees to seek early treatment.[173] Employers would also benefit from a clearer articulation of what constitutes reasonable accommodation, beyond the assurance that no "fundamental" or "substantial" changes are required by the FRA.[174] The ADA has identified certain factors that render an accommodation an "undue hardship" on the employer, and it seems that these same factors should apply to the FRA.[175] Finally, courts should incorporate the finding of whether "reasonable accommodation" was possible into the determination of whether the employee was "otherwise qualified." To do otherwise ignores the responsibility of the federal employer to the employee, and instead merely focuses on the obligations of the employee.[176]

Although these proposed clarifications of the FRA are not exhaustive, it is hoped that they are sufficient to help federal courts reach consistent results. It is not desirable to narrow extensively the courts' freedom of action on FRA claims because of the myriad of diverse situations that may arise. A clarification of the Act's intent therefore should seek to indicate how interests are to be balanced in certain contexts and should take care not to rob the courts of discretion.

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

173. *See supra* notes 153-59 and accompanying text.

174. Alexander v. Choate, 496 U.S. 287, 300 (1985).

175. The factors identified by the ADA include:

> (i) the nature and cost of the accommodation needed under this chapter;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12,111(10)(B) (Supp. III 1991).

176. *See supra* notes 144-53 and accompanying text.

Evidence—Rape Shield Statute—Witnesses—*State v. Guthrie*, 110 N.C. App. 91, 428 S.E.2d 853 (1993)

"It never happened, and whats [sic] more they deserve it."[1]

Before the advent of rape shield laws, the moral character of victims of rape and sexual assault was often an issue at the trials of their attackers.[2] When a case turned on "his word against hers," evidence that the woman was unchaste frequently was used to undermine her testimony.[3] In response to this problem, prosecutors in the 1970s urged legislators to enact rape shield laws making a victim's past sexual behavior irrelevant to the defense of one accused of rape.[4] Defendants then challenged the newly enacted rape shield laws as infringing on their Sixth Amendment right to confront and cross-examine their accusers on all relevant issues.[5] A balance of the competing interests was struck by careful drafting of rape shield laws to permit inquiry into a victim's past sexual behavior only under certain exceptional circumstances.[6]

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1. RAPE VICTIMOLOGY xv (Leroy G. Schultz ed., 1975) (quoting slogan popular in 1971).

2. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON N.C. EVIDENCE, § 104 (1993); *see also* State v. Davis, 291 N.C. 1, 14-15, 229 S.E.2d 285, 294-95 (1976) (recognizing, in a rape case before the 1977 passage of rape shield legislation, evidence that the complainant's reputation was "bad" was admissible on the issue of her credibility); Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 95-110 (1977) (criticizing use of character and reputation evidence of victims in rape prosecutions); Kristine Cordier Karnezis, Annotation, *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's General Reputation for Unchastity*, 95 A.L.R. 3D 1181, 1188-89 (1979) (noting that as late as 1979 the general weight of authority held that evidence of complainant's general reputation for chastity was admissible in rape trials).

3. *See, e.g.*, Barbara Fromm, Comment, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579, 588-93 (1991) (noting that statutory consideration of a victim's dress "reinforc[es] the myth that the victim somehow caused the attack"); Barbara Kantrowitz, *Naming Names*, NEWSWEEK, Apr. 29, 1991, at 26, 31 (citing poll indicating 57% of Americans think negatively about rape victims).

4. *See generally* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 39-84 (1977) (comparing the rights of victims and defendants under the common law and new rape shield legislation); Ordover, *supra* note 2, at 120-26 (suggesting reform of the common law practice of admitting evidence as to chastity); Lara English Simmons, Note, Michigan v. Lucas: *Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592, 1601-05 (1992) (discussing the history of rape shield legislation).

5. The Sixth Amendment states in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. *See generally* David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1255-65 (discussing Sixth Amendment criticisms of rape shield legislation); Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. 4TH 283, 287-91 (1980) (noting numerous state court challenges to newly enacted rape shield legislation on due process grounds).

6. *See, e.g.*, 1 BROUN, *supra* note 2, § 104 (offering examples of typical exceptions to rape shield laws); DONAL E.J. MACNAMARA & EDWARD SAGARIN, SEX, CRIME, AND THE LAW 95

In *State v. Guthrie*,[7] the North Carolina Court of Appeals was asked to decide whether testimony about a victim's letter to a classmate indicating her desire to have sex with the classmate should be admitted to show that she was likely to have written similar letters voluntarily to the defendant. The defendant, fifty-three-year-old Manley Jarvis Guthrie, was charged with second-degree sexual offense and taking indecent liberties with his thirteen-year-old step-granddaughter, Lisa.[8] He was married to Lisa's grandmother, with whom Lisa lived after the death of her mother.[9] At trial Lisa testified that the defendant had sexually abused her since she was eleven.[10] In February of 1991, Lisa, who had become suicidal,[11] first told her grandmother of the alleged abuse.[12] Lisa later repeated the allegations to a school counselor who, in turn, contacted the local Department of Social Services to investigate.[13]

When a detective first interviewed the defendant, he produced three "promise" letters that Lisa had written to him.[14] In the letters, Lisa offered the defendant sexual favors in exchange for his taking her to school and giving her lunch money.[15] Lisa admitted writing the letters, but she claimed that the defendant had forced her to write them whenever she asked

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(1977) (noting that "in rape cases, social policy may require prosecution and measures to reduce the difficulties for the victim while at the same time demanding that the constitutional rights of the accused not be abrogated"); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 578-89 (1980) (giving examples of situations in which prior sexual history might be relevant); Haxton, *supra* note 5, at 1271-72, (concluding that despite Sixth Amendment challenges, most rape shield legislation is constitutional).

7. 110 N.C. App. 91, 428 S.E.2d 853, *disc. rev. denied*, 333 N.C. 793, 431 S.E.2d 28 (1993).

8. *Id.* at 92, 428 S.E.2d at 853.

9. Brief for the State at 1-2, State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993) (No. 9210SC214).

10. *Id.* at 3.

11. The fact that Lisa became suicidal is consistent with some commentators' observations about the effects of incest and child abuse on emotional development. *See, e.g.*, DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 31 (1979); Seymour L. Halleck, *Emotional Effects of Victimization*, *in* SEXUAL BEHAVIOR AND THE LAW 677-79 (Ralph Slovenko ed., 1965); RAPE VICTIMOLOGY, *supra* note 1, at 260-65.

12. Brief for the State at 2-3, *Guthrie* (No. 9210SC214).

13. *Id.* at 3.

14. Defendant-Appellant's Brief at 4-5, *Guthrie* (No. 9210SC214).

15. Brief for the State at app. 5-6, 12, *Guthrie* (No. 9210SC214). The letters read: "Jarvis, take me to school and give me [five] dollars, and I will do something tonight." *Id.* at app. 9, 29. Another read, "I will do something tonight if you take me to school and give me a little money." *Id.* And perhaps the most overtly sexual stated: "Jarvis, I want you to do something to me very bad." All were signed "Lisa." *Id.* The State's attorney pointed out, in his brief to the appellate court, that "Defendant's testimony that he was angry because Lisa wrote the notes and told her that it was wrong to write the notes condemns him because the content of the notes themselves do [sic] not require a prurient interpretation." *Id.* at 9.

him for money or for a ride to school.[16] The trial judge admitted the three "promise" letters over the defendant's objection.[17]

The admissibility of testimony about two other letters became a central issue in the trial and subsequent appeal. Lisa wrote a letter to a boy in her class at school in which she asked him to have sex with her.[18] The boy replied in a return letter that Lisa found on her desk at school and put in her bookbag.[19] The defendant produced the reply letter at trial,[20] but after heated debate, the trial judge refused to admit it.[21] He also refused to allow cross-examination about the reply letter or the initial letter written by Lisa,[22] reasoning that it was precluded by North Carolina's rape shield statute.[23] The statute deems irrelevant all evidence about the prior sexual behavior of a complainant in a sexual offense case.[24]

The North Carolina Court of Appeals reversed the trial court's ruling and ordered a new trial.[25] The court gave two reasons for its decision. First, it held that Rule 412 did not apply because a written letter, including a

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16. *Id.* at 4.

17. *Id.* at app. 9-10. The defendant's attorney did not state the basis for his objection to the admissibility of these three letters in the portion of the transcript set out in the appellate record. *Id.* Apparently, he had stated it on the record at an earlier point, but the admission of the three "promise" letters from Lisa to the defendant was not an issue on appeal. *Id.*

18. *Id.* at app. 7a-8. Lisa testified that the letter was written to the boy as a "joke." *Id.* at app. 8.

19. *Id.* The reply letter, which was produced at trial said, "Also, all you have wrote to me, will you fuck me? Personally, I think you are too fat to fuck." Defendant-Appellant's Brief at app. 15, *Guthrie* (No. 9210SC214). While not particularly legally significant to this case, the language and content of the note demonstrate how this type of evidence could be embarrassing and hurtful to a complainant. That these hurtful words were read out loud at trial by police investigators and repeated in the appellate record exemplifies the point made by one commentator that "[v]ictims frequently report that their encounters with the police, district attorneys, and courtroom personnel were more traumatic than the rape incident itself." Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303 (1974).

20. Lisa testified that she did not know how the defendant had gotten the note. Brief for the State at app. 8, *Guthrie* (No. 9210SC214).

21. Defendant-Appellant's Brief at app. 5-17, *Guthrie* (No. 9210SC214).

22. *Guthrie*, 110 N.C. at 94, 428 S.E.2d at 854; *see also* Defendant-Appellant's Brief at app. 5-17, *Guthrie* (No. 9210SC214) (setting out the attorneys' debate over the judge's ruling).

23. N.C. R. EVID. 412.

24. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854. North Carolina's rape shield statute reads in relevant part:

> (a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.
>
> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution . . . .

N.C. R. EVID. 412. The defendant did not assert that the letter fell within any of the exceptions to the rape shield statute or any other provision of law. *See* Defendant-Appellant's Brief, *Guthrie* (No. 9210SC214). The North Carolina Supreme Court approved the constitutionality of Rule 412 in State v. Fortney, 301 N.C. 31, 34, 269 S.E.2d 110, 112 (1980).

25. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854.

solicitation for sex, is not "sexual behavior" as contemplated by the Rule.[26] Second, analyzing the evidence under the general rules of admissibility,[27] it found the evidence relevant under Rule 401,[28] and determined under Rule 403[29] that its probative value was not outweighed by its prejudicial effect.[30] The court ruled, therefore, that evidence of the letters should have been admitted by the trial court. "Showing that the victim voluntarily wrote at least one letter to another person which is similar to the ones written to the defendant," the court found, "bears directly on the victim's credibility. It [indicates] that the victim wrote the letters to defendant voluntarily, contradicting her earlier testimony."[31]

There are two distinct tensions in *State v. Guthrie*. First, the statutory definition of "sexual behavior" and the purpose of the rape shield statute appear to conflict. Both the plain language of the statute[32] and North Carolina case law narrowly define "sexual behavior." This definition does not include letter writing, even if a letter is a sexual solicitation.[33] This narrow

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26. *Id.* at 93, 428 S.E.2d at 854; *see also supra* note 24.

27. *Guthrie*, 110 N.C.App. at 94, 428 S.E.2d at 854.

28. N.C. R. EVID. 401. North Carolina defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

29. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854. North Carolina's Rule 403 states that even if evidence is relevant, it may not be admissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. R. EVID. 403.

30. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854. Defendant maintained that impeaching Lisa's credibility was the reason for introducing the evidence regarding the letter. He said this was a case solely about credibility, not a case involving a consent defense, as he denied making any sexual advances. Defendant-Appellant's Brief at 7, *Guthrie* (No. 9210SC214).

31. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854. The court determined that the defendant had a Sixth Amendment right to confront his accuser about her letter writing. The Sixth Amendment right to confront one's accusers is central to an effective defense and a fair trial. However, the Sixth Amendment right of cross-examination is not absolute, and in some instances may be outweighed by other legitimate interests. *See* State v. Durham, 74 N.C. App. 159, 163, 327 S.E.2d 920, 923 (1985) (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)). One legitimate limitation on cross-examination may be a situation in which the prejudicial effect of the evidence outweighs its probative value. *See supra* note 27 and accompanying text. The rape shield statute expressly limits cross-examination in sexual offense cases. *See infra* note 41. It prevents a defendant from inquiring into a complainant's sexual history for any reason not addressed in the exceptions to Rule 412. *See* State v. Alverson, 91 N.C. App. 577, 579, 372 S.E.2d 729, 730 (1988) (holding that when the defendant speculated that the prosecuting witness was pregnant by a boyfriend, and this motivated her to accuse the defendant of raping her, the trial court properly denied the defendant the opportunity to cross-examine the victim about her sexual behavior); 1 BROUN, supra note 2, § 104 (1993).

32. *See supra* note 24 for text of statute.

33. "Sexual behavior" means a "sex act" and not mere words or conversation. State v. Baron, 58 N.C. App. 150, 153, 292 S.E.2d 741, 743 (1982) (citing State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371, *disc. rev. denied*, 301 N.C. 104, 273 S.E.2d 460 (1980)). In *Baron*, the defendant sought to cross-examine the victim about allegations of sexual abuse she made against other family members. *Id.* at 152, 292 S.E.2d at 742. The court of appeals held that those accusa-

definition may often be at odds with the statute's purpose—preventing unnecessary embarrassment to the victim and keeping out irrelevant evidence.[34]

Prior North Carolina cases have construed "sexual behavior" narrowly, but these cases can be distinguished from *Guthrie*. In *State v. Smith*,[35] the court of appeals defined "sexual history" narrowly in order to prevent the admission of a conversation between the defendant and the victim.[36] Subsection (b)(1) allows admission of evidence of behavior "between the complainant and the defendant."[37] Presumably, the court's intent was to protect the complainant from embarrassment, an intent consistent with the purpose of the statute.[38] In *Guthrie*, by contrast, the narrow definition was used to *admit* evidence that might be embarrassing.[39]

In *State v. Baron*,[40] the court of appeals deemed admissible evidence of false allegations of sex abuse previously made by the complainant against the defendant.[41] The court ruled that the accusations were not "sexual behavior" within the meaning of the statute.[42] Like *Smith*, *Baron* can be distinguished; to apply the statute in *Baron* would not have furthered the statute's purpose. The policy of protecting a victim from embarrassment does not support protecting a false accuser from the consequences of her own lies. Nor does that policy justify the exclusion of evidence that is directly probative of a complainant's lack of credibility.[43]

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tions were merely words and not sexual behavior. *Id.* at 153, 292 S.E.2d at 743. Therefore, the court reasoned, the subject matter did not fall into the category of inquiry that the legislature intended to protect. The court noted: "We believe that the Legislature intended to exclude the *actual sexual history of the complainant* . . . ." *Id.* (emphasis added). The *Baron* court cited State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371, *disc. rev. denied*, 301 N.C. 104, 273 S.E.2d 460 (1980), as standing for the proposition that conversation does not constitute sexual behavior. *Baron*, 58 N.C. App. at 153, 292 S.E.2d at 743. In *Smith*, the defendant wanted to admit evidence that the victim talked with him about her sexual problems in an inviting way. *Smith*, 45 N.C. App. at 502, 263 S.E.2d at 372. Since prior sexual activity between the defendant and the victim is relevant under an exception to Rule 412, the defendant sought to have the evidence admitted because it was relevant to the issue of consent. *Id.* at 503, 263 S.E.2d at 372. The *Smith* court held that conversation does not constitute activity, so it does not come in under the exception to Rule 412. *Id.*

34. State v. Fortney, 301 N.C. 31, 43-44, 269 S.E.2d 110, 117 (1980); *see also infra* note 41 and accompanying text.

35. 45 N.C. App. 501, 263 S.E.2d 371, *disc. rev. denied*, 301 N.C. 104, 273 S.E.2d 460 (1980); *see also supra* note 33.

36. *Id.* at 503, 263 S.E.2d at 372.

37. N.C. R. EVID. 412(b)(1) (1992).

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

39. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854.

40. 58 N.C. App. 150, 292 S.E.2d 741 (1982); *see supra* note 32.

41. *Baron*, 58 N.C. App. at 154, 292 S.E.2d at 743.

42. *Id.*

43. *Id.* at 154, 292 S.E.2d at 743-44.

To exclude letters from the meaning of "sexual behavior" is inconsistent with the purpose of the statute, because written or oral communication about sexual matters can be just as embarrassing and irrelevant as prior sexual acts.[44] Yet because existing case law interprets Rule 412 to apply only to actual "sex acts," and does not bar the defendant from cross-examining the victim about prior letters, the victim is protected only by the standards of relevancy and admissibility provided in Rules 401 and 403.[45]

The second tension in *Guthrie*, a tension that is independent of the statute, is in determining whether a sexual letter is sufficiently probative on the issue of the victim's credibility to outweigh its prejudicial effect on the issue of her sexual history. The argument for admission is that the letter introduces a question of the victim's credibility that outweighs any prejudicial effect of revealing her sexual history.[46] Balancing the probative value against the prejudicial effect of the evidence,[47] the defendant is entitled to cross-examine the victim about the letter if it indicates that she is lying.[48]

In its brief to the court of appeals, the State addressed this issue:

> Defendant argues that Lisa's testimony that she *voluntarily* wrote a note to a classmate named Michael, asking him if he would have sexual intercourse with her, tends to prove that Lisa *voluntarily* wrote [similar notes] to defendant. It is denied that the proffered evidence tends to prove that if a 13 year old voluntarily writes vulgar notes to a classmate, it is more likely that she would write a similar note to her 53 year old step grandfather, particularly if the usual relationship, attested to by defendant, existed. Such an inference is beyond the limits of relevancy prescribed by N.C.G.S. 8C-1, Rule 401.[49]

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44. The purpose of the rape shield statute is to prevent harassing, humiliating, and irrelevant inquiries into the past sexual behavior of victims, as well as to prevent the introduction of collateral issues that may confuse the jury. *See* State v. Fortney, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (concluding that North Carolina's rape shield rule narrows the traditional relevancy test to a balancing of the defendant's right to cross-examination and the victim's right to privacy and right to avoid further trauma during the investigation and trial process). The *Fortney* court noted that evidence of sexual history diverts the jury's attention to collateral issues. *Id.* at 39, 269 S.E.2d at 114. It also noted policy reasons, aside from questions of relevance, for excluding sexual history. Noting that rape is an under-reported crime, the court stated that inquiry into embarrassing sexual history would cause harm by discouraging victims from reporting and prosecuting the crime. *Id.* at 42-43, 269 S.E.2d at 116.

45. *Guthrie*, 110 N.C. App. at 94, 428 S.E.2d at 854.

46. *See id.*

47. *See* N.C. R. Evid. 403; *see also supra* notes 27-30 and accompanying text.

48. N.C. R. Evid. 403.

49. Brief for the State at 7, *Guthrie* (No. 9210SC214).

The State further argued that even if the evidence were relevant, the danger of unfair prejudice, confusion of the issues, and waste of time outweighed the letter's probative value.[50]

The court should go beyond the wording of the statute to its purpose. The letter soliciting sex, while not considered a sexual act, is potentially just as embarrassing and prejudicial to the victim as if she had engaged in sex with her classmate. If the policy behind the rape shield statute[51] is compelling with respect to sexual acts, then it should be equally valid in this case. Moreover, evidence of the complainant's sexual knowledge, if considered relevant at all, surely is more prejudicial than probative on the issue of her credibility.[52] The purpose of rape shield laws is to keep out this type of evidence.

Past sexual talk is relevant to chastity, not credibility. By enacting the rape shield statute, the legislature has made it clear that a victim's chastity is not to be an issue at a rape trial.

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50. *Id.*

51. *See supra* note 44 and accompanying text.

52. This seems particularly true given societal attitudes towards rape victims. *See supra* note 3 and accompanying text.

Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support

Graduate and professional education is a costly undertaking. Tuition, fees, books, room, board, and the opportunity costs of voluntary unemployment can impose a significant financial burden on students and their families. Unmarried students may look to a combination of parental assistance, prior earnings, and student loans to offset these expenses. Married students often have access to an additional source of funds—the income and savings of their spouses.

When one spouse undertakes to finance another's advanced degree, the supporting spouse consents to a present reduction in standard of living in anticipation of a future increase in earning capacity. If the degree is attained and the marriage continues, the supporting spouse recoups the financial contribution to the other's education in the form of increased marital income. But if the marriage dissolves shortly after the program is completed and marital property is limited, the contribution of the supporting spouse is never repaid. In the latter case, the investment of both spouses is realized by one alone.

This Note examines *Kuder v. Schroeder*,[1] a recent North Carolina Court of Appeals case in which a supporting spouse's attempt to recoup expenditures for her husband's professional education failed. The Note explores remedies available to separating spouses under North Carolina law,[2] analyzes the court's decision in light of those remedies,[3] and considers the possibility of importing solutions from other jurisdictions.[4]

In *Kuder*, the court of appeals considered a wife's divorce-related claims against her husband for breach of contract and unjust enrichment.[5] Cynthia Kuder alleged that she and Thomas Schroeder, married in 1978, entered into an agreement whereby she would provide support for the family and pay her husband's educational expenses in exchange for his subsequent support of the family and the opportunity for her to become a full-time wife and mother.[6]

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1. 110 N.C. App. 355, 430 S.E.2d 271 (1993). The plaintiff has not petitioned the North Carolina Supreme Court for discretionary review under N.C. GEN. STAT. § 7A-31 (1981).

2. *See infra* notes 23-83 and accompanying text.

3. *See infra* notes 96-120 and accompanying text.

4. *See infra* notes 84-95, 121-34 and accompanying text.

5. *Kuder*, 110 N.C. App. at 356, 430 S.E.2d at 272. Unjust enrichment is an equitable doctrine compensating the benefactor when it would be unfair for the recipient of services to retain their benefit. *See infra* notes 55-61 and accompanying text.

6. *Kuder*, 110 N.C. App. at 356-57, 430 S.E.2d at 272-73.

Mr. Schroeder was unemployed for eleven years, throughout which he pursued undergraduate, Master's, and law degrees.[7] During this period, Ms. Kuder remained the family's sole income earner, paying both the direct and indirect expenses of her husband's education allegedly in accord with the couple's agreement.[8] Three months after becoming an associate in a law firm—his first employment earning a salary sufficient to provide complete support for the family—Mr. Schroeder requested a separation.[9] At that time, the marital estate consisted of little property and Mr. Schroeder had established no goodwill as an attorney.[10]

The trial court dismissed Ms. Kuder's alimony claim because she was unable to demonstrate the threshold requirement of financial dependence on her spouse.[11] Her contract claim, premised on the alleged agreement between the spouses, and her quasi-contract claim, premised on Mr. Schroeder's unjust retention of an increased earning capacity derived from Ms. Kuder's services, were both dismissed for failure to state a claim upon which relief can be granted.[12] Ms. Kuder appealed the dismissal of the contract and quasi-contract claims.[13]

Judge Wells, writing for the court of appeals, affirmed.[14] The majority held that (1) a personal duty of each spouse to support the other arises out of the marital relationship and (2) the duty cannot be abrogated or modified by an agreement between the parties.[15]

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7. *Id.* at 358-59, 430 S.E.2d at 273-74 (Greene, J., dissenting). Upon receiving his law degree, Mr. Schroeder first founded a legal research business. Amended Complaint at 2-3, Kuder v. Schroeder, 110 N.C. App. 355, 430 S.E.2d 271 (No. 9220DC425) (1993). He earned approximately $5,000 in the first year of business and $20,000 in the second year. *Id.* The venture subsequently failed. *Id.*

8. *Kuder*, 110 N.C. App. at 358, 430 S.E.2d at 273 (Greene, J., dissenting). Ms. Kuder was a veterinarian employed as a teacher at a community college. *Id.* (Greene, J., dissenting). She earned $36,000 per year. Complaint at 3, Kuder v. Schroeder, 110 N.C. App. 355, 430 S.E.2d 271 (No. 9220DC425) (1993).

For the purposes of this Note, "direct expenses" are tuition, fees, and books; "indirect expenses" include room, board, transportation, and opportunity costs.

9. *Kuder*, 110 N.C. App. at 359, 430 S.E.2d at 274 (Greene, J., dissenting). Mr. Schroeder informed Ms. Kuder that he would earn at least $33,000 in each of his first two years as an attorney and $100,000 annually thereafter. Amended Complaint at 3, Kuder v. Schroeder, 110 N.C. App. 355, 430 S.E.2d 271 (No. 9220DC425) (1993).

10. *Kuder*, 110 N.C. App. at 365, 430 S.E.2d at 277 (Wynn, J., concurring); *see also infra* notes 41-43 and accompanying text (discussing the distribution of goodwill).

11. *Kuder*, 110 N.C. App. at 356, 430 S.E.2d at 272; *see also infra* notes 33-36 and accompanying text (citing N.C. GEN. STAT. § 50-16.1(3) (1987)).

12. *Kuder*, 110 N.C. App. at 356, 430 S.E.2d at 272.

13. *Id.*

14. *Id.* at 357-58, 430 S.E.2d at 273.

15. *Id.* at 357, 430 S.E.2d at 273 (citing North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987); Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945)).

Judge Greene, concurring in the dismissal of Ms. Kuder's contract claim, found a lack of specificity in the alleged contract between the spouses.[16] He disagreed, however, with the majority's position that a supporting spouse's contract-based action to recoup educational expenditures should always go unrecognized.[17] Regarding Ms. Kuder's unjust enrichment claim, Judge Greene dissented in both analysis and result.[18] He urged that the agreement between the spouses sufficiently demonstrated Ms. Kuder's nongratuitous intent to provide her husband with educational support.[19] He further argued that, even between spouses, such a demonstration warrants equitable intervention.[20]

Judge Wynn concurred with the majority and responded directly to Judge Greene's dissent regarding the viability of Ms. Kuder's unjust enrichment claim. He maintained that the equitable doctrine of unjust enrichment "is inapplicable when the benefit is bestowed gratuitously or is in discharge of some obligation."[21] He agreed with the majority that the provision of educational benefits is in discharge of each spouse's obligation to support the other.[22]

In North Carolina, each spouse undertakes a common-law obligation upon marriage to provide the other with the necessaries of life.[23] Rather than attempt to enumerate these necessaries, North Carolina courts have preferred to expound the duty more broadly: "Under the law of this State, there is a personal duty of each spouse to support the other, a duty arising from the marital relationship, and carrying with it the corollary right to support from the other spouse."[24] The relevant case law predictably examines the minimum duty, but the obligation is often described as one of "reasonable support" according to the provider's means, ability, and station in life.[25] In discussing the scope of the duty of support owed a child, for

16. *Id.* at 360, 430 S.E.2d at 274 (Greene, J., dissenting) (citing Matthews v. Matthews, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968)).

17. *Id.* at 359-60, 430 S.E.2d at 274 (Greene, J., dissenting).

18. *Id.* at 361-63, 430 S.E.2d at 275-76 (Greene, J., dissenting).

19. *Id.* at 362-63, 430 S.E.2d at 275-76 (Greene, J., dissenting).

20. *Id.* at 363, 430 S.E.2d at 276 (Greene, J., dissenting).

21. *Id.* at 364, 430 S.E.2d at 277 (Wynn, J., concurring) (citing Atlantic Coast Line R.R. v. State Highway Comm'n, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966)).

22. *Id.* at 364, 430 S.E.2d at 277 (Wynn, J., concurring).

23. Ritchie v. White, 225 N.C. 450, 453, 35 S.E.2d 414, 416 (1945); 41 AM. JUR. 2D *Husband and Wife* §§ 329-330 (1968). *See generally* 73 AM. JUR. 2D *Support of Persons* § 11 (1974) (discussing support obligations generally); 41 AM. JUR. 2D *Husband and Wife* §§ 365 (1968) (discussing what services constitute necessaries).

24. *Kuder*, 110 N.C. App. at 357, 430 S.E.2d at 273 (citing North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987) (extending liability arising from the doctrine of necessaries to female spouses)).

25. *See* Schloss v. Schloss, 273 N.C. 266, 271-72, 160 S.E.2d 5, 10-11 (1968); Mercer v. Mercer, 253 N.C. 164, 169, 116 S.E.2d 443, 447 (1960); Bowling v. Bowling, 252 N.C. 527, 532,

instance, the supreme court has held that the reasonable amount "is to be determined with reference to the special circumstances of the particular parties."[26] Thus, what may be a reasonable support obligation for one family may be beyond reasonability for another.

In North Carolina, as between the spouses themselves and in the absence of a valid antenuptial or separation agreement,[27] economic disparities arising out of separation or divorce may be resolved by an alimony award,[28] a property distribution under the Equitable Distribution Act,[29] or a combination of the two remedies.[30] The remedies may be indistinguishable, as North Carolina allows alimony in "lump sum"[31] and distributive awards "over a period of time in fixed amounts" when physical distribution would be impractical.[32]

To support a claim for alimony, section 50-16.1(3) of the North Carolina General Statutes demands a threshold showing of economic dependency on the part of the support-seeking spouse.[33] Alimony claims by spouses with a demonstrated ability to provide for themselves and their families are dismissed for failure to satisfy the dependency requirement.[34] If substantial dependency is shown, the support-seeking spouse must then allege and demonstrate one of ten grounds for alimony.[35] In North Caro-

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114 S.E.2d 228, 232 (1960). As the standard of living improves, the tendency among courts is to broaden the scope of what constitutes necessaries. ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 132, at 129 (4th ed. 1980).

26. Williams v. Williams, 261 N.C. 48, 57, 134 S.E.2d 227, 234 (1964). *Williams* contains one of the court's most complete discussions of the duty of support as manifested in the closely related doctrine of necessaries.

27. *See infra* note 53.

28. N.C. GEN. STAT. § 50-16.2 (1987).

29. *Id.* § 50-20 (Supp. 1993).

30. LEE, *supra* note 25, § 135.1, at 145. The remedies are initially determined independently, subject to the court's revisitation of the alimony award. N.C. GEN. STAT. § 50-20(f) (Supp. 1993). The statute states:

> The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

Id.

31. N.C. GEN. STAT. § 50-16.1(1) (1987).

32. *Id.* § 50-20(b)(3) (Supp. 1993). *See generally* LEE, *supra* note 25, § 135.1, at 145-46 (discussing spousal remedies).

33. N.C. GEN. STAT. § 50-16.1(3) (1987).

34. Williams v. Williams, 299 N.C. 174, 182-86, 261 S.E.2d 849, 855-58 (1980). The *Williams* court held that, even in the absence of actual dependence, a spouse could still demonstrate a "need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed." *Id.* at 183, 261 S.E.2d at 856. However, in a situation in which the alimony-seeking spouse provided virtually all family resources throughout the marriage, such a demonstration is impossible.

35. See N.C. GEN. STAT. § 50-16.2 (1987) for a list of these grounds.

lina, all grounds for alimony constitute marital misconduct or "fault" on the part of the supporting spouse.[36]

The Equitable Distribution Act,[37] enacted in 1981, represents an attempt by the state legislature "to alleviate many of the problems that had existed in property divisions of divorced couples."[38] The first step in the distribution process is to identify marital property.[39] In North Carolina, professional licenses and degrees, even if acquired during a marriage, are not considered marital property for the purposes of distribution under the Act.[40] Goodwill associated with a professional practice, however, is distributable as marital property.[41] Goodwill can only be accumulated by professionals with an ownership interest in their practice, not by salaried professionals,[42] and the accumulation is limited by the length of time the practice has been in operation.[43]

Although strongly favoring an equal distribution of marital property, upon classification the Act affords the parties an opportunity to demonstrate that an equal division of property would be inequitable under the circumstances.[44] Factors warranting an unequal distribution involve the relative

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36. *See* N.C. GEN. STAT. § 50-16.2 (1987); *Williams*, 299 N.C. at 187-88, 261 S.E.2d at 858-59.

37. N.C. GEN. STAT. § 50-20 (Supp. 1993).

38. Hagler v. Hagler, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987) (citing Sally B. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247 (1983)).

39. Smith v. Smith, 111 N.C. App. 460, 472, 433 S.E.2d 196, 204 (1993).

40. N.C. GEN. STAT. § 50-20(b)(2) (Supp. 1993); Haywood v. Haywood, 106 N.C. App. 91, 99, 415 S.E.2d 565, 570 (1992); Geer v. Geer, 84 N.C. App. 471, 478, 353 S.E.2d 427, 431 (1987).

41. Poore v. Poore, 75 N.C. App. 414, 420-21, 331 S.E.2d 266, 271, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). Marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties." N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1993). In *Poore*, the court ruled that goodwill associated with a dental practice and accumulated during the marriage was within the scope of this definition. *Poore*, 75 N.C. App. at 420-21, 331 S.E.2d at 271.

42. Sonek v. Sonek, 105 N.C. App. 247, 250, 412 S.E.2d 917, 919, *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 255 (1992). Although the alleged goodwill interest in *Sonek* was denied, the court remanded the issue for an increase in the plaintiff's distributional percentage because one spouse's enhancement of the other spouse's earning capacity is a factor weighing in favor of an unequal distribution under N.C. GEN. STAT. § 50-20(c)(7) (1991). *Id.* at 251, 412 S.E.2d at 920. Judge Greene concurred in *Sonek's* result, arguing that, although the license should itself remain separate property, any increase in the value of the license due to marital contribution should be regarded as actual marital property rather than as a mere distributional factor. *Id.* at 255-58, 412 S.E.2d at 923-24 (Greene, J., concurring). At least in cases in which goodwill is at issue, such a classification would avoid inequity when little marital property has been accumulated, presumably by warranting a distributive award to be paid over time under N.C. GEN. STAT. § 50-20(e) (Supp. 1991).

43. *Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271.

44. N.C. GEN. STAT. § 50-20(c) (Supp. 1993). In White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985), the court stated:

needs, expectations, and contributions of each party, including "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse."[45] Because an educational or career development contribution merely suggests an unequal distribution of assets *already* classified as marital property, the Act benefits the contributing spouse only in the event that significant marital property exists at the time of dissolution. In addition to alimony and equitable property distribution—statutory rights derived from the marital relationship itself—spouses may upon dissolution allege additional rights founded on specific acts or agreements between them.[46] Contract and unjust enrichment claims fall within this category.

Contracts between North Carolina spouses are generally valid unless inconsistent with public policy.[47] In *Ritchie v. White*,[48] the supreme court considered a widow's contract and unjust enrichment claims against her deceased husband's estate.[49] In the alleged agreement between the spouses, Mr. Ritchie promised to devise his family's "home place" to his wife in exchange for her provision of domestic services, lodging, and utilities until his death.[50] The husband failed to devise the property as agreed.[51] Regarding the contract claim, the court held that marital contracts that transfer the spousal duty of support from one party to another or relieve one party of the duty altogether are void.[52] Such an agreement fails both because it offers a preexisting duty as consideration and because a modification or release of either party's obligations under the duty of support during the marriage violates public policy encouraging spousal support.[53]

> The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable.

Id. at 776, 324 S.E.2d at 832.

45. N.C. GEN. STAT. § 50-20(c)(7) (Supp. 1993).

46. *See supra* notes 28-30.

47. N.C. GEN. STAT. § 52-10(a) (1991).

48. 225 N.C. 450, 35 S.E.2d 414 (1945).

49. *Id.* at 452, 35 S.E.2d at 415.

50. *Id.*

51. *Id.*

52. *Id.* at 454, 35 S.E.2d at 416.

53. *Id.* at 452, 35 S.E.2d at 416. The duty of support may nevertheless be contractually altered before or after marriage by premarital agreement, N.C. GEN. STAT. § 52B-4(4) (1987), or separation agreement, Archbell v. Archbell, 158 N.C. 409, 414, 74 S.E. 327, 329 (1912) (holding that separation agreements are permissible "where the separation has already taken place or immediately follows"). During the marriage, services beyond the scope of the support duty may be the subject of a contract between the spouses. Dorsett v. Dorsett, 183 N.C. 354, 358, 111 S.E. 541, 543 (1922).

Actions for unjust enrichment, like contract actions, are available to both husband and wife.[54] The general rule regarding unjust enrichment is that "if one performs services for another which are knowingly and voluntarily accepted, nothing else appearing, the law implies a promise on the part of the recipient to pay the reasonable value of the services."[55] The principle has never been applicable, however, "[i]f the services were rendered as a pure gratuity or in discharge of a moral obligation."[56]

In *Atlantic Coast Line Railroad Co. v. State Highway Commission*,[57] the supreme court narrowed the applicability of the doctrine to exclude compensation for services performed in discharge of a legal obligation.[58] In *Atlantic Coast*, the plaintiff railroad made necessary improvements to a crossing it operated when the defendant State Highway Commission widened the underlying road.[59] The railroad sued to recover its expenses on the theory that the State had been unjustly enriched by the railroad's modifications.[60] The court, pointing to a statute requiring such repairs by rail carriers, held that the principle of unjust enrichment is inapplicable "when the services are rendered gratuitously or in discharge of *some* obligation."[61]

Although these limitations complicate claims between spouses, there is no doubt that an unjust enrichment claim can succeed when a spouse seeks recovery for non-domestic services. Most commonly, such claims involve services rendered in furtherance of the benefited spouse's business. In *Dorsett v. Dorsett*,[62] the supreme court denied a wife's unjust enrichment claim based on her services in her former husband's repair shop because no agreement regarding compensation existed.[63] In dicta, however, the court noted that a wife would have a valid claim if her services did not arise from the marital relation and there was an express agreement between the parties

54. Most recently, in Biesecker v. Biesecker, 62 N.C. App. 282, 302 S.E.2d 826 (1983), the court remanded for further consideration a defendant-wife's counterclaim for unjust enrichment. *Id.* at 286, 288, 302 S.E.2d at 829-30. In Wright v. Wright, 47 N.C. App. 367, 267 S.E.2d 61 (1980), the court remanded a plaintiff-husband's unjust enrichment claim when the trial court incorrectly instructed the jury to determine whether a contract between the parties existed. *Id.* at 369-70, 267 S.E.2d at 62.

55. *See* Johnson v. Sanders, 260 N.C. 291, 293, 132 S.E.2d 582, 584 (1963); Young v. Herman, 97 N.C. 280, 281-82, 1 S.E. 792, 793 (1887).

56. Twiford v. Waterfield, 240 N.C. 582, 585, 83 S.E.2d 548, 551 (1954) (citing *Young*, 97 N.C. at 281-82, 1 S.E. at 793).

57. 268 N.C. 92, 150 S.E.2d 70 (1966).

58. *Id.* at 96, 150 S.E.2d at 73.

59. *Id.* at 93-94, 150 S.E.2d at 71-72.

60. *Id.*

61. *Id.* at 96, 150 S.E.2d at 73 (emphasis added) (citing Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963); Allen v. Seay, 248 N.C. 321, 103 S.E.2d 332 (1958); Twiford v. Waterfield, 240 N.C. 582, 83 S.E.2d 548 (1954)).

62. 183 N.C. 354, 111 S.E. 541 (1922).

63. *Id.* at 356-58, 111 S.E. at 542-43.

regarding compensation.[64] In *Leatherman v. Leatherman*,[65] the court reiterated that unjust enrichment claims based on non-domestic services are available to spouses and noted that, although even business-related services between spouses are presumptively gratuitous, this presumption can be rebutted by evidence of an express or implied agreement to the contrary.[66]

The applicability of unjust enrichment to domestic services is most clearly discussed in *Francis v. Francis*.[67] In *Francis*, the plaintiff sought recovery for domestic services she provided to her father-in-law in the years preceding his death.[68] Because no express contract to pay existed, the plaintiff's theory of recovery was limited to unjust enrichment.[69] The court noted that when valuable services are rendered between parties in "certain family relationships," a presumption of gratuity and moral obligation arises.[70] The court acknowledged, however, that "this is a presumption which may be overcome or rebutted by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other."[71] The court held that, as between family members as distant as father and daughter-in-law, no presumption of gratuity arises.[72] Alternatively, and for good measure, the court found evidence showing "that plaintiff's services were, at the time, intended to be paid for by the decedent."[73]

In addition to the problems of gratuity and discharge of obligation, spouses seeking recovery for domestic services based on unjust enrichment face yet another hurdle. In *Ritchie*, in which the court denied the plaintiff-wife's contract claim for domestic services on grounds that the contract lacked adequate consideration and violated public policy, the court further

64. *Id.* at 358, 111 S.E. at 543.

65. 297 N.C. 618, 256 S.E.2d 793 (1979).

66. *Id.* at 622, 256 S.E.2d at 796. For other cases considering unjust enrichment claims for services in furtherance of spouse's business, see Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951); Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948).

67. 223 N.C. 401, 26 S.E.2d 907 (1943).

68. *Id.* at 402, 26 S.E.2d at 907.

69. *Id.*, 26 S.E.2d at 908.

70. *Id; see also* Allen v. Seay, 248 N.C. 321, 323, 103 S.E.2d 332, 333 (1958) (discussing the presumption); Twiford v. Waterfield, 240 N.C. 582, 585, 83 S.E.2d 548, 551 (1954) (same).

71. *Francis*, 223 N.C. at 402, 26 S.E.2d at 908 (quoting Nesbitt v. Donoho, 198 N.C. 147, 147, 150 S.E. 875, 875 (1929)).

72. *Id.* at 402-03, 26 S.E.2d at 908. Cases turning on whether the presumption of gratuity applies to domestic services rendered within a particular relationship have involved family members other than spouses. *See, e.g.*, Johnson v. Sanders, 260 N.C. 291, 292, 132 S.E.2d 582, 583 (1963) (adult daughter); *Allen*, 248 N.C. at 323, 103 S.E.2d at 333 (first cousin once removed); *Twiford*, 240 N.C. at 583, 83 S.E.2d at 549 (adult foster son); *Francis*, 223 N.C. at 402, 26 S.E.2d at 908 (adult daughter-in-law).

73. *Francis*, 223 N.C. at 403, 26 S.E.2d at 908. It should be noted that although *Francis* involved domestic services, the distant relation between the parties removed the services from the scope of the duty of support.

held that Ms. Ritchie's unjust enrichment claim failed because "[t]he law will not imply *assumpsit* where the parties may not effectually agree."[74] Although she alleged express and implied agreements evidencing the non-gratuitous nature of her labor and rebutting the presumption of gratuity arising between spouses, Ms. Ritchie could not claim unjust enrichment when she could not contract for the same transaction.[75]

The case of *Suggs v. Norris*[76] further illustrates the point that recovery in equity is unavailable when recovery at law would be impossible. In *Suggs*, a partner to an unmarried but cohabiting relationship brought an unjust enrichment claim to recover the value of services provided to her cohabitant's produce business.[77] The court noted that "no recovery can be had under either a contract or restitutionary (*quantum meruit*) theory arising out of a contract or circumstances which violate public policy."[78] But because the relationship was between unmarried partners and involved business services "not of the character usually found to be performed gratuitously," no violation of public policy had occurred and recovery was allowed.[79]

Although the *Suggs* court cited the celebrated California case of *Marvin v. Marvin*[80] as authority for the proposition that express contract and quasi-contract claims should be made available to unmarried cohabitants, the *Suggs* court did not adopt *Marvin*'s holding that relief for unmarried cohabitants should extend to claims for domestic services as well.[81] In *Marvin*, the California Supreme Court approved relief based on the plaintiff's services "as a companion, homemaker, housekeeper and cook."[82] The *Suggs* trial court, however, "refused to submit to the jury any issues

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74. Ritchie v. White, 225 N.C. 450, 455, 35 S.E.2d 414, 417 (1945); *see also supra* notes 48-53 and accompanying text.

75. *Ritchie*, 225 N.C. at 455, 35 S.E.2d at 417. In Pierce v. Cobb, 161 N.C. 300, 77 S.E. 350 (1913), the supreme court fully expounded the principle that unjust enrichment is unavailable when an underlying contract for the same services would violate public policy. The court stated:

> The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. . . . When parties . . . have united in an unlawful transaction to injure another or others or the public . . . or when the contract is against public policy, or *contra bonos mores*, the courts will not enforce it in favor of either party.

Id. at 302, 77 S.E.2d at 350-51 (citations omitted).

76. 88 N.C. App. 539, 364 S.E.2d 159 (1988).

77. *Id.* at 540, 364 S.E.2d at 160-61.

78. *Id.* at 541, 364 S.E.2d at 161 (citing *Pierce*, 161 N.C. 300, 77 S.E. 350 (1913)).

79. *Id.* at 542-43, 545, 364 S.E.2d at 162-63.

80. 557 P.2d 106 (Cal. 1976).

81. *Suggs*, 88 N.C. App. at 545, 364 S.E.2d at 163.

82. *Marvin*, 557 P.2d at 110, 122-23.

concerning plaintiff's recovery for housecleaning and domestic services."[83] The court of appeals did not remand on this issue.

Courts in other jurisdictions have fashioned various remedies for the situation in which a spouse providing educational benefits remains uncompensated at dissolution by a distribution of limited marital property. Perhaps the most radical alternative is to classify professional degrees and licenses as marital property for equitable distribution purposes. The vast majority of states considering the issue, including North Carolina, have held that neither an educational degree nor a professional license is marital property.[84] Few courts or legislatures have felt compelled to wrestle with the practical problems of valuation, an inherent lack of transferability, and the danger of speculation as to future value of the degree or license.[85] A revisitation of this rule by North Carolina courts appears unlikely.

Alternatively, some courts have applied remedies such as "reimbursement alimony" or "equitable reimbursement" in similar situations. In reimbursement alimony, the education-providing spouse receives regular maintenance payments equal in total value to her contribution to the direct and indirect expenses of her spouse's education.[86] States applying this remedy, however, may rely on alimony statutes that consider the alimony-seeking spouse's potential for self-support as a mere factor in the determination

83. *Suggs*, 88 N.C. App. at 540, 364 S.E.2d at 161.

84. North Carolina's position is clearly stated in Haywood v. Haywood, 106 N.C. App. 91, 99, 415 S.E.2d 565, 570 (1992). For a list of twenty-four courts refusing to consider a degree or license marital property, see Archer v. Archer, 493 A.2d 1074, 1078 n.1 (Md. 1985). For decisions holding that degrees or licenses are marital property see Postema v. Postema, 471 N.W.2d 912, 918 (Mich. Ct. App. 1991); O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. App. Div. 1985); Inman v. Inman, 578 S.W.2d 266, 288 (Ky. Ct. App. 1979).

85. *See* Leonard L. Loeb & Mary K. McCann, *Dilemma v. Paradox: Valuation of an Advanced Degree Upon Dissolution of a Marriage*, 66 MARQ. L. REV. 495, 519-21 (1983) (attempting a valuation approach when advanced degrees are considered distributable marital property and cautioning that property settlements are non-modifiable as a result of changed circumstances and are dischargeable in bankruptcy); *see also* Linda S. Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A. L. REV. 227, 283 (1983) (concluding that "the most equitable method of valuing a degree is in terms of the labor time utilized by the student spouse to achieve the degree" and recommending the supporting spouse receive one-half the value of this asset).

86. Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982). According to *Mahoney*, reimbursement alimony includes "all financial contributions to the former spouse's education including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license." *Id.* For another application of reimbursement alimony, see Bold v. Bold, 574 A.2d 552 (Pa. 1990). *See also* Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 417 (1980) (advocating a nonmodifiable, in gross maintenance award based on both actual expenditure *and* expected return in proportion to the amount invested by the supporting spouse).

of an award and are not exclusively "fault-based."[87] North Carolina's alimony statute plainly prevents such an award on both grounds.[88]

Equitable reimbursement also awards the supporting spouse the value of direct and indirect contributions to the education, but it does so outside the statutory dissolution framework of support maintenance and property distribution.[89] The award, although not the result of a property settlement, consists of cash payments similar in form to distributive awards under North Carolina's Equitable Distribution Act. The amount represents restitution of financial support provided by either spouse toward the education of the other—in essence, a limited but explicitly authorized unjust enrichment claim.[90] In some jurisdictions, the action requires proof of an agreement evidencing non-gratuity.[91] In other jurisdictions, even absent such an agreement, the action prescribes post-separation recovery of any spousal expenditures in excess of a minimum legally obligated support amount.[92] The availability of the award, however, clearly depends on a restricted view of what services fall within the duty of support.

A more creative remedy considers any increase to future earning capacity acquired during the term of marriage, including the acquisition of an advanced degree, as a marital asset relevant not only to an equitable property distribution, but also to whether a continuing alimony award is justified.[93] As a final alternative, at least one court has fashioned a remedy by

87. *See* N.J. STAT. ANN. § 2A:34-23 (West 1984); PA. STAT. ANN. tit. 23, § 3701(a), (b) (1988).

88. N.C. GEN. STAT. § 50-16.2 (1987); *see also supra* notes 33-36 and accompanying text.

89. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 757-58 (Minn. 1981). For a proposal codifying the equitable reimbursement remedy, see Nancy S. Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 971-74 (1978) (recommending amending the Uniform Marriage and Divorce Act to mandate repayment of direct and indirect educational expenditures in the absence of a written waiver).

90. *DeLa Rosa*, 309 N.W.2d at 757-58.

91. Pyeatte v. Pyeatte, 661 P.2d 196, 203 (Ariz. Ct. App. 1982). The *Pyeatte* court held: "[W]e do not need to decide what limits or standards would apply in the absence of an agreement." *Id.* at 207.

92. Bold v. Bold, 574 A.2d 552, 556 (Pa. 1990); *see also* Katherine Hein, Note, *Pennsylvania Recognizes the Reality of the Professional Degree/Divorce Decree Couple*, 64 TEMP. L. REV. 281, 295-97 (1991) (applauding the *Bold* court's award of actual expenses beyond the duty of support but criticizing the court's failure to allow recovery for lost opportunity costs and other intangibles).

93. *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); *see also* Randall Caldwell, Note, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705, 716-21 (1979) (analogizing the *Horstmann* award to an award at dissolution for pension benefits, business goodwill, and traditional investment); *see also* Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 781-86 (1988) (recommending that enhanced earning capacity be considered a marital asset distributable upon divorce, but advising that only "cost of acquisition" of the enhanced capacity and not projected future earnings resulting therefrom should be distributed); Susan Klebanoff, Comment, *To Love and Obey 'Til Graduation Day—The Professional Degree in Light of the*

liberally construing its state's statutory "threshold of need" requirement that the spouse seeking alimony must be incapable of self-support through appropriate employment.[94] Recommending a maintenance award when a marriage that had accumulated little property dissolved shortly after a fully supported spouse obtained his degree, the court held: "[T]he determination of what constitutes 'appropriate employment' . . . requires that the party's . . . reasonable expectations established during the marriage be considered."[95] The defendant-husband was essentially estopped from asserting that his spouse had demonstrated her self-maintenance capabilities.

The reasoning of the court of appeals in *Kuder v. Schroeder* presumes that the direct and indirect expenses of a graduate education are within the scope of the duty of support.[96] As Judge Greene pointed out, however, this conclusion is questionable.[97] Because the extent of the duty is generally based on reasonability under the circumstances,[98] the court should have examined whether Ms. Kuder's ability to provide support—although sufficient to cover the cost of food, shelter, and medical care—was sufficient under the circumstances to create an obligation to provide educational expenses as well.[99] Although this point was not raised by the court, the existence of an agreement between Ms. Kuder and Mr. Schroeder arguably suggests that the couple's financial status was inadequate to support such an obligation.

Assuming, however, that the services in question are within the scope of the support duty, the majority's brief analysis of Ms. Kuder's contract claim is unassailable under current North Carolina law. An agreement entered into *during* the marriage that attempts to modify the duty of support between the spouses is void as a matter of law and public policy.[100] The entire panel agreed on this point.[101]

But Judge Greene argued that if the court refused to limit the scope of the support duty, it should nevertheless expand spousal contract rights to allow modifications of the obligation during marriage.[102] In support of this

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Uniform Marital Property Act, 34 AM. U. L. REV. 839, 873 (1985) (asserting that the current Uniform Marital Property Act encompasses contributions to earning capacity because under its provisions, "if one spouse substantially contributes to the appreciation of the individual or separate property of the other spouse, the appreciation constitutes marital property").

94. *In re* Marriage of Olar, 747 P.2d 676, 681-82 (Colo. 1987).

95. *Id.* at 681. A finding of fault is not required under Colorado's alimony statute. *See* COLO. REV. STAT. § 14-10-114 (1987).

96. *See* 110 N.C. App. at 357, 430 S.E.2d at 273.

97. *See id.* at 359, 430 S.E.2d at 274 (Greene, J., dissenting).

98. *See supra* notes 23-26 and accompanying text.

99. *See supra* note 8.

100. *See supra* notes 47-53 and accompanying text.

101. *Kuder*, 110 N.C. App. at 357, 359, 430 S.E.2d at 273, 274.

102. *Id.* at 359-60, 430 S.E.2d at 274 (Greene, J., dissenting).

prescription, Judge Greene first alluded to the legislative trend toward consideration of marriage as a modifiable contract.[103] Then, citing the holding by the court of appeals in *Suggs v. Norris* that express or implied agreements between unmarried cohabitants are enforceable, Judge Greene observed that "our Courts recognize the validity of an agreement of the type at issue provided that the parties to such an agreement are unmarried cohabiting partners."[104] He found the differing treatment of spouses and unmarried cohabitants in like situations "incongruous" and questioned the public policy behind such a result.[105] Judge Wynn responded to Judge Greene's arguments by bluntly observing: "Quite simply, the rules are different for married couples."[106] In Judge Wynn's opinion, the special protections bestowed by the state on the marital relationship far outweigh the minor deprivation to which Judge Greene alluded.[107]

Although Judge Wynn defended current law on the ground that any deprivation imposed by the marital status is *de minimis*, it is not clear, contrary to Judge Greene's observation, that the contract rights of unmarried couples actually do exceed those of spouses. Recall that *Suggs*, unlike the California case of *Marvin v. Marvin*, never approved agreements regarding domestic services or services within the duty of support.[108] Rather, by destroying the presumption that the plaintiff's services in the defendant's business were rendered in exchange for illicit sexual services, *Suggs* granted unmarried cohabitants the same rights as spouses to recover for services clearly beyond the scope of the support duty.[109] Had Ms. Kuder been unmarried and the court persisted in its classification of educational expenditures as within the scope of the duty of support, her claim, under the requirements set forth in *Suggs*, would likely have failed. Whether Judge

103. *Id.* (citing N.C. GEN. STAT. §§ 52B-1 to 52B-4(a)(4) (1987) (extending spousal right to modify the duty of support by agreement *before* marriage); N.C. GEN. STAT. § 52-10.1 (1991) (extending spousal right to modify the duty of support by agreement upon separation); N.C. GEN. STAT. § 50-20(d) (Supp. 1992) (extending spousal right to distribute marital property by agreement before, during, and after marriage)).

104. *Kuder*, 110 N.C. App. at 360, 430 S.E.2d at 274 (Greene, J., dissenting); *see also supra* notes 76-83 and accompanying text.

105. *Kuder*, 110 N.C. App. at 360, 430 S.E.2d at 274 (Greene, J., dissenting).

106. *Id.* at 364, 430 S.E.2d at 276-77 (Wynn, J., concurring) (citing Ritchie v. White, 225 N.C. 450, 453, 35 S.E.2d 414, 416 (1945) (holding that certain rights spring into being the moment the marriage relation comes into existence)).

107. Judge Wynn listed the following special protections: the right to hold property in tenancy by the entirety, the right to claim an elective share of a deceased spouse's estate, and the right to a year's allowance upon the death of a spouse. *Id.* at 363, 430 S.E.2d at 276 (Wynn, J., concurring) (citations omitted). Additionally, from the viewpoint of public policy, it is not likely that the public interest intervenes to protect the support rights and expectations of unmarried cohabitants.

108. *See supra* notes 80-83 and accompanying text.

109. Suggs v. Norris, 88 N.C. App. 539, 542-43, 364 S.E.2d 159, 162 (1988); *see also supra* notes 76-83 and accompanying text.

Greene properly recommended that contract rights between married couples should be expanded, North Carolina's treatment of similarly situated spouses and unmarried partners does not provide legitimate support for his position.

Given only the terse statement that the "duty of support may not be abrogated or modified by the agreement of the parties to a marriage,"[110] the majority's consideration of Ms. Kuder's unjust enrichment claim is more difficult to reconstruct. Judge Wynn's concurrence provides the only insight into the court's reasoning. Citing the principle from *Atlantic Coast* that unjust enrichment is unavailable "when the benefit is bestowed gratuitously or in discharge of some obligation," Judge Wynn continued: "Each spouse has a duty to support the other during the course of the marriage, and, therefore, the wife in the instant case cannot now seek to be reimbursed for such support under a theory of unjust enrichment."[111] Significantly, Judge Wynn identified the stumbling block of Ms. Kuder's unjust enrichment claim not as gratuity but rather as the existence of a legal obligation—in particular the duty of support.[112]

Judge Greene's dissent, however, focused solely on the limitation that the benefit not be conferred gratuitously.[113] Judge Greene appropriately cited *Francis* for the proposition that although a presumption of gratuity arises between spouses, the presumption can be overcome by proof of agreement or circumstances to the contrary,[114] but he ignored the further limitation—disharge of legal obligation—that *Atlantic Coast* imposed.[115] The *Atlantic Coast* model is particularly hostile to unjust enrichment recovery because, unlike the limitation based on gratuity or moral obligation alone, the plaintiff has no opportunity to rebut evidence of legal obligation. A legal obligation simply exists or it does not. Understandably, Judge Greene relied on the more easily satisfied *Francis* paradigm because *Francis* has historically provided the standard for evaluating unjust enrichment claims to recover the value of domestic services.[116] The more expansive *Atlantic Coast* limitation, on the other hand, arose to prevent a rail carrier's recovery against the State and is founded on no discernible precedent.[117]

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110. *Kuder*, 110 N.C. App. at 357, 430 S.E.2d at 273.

111. *Id.* at 364, 430 S.E.2d at 277 (Wynn, J., concurring) (citing Atlantic Coast Line R.R. v. State Highway Comm'n, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966)).

112. Whereas in *Atlantic Coast* a statutory duty was at issue, Judge Wynn applied the same rule to the common-law duty between the spouses in *Kuder*. *Id.* (Wynn, J., concurring).

113. *Id.* at 361, 430 S.E.2d at 275 (Greene, J., dissenting).

114. *Id.*

115. *See supra* notes 57-61 and accompanying text.

116. *See supra* notes 67-73 and accompanying text.

117. Atlantic Coast Line R.R. v. State Highway Comm'n, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966) (citing Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963); Allen v. Seay, 248 N.C. 321, 103 S.E.2d 332 (1958); Twiford v. Waterfield, 240 N.C. 582, 83 S.E.2d 548 (1954)). The

But even assuming that the *Atlantic Coast* standard can be dismissed as an anomaly, could Ms. Kuder recover under the *Francis* standard limiting unjust enrichment only in cases of gratuity or moral obligation? In *Francis*, recovery was allowed because the parties were not spouses and the presumption of gratuity did not arise.[118] In Ms. Kuder's case, however, the presumption would arise and Ms. Kuder would offer her agreement with Mr. Schroeder as evidence that payment was intended or expected.[119] But at this point, the additional limitation on unjust enrichment claims imposed by *Ritchie v. White* could easily be invoked to prevent recovery.[120] Ms. Kuder's inability to enter into a legally enforceable contract transferring the duty of support would give a reluctant court cause to deny relief in equity.

Could any of the alternative remedies available in other jurisdictions be incorporated into existing North Carolina law? Importing an alimony-based solution would be the most disruptive to the state's current divorce framework. To authorize either reimbursement alimony[121] or conventional alimony based solely on one spouse's contribution to the other's increased earning capacity[122] would require either a departure from North Carolina's exclusively fault-based alimony statute[123] or an overly broad interpretation of its threshold dependency requirement.[124]

Under the present scope of the marital duty of support, contract remedies are problematic because a public policy violation arises from a modification of the duty of support and the preexisting support duty results in invalid consideration.[125] Contract-based solutions are also invalidated, as Judge Greene pointed out in *Kuder*, because the terms of an agreement between spouses will often be too uncertain to warrant enforcement.[126]

The alternative remedy of equitable reimbursement,[127] although not prohibited statutorily, fails in North Carolina for the same reason that unjust enrichment claims fail under current law. Given the *Kuder* court's inclusion of direct and indirect educational expenses within the duty of support,

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authorities cited in *Atlantic Coast* contain no mention of a limitation based on legal obligation—only gratuity and moral obligation; *see Johnson* at 293, 132 S.E.2d at 584 ("gratuitous"); *Allen* at 323, 103 S.E.2d at 333 ("moral obligation"); *Twiford* at 585, 83 S.E.2d at 551 ("pure gratuity or in discharge of a moral obligation") (citing Francis v. Francis, 223 N.C. 401, 26 S.E.2d 907 (1943)).

118. *See supra* note 72 and accompanying text.

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

120. *See supra* notes 74-75 and accompanying text.

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

122. *See supra* note 93 and accompanying text.

123. *See supra* notes 35-36 and accompanying text.

124. *See supra* notes 33-34 and accompanying text. *But cf. supra* notes 94-95 and accompanying text (expansively interpreting Colorado's "threshold of need" requirement).

125. *See supra* notes 47-53 and accompanying text.

126. *See Kuder*, 110 N.C. App. at 360-61, 430 S.E.2d at 274-75 (Greene, J., dissenting).

127. *See supra* notes 89-92 and accompanying text.

any unjust enrichment claim between spouses concerning the provision of educational benefits must, in order to rebut the presumption of gratuity arising between parties of close family relationship, be founded on an agreement to modify or abrogate that duty. Since such agreements are currently deemed contrary to public policy, these claims will fail.[128]

In short, no alternative remedy is easily transplanted in the absence of a significant change of course by the legislature or a limitation of the scope of the duty of support by the judiciary. The court of appeals in *Kuder* recognized the "apparent dilemma" of the uncompensated education-providing spouse.[129] At the same time, however, the court may have feared that by limiting the scope of the support duty, it risked opening a Pandora's box of contract and unjust enrichment claims between separating spouses and fostering a wholesale erosion of the marital duty of support.[130]

Although any judicial remedy must involve a limitation on the scope of the support duty, the solution that best limits these risks appears to be a restricted form of equitable remibursement. If the court were to classify provision of educational expenses as a service in furtherance of the benefited spouse's business, the equitable reimbursement doctrine could be grafted onto existing North Carolina law with little disturbance. In *Dorsett* and *Leatherman*, the supreme court recognized that a spouse's services outside the support duty and in benefit of the other spouse's business can be the subject of an unjust enrichment claim.[131] The presumption of gratuity attaching to all services rendered between spouses can be rebutted by evidence of agreement to the contrary,[132] and because spouses may enter into a business contract,[133] unjust enrichment would not be foreclosed on the grounds that the parties could not contract for the same services.[134] In order to limit the use of equitable reimbursement, the court should allow the remedy only when marital property is insufficient to otherwise compensate the supporting spouse, proof of an agreement between the spouses exists, and dissolution occurs soon after the advanced degree is attained. The court could further limit recovery to the direct expenses of the education since

128. *See supra* notes 74-75 and accompanying text.

129. 110 N.C. App. at 357, 430 S.E.2d at 273.

130. The court appears to fear a surge in litigation to determine spousal rights under private agreements or to account for benefits conferred non-gratuitously: "[R]eaching the result that the dissenting opinion urges . . . would result in unwarranted litigation in those situations where a supporting spouse claims recovery under a theory of unjust enrichment in an amount in excess of the value of the marital property." *Id.* at 365, 430 S.E.2d at 277 (Wynn, J., concurring). The court has also expressed a fear of "reduc[ing] the institution of marriage, or the obligations of family life, to a commercial basis." Ritchie v. White, 225 N.C. 450, 452, 35 S.E.2d 414, 415 (1945).

131. *See supra* notes 62-66 and accompanying text.

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

133. *Leatherman v. Leatherman*, 297 N.C. 618, 622, 256 S.E.2d 793, 796 (1979).

134. *See supra* notes 74-75 and accompanying text.

these expenses are the most easily quantified. Such a holding would remove professional education from the scope of the duty of support, but only in the most compelling circumstances.

STEVEN A. KING

Family Law—Equitable Distribution—*Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993).

Equitable distribution, a remedy used in divorce cases, attempts to give both spouses an equitable share of the marital property in order to allow them to maintain the same standard of living to which they were accustomed during marriage.[1] In the words of one commentator, equitable distribution "seeks to effect upon divorce those sharing principles that motivate most couples during marriage."[2] During the pendency of an equitable distribution action, however, there are no assurances that both parties will control enough assets to live at the level at which they lived prior to divorce. The problem is particularly acute when one of the significant marital assets is an income-producing asset, such as a partnership or a family owned business.[3] While the spouse who owns the business has access to income derived from it, the other spouse may have little or no income until the final equitable distribution judgment is rendered.

In 1991, the North Carolina General Assembly amended the equitable distribution statute.[4] The amendment, codified at North Carolina General Statutes section 50-20(i1), allows a judicially enforced interim transfer of assets before the final equitable distribution judgment.[5] In the recent case of *Brown v. Brown*[6] the North Carolina Court of Appeals interpreted section 50-20(i1) for the first time. *Brown* addressed the question of whether a trial judge has the authority under the statute to order an interim cash transfer

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1. *Cf.* Mims v. Mims, 305 N.C. 41, 54, 286 S.E.2d 779, 788 (1982) (stating that the equitable distribution statute is intended to divide property "equitably, based upon the relative positions of the parties at the time of divorce"). For a discussion of the background of equitable distribution in North Carolina, see Sally B. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247, 247 (1983).

2. *See* Sharp, *supra* note 1, at 247.

3. *Cf.* Gary N. Skoloff & Cary G. Cheifetz, *Equitable Distribution Delayed: Justice Denied*, 124 N.J. L.J. 1360 (1989) (stating that allowing one spouse to control an investment portfolio pending the outcome of the equitable distribution action is unfair to the non-controlling spouse).

4. An Act for Equitable Distribution of Marital Property, ch. 815, 1981 N.C. Sess. Laws 1184 (1981) (current version at N.C. GEN. STAT. §§ 50-20 to -21 (Supp. 1993)).

5. N.C. GEN. STAT. § 50-20(i1). The statute provides:

> After an action for equitable distribution has been filed the Court may, for just cause, order the spouse in control of marital assets to transfer the use and possession of some or all of those assets to the other spouse provided that any and all assets so transferred shall be subject to a full accounting when the property is ultimately allocated in an equitable distribution judgment. Any property transfer made pursuant to this subsection shall be made without prejudice to the rights of either spouse to claim a contrary classification, value, or distribution in the final equitable distribution trial.

Id.

6. 112 N.C. App. 15, 434 S.E.2d 873 (1993).

between the parties of cash that is not itself an identifiable marital asset. The court held that the trial judge does not have such authority.[7]

JoAnn Brown and D.T. Brown, Jr. separated on July 26, 1981 after more than thirty-one years of marriage.[8] On January 13, 1982, JoAnn filed an action seeking, among other things, equitable distribution of the marital property.[9] During the legal battle over the marital assets, JoAnn's standard of living was significantly lower than the standard she had enjoyed during her marriage.[10] Meanwhile, D.T. had access to the vast majority of the marital assets.[11] On October 22, 1991, JoAnn filed a motion pursuant to section 50-20(i1), seeking an interim distribution of marital assets.[12] Even though the marital property did not include significant cash,[13] the court ordered D.T. to pay JoAnn $400,000.[14] The court further provided that if D.T. failed to make the payment, Brown Brothers Construction Co. would be forced to pay.[15] The court of appeals held that section 50-20(i1) authorizes only in-kind transfers of assets and that the trial court had erred in ordering the transfer of liquid assets that were not part of the marital estate.[16]

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7. *Id.* at 17, 434 S.E.2d at 876.

8. *Id.* at 15, 434 S.E.2d at 875.

9. *Id.* JoAnn later amended her complaint, adding Paul Brown, D.T.'s brother and co-owner with him of Brown Brothers Construction Company, as an additional defendant. *Id.* at 16, 434 S.E.2d at 875. The trial court dismissed many of the claims against Paul's property, but allowed claims against property titled in the names of both brothers or in the name of Brown Brothers Construction Co., which was the most significant marital asset. *Id.* On December 12, 1988, the trial court appointed a referee to determine the identity and value of the marital property and to suggest an equitable distribution. *Id.* The referee concluded that the marital estate consisted of $2.4 million in titled property. Plaintiff-Appellee's Brief at 5, *Brown* (No. 9224DC669).

JoAnn also sought alimony and possession of the marital estate. The parties entered into a Consent Judgment on February 25, 1982, which set alimony at $1,200 per month and gave JoAnn possession of the marital home. *Brown*, 112 N.C. App. at 15, 434 S.E.2d at 875.

10. *Id.* at 23, 434 S.E.2d at 880 (Greene, J., dissenting). To supplement her monthly alimony payments, JoAnn worked minimum wage jobs. *Id.* (Greene, J., dissenting). Because of her meager income, had no money to pay her enormous legal fees, had been without a vehicle for five years, and periodically lived without heat in her house. *Id.* (Greene, J., dissenting).

11. *Id.* at 23-24, 434 S.E.2d at 880 (Greene, J., dissenting). Of the $2.4 million in "titled" marital assets found by the referee, D.T. controlled approximately $2.2 million. Plaintiff-Appellee's Brief at 5, *Brown* (No. 9224DC669).

12. *Brown*, 112 N.C. App. at 16, 434 S.E.2d at 875.

13. Defendant-Appellant's Brief at 6, *Brown* (No. 9224DC669). The marital property included only $200,714 in liquid assets. *Id.* These were in the form of cash, stocks, and the cash value of life insurance policies. *Id.*

14. *Brown*, 112 N.C. App. at 16, 434 S.E.2d at 875.

15. *Id.* at 16-17, 434 S.E.2d at 875-76.

16. *Id.* at 17-18, 434 S.E.2d at 876. Under North Carolina law, JoAnn was entitled to an appeal as of right to the North Carolina Supreme Court. N.C. GEN. STAT. § 7A-30 (1989). The parties, however, reached a settlement that precluded the need for such an appeal. Interview with Judge Edward Greene, North Carolina Court of Appeals, in Chapel Hill, N.C. (Feb. 22, 1994).

Writing for a divided court, Judge Wynn began his discussion by noting that the legislature enacted section 50-20(i1) to achieve equity between the parties during the pendency of the equitable distribution action.[17] The court then examined the plain language of the amendment.[18] It noted that the amendment referred to the transfer of the "use and possession" of assets.[19] The court interpreted this to mean that a transferee can use a transferred asset only "as it was meant to be used."[20] Such a reading makes the cash transfer of the value of an asset, instead of the asset itself, inconsistent with the statutory language.[21] Further, the court noted that the amendment provides for a "full accounting" at the final equitable distribution[22] and that the transfer could not adversely affect "the rights of either spouse to claim a contrary classification, value, or distribution in the final equitable distribution trial."[23] To force the liquidation of an asset to pay a lump-sum award, it reasoned, would frustrate the intent of the legislature to ensure that neither party is permanently disadvantaged by an interim award.[24]

The court then looked at how the amendment fits within the larger framework of the equitable distribution statute. It noted that under the equitable distribution statute, there is a presumption that any distribution of assets be in kind.[25] The provision allowing for liquid distributive awards,[26] the court stated, is a "secondary remedy."[27] It requires a judge to find that a

17. *Brown*, 112 N.C. App. at 17-18, 434 S.E.2d at 876. For a fuller discussion of the goals of section 50-20(i1), see *infra* notes 44-46 and accompanying text.

18. *Brown*, 112 N.C. App. at 17, 434 S.E.2d at 876.

19. *Id.* at 18, 434 S.E.2d at 876.

20. *Id.* at 18, 434 S.E.2d at 877. The court cited the transfer of the marital home, rental property that would allow the transferee to collect rental income, and a bank account as examples of the type of asset transfers contemplated under § 50-20(i1). *Id.*

21. *Id.* at 18-19, 434 S.E.2d at 877.

22. *Id.* at 18, 434 S.E.2d at 877.

23. *Id.* at 18-19, 434 S.E.2d at 877.

24. *Id.* at 19, S.E.2d at 877. Presumably, if the recipient of the cash award spent all the money before the final distribution, the transferring spouse would have no recourse even if the interim valuation was incorrect. *See id.* at 20, 434 S.E.2d at 878.

25. *Id.* at 19, 434 S.E.2d. at 877.

26. N.C. GEN. STAT. § 50-20(e) (Supp. 1993) provides that the court may make distributive awards. The section states:

> In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

Id.

A distributive award is an award of the monetary value of an asset given in lieu of the asset itself. *See Smith v. Smith*, 111 N.C. App. 460, 514-17, 433 S.E.2d 196, 229-30 (1993). For a discussion of the distributive award provision of the equitable distribution statute, see *infra* notes 56-58 and accompanying text.

27. *Brown*, 112 N.C. App. at 19, 434 S.E.2d at 877.

distribution in kind either would be impractical or would "facilitate, effectuate or supplement" the distribution.[28] Because these findings are a prerequisite to a distributive award, the court determined, the remedy is particularly unsuitable for an interim award, which "is useful to the party without assets precisely because it can be awarded quickly."[29] The majority stated that one goal of the equitable distribution statute—keeping the marital estate as intact as possible until a final distribution—is consistent with a requirement of an in-kind interim distribution.[30]

To reach this conclusion, the majority employed basic tenets of statutory construction. First, it noted that an amendment statute is not presumed to change a statute except as is explicitly stated in the amendment.[31] Because section 50-20(i1) specifically provides for asset transfers and does not mention a lump-sum payment or distributive award, the court refused to infer authorization for such an award.[32] Second, it noted that the language of section 50-20(e), which does allow the court to order payment of liquid assets, contains the phrase "distributive award."[33] That the legislature opted not to use that language in the context of interim awards, but instead chose the phrase "transfer the use and possession,"[34] is "presumptive evidence that it intended that the provision" not include the option of awarding cash that was not an identifiable marital asset.[35]

The majority noted that a provision should not be read to render another part of the statute meaningless.[36] The court reasoned that if the trial judge was allowed to divide and distribute the marital assets at the interim stage, there would be no need for the final equitable distribution trial.[37] The majority concluded that the proper relief in this case would be an in-kind transfer of existing marital assets.[38] The court remanded the case and recommended that the trial judge order D.T. to transfer at least a part of his interest in Brown Brothers Construction Co. to JoAnn, so that she would realize a share of the profits until the final equitable distribution.[39]

Judge Greene argued in his dissenting opinion that nothing in section 50-20(i1) precludes a trial judge from making an interim distributive

28. *Id.*
29. *Id.*
30. *Id.* at 20, 434 S.E.2d at 877.
31. *Id.* at 20, 434 S.E.2d at 878.
32. *Id.*
33. *Id.*
34. N.C. GEN. STAT. § 50-20(i1) (Supp. 1993).
35. *Id.* at 20, 434 S.E.2d at 878.
36. *Id.* at 21, 434 S.E.2d at 878; *accord* State v. Tew, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990).
37. *Brown*, 112 N.C. App. at 21, 434 S.E.2d at 878.
38. *Id.*
39. *Id.* at 21-22, 434 S.E.2d at 878-79.

award.[40] Judge Greene examined the amendment in the context of the statute as a whole.[41] He focused on section 50-20(e), which allows a judge to make a distributive award if distribution in kind would be impractical, and concluded that "there is no language in the section that would prohibit its use in the context of interim awards."[42] He noted also that the policy behind distributive awards, to achieve "equity between the parties," would be well served by allowing interim distributive awards.[43]

The majority's disposition of *Brown* is consistent with the language of the amendment, but its interpretation does not further the goals of the statute when applied to an asset such as a partnership or closely held corporation.[44] The majority is correct that the phrase "transfer the use and possession" suggests that the legislature contemplated a transfer of the asset itself, not its value.[45] That the legislature did not refer to "distributive awards" or provide for an alternative remedy when an in-kind transfer is "impractical" is further support for this conclusion.[46] However, although the legislature did not specifically provide for the possibility of interim distributive awards, to allow such awards would help further the goals of the amendment. Section 50-20(i1) was intended to address two major problems.[47] First, without the statute, the spouse not controlling the assets could not continue to live at the financial level she enjoyed during the marriage, while the controlling spouse could continue to live at the level to which he was accustomed.[48] Second, the controlling spouse would have "an incentive to delay the equitable distribution proceedings."[49]

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40. *Id.* at 23, 434 S.E.2d at 879 (Greene, J., dissenting).

41. *Id.* (Greene, J., dissenting).

42. *Id.* (Greene, J., dissenting).

43. *Id.* at 23, 434 S.E.2d at 879-80 (Greene, J., dissenting). Judge Greene would require that two facts be found before an interim distribution could be awarded: (1) "just cause" for the interim award and (2) that an in kind transfer is impractical. *Id.* (Greene, J., dissenting). On the facts at issue, Judge Greene agreed with the trial court that JoAnn's financial difficulties, especially in light of D.T.'s control of the income-producing marital assets, constituted just cause. *Id.* at 23-24, 434 S.E.2d at 880. Further, he argued that a transfer of assets in kind would be impractical in this case. Transfer of a portion of the partnership would "have disrupted the operation of the construction company." *Id.* at 24, 434 S.E.2d at 880 (Greene, J., dissenting). In addition, JoAnn would have had a difficult time converting the partnership to cash. *Id.*

44. *See supra* note 3 and accompanying text.

45. *Brown*, 112 N.C. App. at 20, 434 S.E.2d at 878.

46. *Id.*

47. *Id.* at 17-18, 434 S.E.2d at 876. *But cf.* Skoloff & Cheifetz, *supra* note 3, at 8 (suggesting other policy reasons for interim property distribution).

48. *Brown*, 112 N.C. App. at 17-18, 434 S.E.2d at 876.

49. *Id.* at 18, 434 S.E.2d at 876. *Brown* presented this problem in stark form. The case had been at the trial court level for 10 years, at the time the oldest pending case at that level in North Carolina. Plaintiff-Appellee's Brief at 5, *Brown* (No. 9224DC669).

As recognized by the majority in *Brown*,[50] these problems often arise because one spouse runs a business in which the other spouse is not involved. An in-kind transfer of such an asset may be impractical and unwise.[51] First, it may be difficult for the spouse not participating in the business to reap much benefit from it. Second, such a transfer may damage the business, an outcome contrary to the policy of keeping marital assets intact until the final distribution.[52] Finally, to force the parties to interact together as business partners, or one spouse to interact with the family members of the other,[53] would be unwise. Courts in other jurisdictions have recognized the inherent problems in dividing businesses in kind in the context of final equitable distributions,[54] and the policy justifications for avoiding such a division are the same as those for interim awards.[55]

Clearly, forced sale of a family business to pay a lump-sum interim award is an undesirable outcome. An alternative that may avoid this outcome while accomplishing the goals of the amendment is the payment of an interim distributive award[56] on a periodic

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50. *Brown*, 112 N.C. App. at 17-18, 434 S.E.2d at 876.

51. Courts are often hesitant to divide property in kind when the result will be to force "ongoing financial interaction between the parties." LAWRENCE J. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY 248 (1983). Judges take this approach because they recognize that "[s]pouses frequently cannot interact well after divorce." THOMAS J. OLDHAM, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY § 13.03(8) (1987). The issue often arises when the asset in question is a closely held business or partnership. *Id.* § 13.03(7).

52. The majority in *Brown* specifically recognized this policy. *See supra* notes 22-24 and accompanying text.

53. That would have been the result in *Brown*, had there been an in-kind transfer. *See Brown*, 112 N.C. App. at 24, 434 S.E.2d at 880 (Greene, J., dissenting).

54. *E.g.*, Weston v. Weston, 773 P.2d 408 (Utah App. 1989). In *Weston*, the trial court awarded the wife the cash value of half the stock owned by the husband in a closely held, family owned business. *Id.* at 409. On appeal, the husband argued that the trial court erred by not allowing him to transfer the shares themselves instead of the share value. *Id.* at 410. The Appeals Court upheld the award of money. *Id.* at 412. It noted first that there was no assurance that the wife would receive any income, because the "[husband] and his family own the majority interest and have exclusive control of business operations." *Id.* Furthermore, the court noted that giving the wife an ownership interest would force the former spouses to interact, providing "a breeding ground for future conflicts . . . thus interfering with their abilities to proceed with their separate lives." *Id.*; *see also* Josephson v. Josephson, 772 P.2d 1236, 1243 (Idaho Ct. App. 1989) (awarding the wife cash value of shares in closely held corporation in order to "leav[e] the parties free of tangled interests"); Borodinsky v. Borodinsky, 393 A.2d 583, 589 (N.J. Super. 1978) (finding trial judge erred in awarding 50% of stock in closely held corporation to wife).

55. *See Brown*, 112 N.C. App. at 24, 434 S.E.2d at 881 (Greene, J., dissenting); *supra* note 44 and accompanying text.

56. Section 50-20(e) of the equitable distribution statute provides that the trial judge has the power to make a distributive award. N.C. GEN. STAT. § 15-20(e) (Supp. 1993). A distributive award is used when the court determines that marital property should not be sold or divided. GOLDEN, *supra* note 51, at 246. In Sonek v. Sonek, 105 N.C. App. 247, 412 S.E.2d 917 (1992), the court of appeals held that a trial judge has discretion to make a distributive award in two circumstances. *Id.* at 252, 412 S.E.2d at 920. First, she may make such an award when division in kind is impractical. *Id.* Alternatively, she may make a distributive award "to facilitate, effectu-

basis.[57] In *Brown*, periodic payments would have allowed JoAnn to maintain her predivorce standard of living.[58] Also, such an arrangement would have curtailed the incentive for D.T. to prolong the equitable distribution proceedings.[59] D.T. could have funded such payments out of his existing income from the construction business, thus eliminating the possibility that marital assets would have to be sold. Finally, the payments easily could have been subjected to a "full accounting" at the end of the proceedings when the final distribution of assets took place.[60]

Section 50-20(i1) should be amended to require a more moderate approach. The amendment should state clearly that interim distributive awards are permitted, but subject to strict conditions: (1) payments must be periodic, and (2) under no circumstances can such awards cause the forced sale of marital assets. For example, the legislature might add the following after the first sentence: "If in the discretion of the trial court a distributive award is warranted, the award shall be payable in periodic amounts. The court shall consider the ability of the transferor to make such payments without selling the asset that is the basis of the award." Amended in this manner, section 50-20(i1) would continue to aid the party that does not control the income-producing asset by countering any delaying tactics on the part of the controlling spouse. It would do so, however, without forcing

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ate, or supplement a distribution of marital property." *Id.* (quoting Harris v. Harris, 84 N.C. App. 353, 362, 352 S.E.2d 869, 875 (1987)). The main advantage of the distributive award is that it gives the judge an alternative to either forcing a sale of a business or granting the nonowning spouse an interest in the business. GOLDEN, *supra* note 51, at 246.

57. In deciding on the proper structure of a distributive award the trial judge has wide discretion. *Sonek*, 105 N.C. App. at 252, 412 S.E.2d at 920 (noting that the only apparent limit on the judge's discretion relates to the taxation consequences of distributive awards). For example, in Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196 (1993), the trial judge ordered the husband in an equitable distribution action to make periodic payments to his former wife in the amount of $15 million over a ten-year period. *Id.* at 514-15, 433 S.E.2d at 229. The court of appeals noted that the trial judge had considered the husband's lack of then-existing liquid assets, and therefore had structured the payment over a ten-year period. *Id.* at 516, 433 S.E.2d at 229. Furthermore, the trial court had found that, given the husband's ownership of substantial business interests, he had considerable borrowing capacity that would enable him to meet the periodic payment requirements. *Id.* at 516-17, 433 S.E.2d 229-30. The court approved the plan, stating that the distributive award "reflects a careful balancing of the respective interests of the parties." *Id.* at 517, 433 S.E.2d at 230.

58. Allowing the parties to live at predivorce levels is the goal of the equitable distribution statute. *See supra* note 1 and accompanying text.

59. *See Brown*, 112 N.C. App. at 18, 434 S.E.2d at 876 (noting that before the enactment of § 50-20(i1), the spouse in control of assets had "an incentive to delay the equitable distribution proceedings").

60. Section 50-20(i1) requires that "any and all assets . . . transferred shall be subject to a full accounting" at the final equitable distribution. N.C. GEN. STAT. § 50-20(i1) (Supp. 1993). Because periodic payments would not total anywhere near the noncontrolling spouse's equitable share of the income-producing asset, the effects of an improperly calculated interim distributive award could be rectified at the final equitable distribution.

the parties to interact.[61] Most importantly, the prohibition on forced sale would prevent the interim remedy from causing a permanent detrimental effect on both parties—the sale of the income-producing asset.

WILLIAM E. SCHWARTZ

61. *See supra* notes 53-55 and accompanying text.

Baxley v. Nationwide Mutual Insurance Company: A Key Loophole in the Financial Responsibility Act of 1953 Comes to Light

American tort law provides a mechanism to shift the costs of wrongful actions from the injured party to the wrongdoer.[1] Its goal is to "make the victim whole" by awarding damages sufficient to place the victim in the same position she would have enjoyed had the injury not occurred.[2] For centuries, however, a simple rule of economics prevented the accomplishment of this goal: "[B]ecause of the delay between the date of the plaintiff's injury and the court's judgment, a plaintiff loses the 'use of money' he would have had absent the defendant's negligence . . . [and consequently] is not fully compensated."[3]

To remedy this gap in tort compensation, the North Carolina General Assembly amended section 24-5 of the North Carolina General Statutes in 1981.[4] Section 24-5(b) now provides that "[i]n an action other than contract, the portion of money judgment designated by the fact finder as com-

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1. *See* 1 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 1:3, at 12 (1983) (" 'The primary purpose of tort law is that of compensating plaintiffs for the injury they have suffered wrongfully at the hands of others.' ") (quoting Berman v. Allan, 404 A.2d 8, 11 (N.J. 1979)).

2. Shaver v. Monroe Constr. Co., 63 N.C. App. 605, 615, 306 S.E.2d 519, 526 (1983); RESTATEMENT (SECOND) OF TORTS § 901(a) (1979); 22 AM. JUR. 2D *Damages* § 26 (1988).

3. Jeffrey R. Sandler, Note, *Prejudgment Interest in Personal Injury Claims: A Proposal for the Illinois General Assembly*, 25 J. MARSHALL L. REV. 595, 596-97 (1992).

4. Prior to 1981, section 24-5 provided for prejudgment interest only in actions based on contract. The 1981 amendment added the following language:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied.

Act of May 5, 1981, ch. 327, § 1, 1981 N.C. Sess. Laws 369 (current version codified at N.C. GEN. STAT. § 24-5(b) (1991)). In 1985, the General Assembly again amended the statute, resulting in its current formulation:

> (a) Contracts. — In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principle from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment then interest on an award in a contract action shall be at the contract rate after judgment, otherwise it shall be at the legal rate provided, however, that on awards in action on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, interest shall be at the legal rate, provided, however, such rate shall not exceed the contract rate.

pensatory damages bears interest from the date the action is instituted until the judgment is satisfied."[5] Despite the apparently far-reaching language of the amended statute, the effort to compensate plaintiffs for the use-value of their money could not yet claim success. Disagreements erupted between automobile insurance companies and their insureds not over the propriety of prejudgment interest awards, but over who would bear ultimate responsibility for their payment.[6]

Under the Financial Responsibility Act of 1953,[7] automobile insurers are required to provide three types of coverage: basic liability coverage,[8] uninsured motorist (UM) coverage,[9] and underinsured motorist (UIM) coverage.[10] In general, once coverage is properly established for a liability or

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(b) Other Actions. — In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

Act of May 21, 1985, ch. 214, § 1, 1985 N.C. Sess. Laws 181 (codified at N.C. GEN. STAT. § 24-5(b) (1991)).

5. N.C. GEN. STAT. § 24-5(b) (1991).

6. *See infra* notes 74-102 and accompanying text.

7. N.C. GEN. STAT. § 20-279 (1993).

8. *See* N.C. GEN. STAT. § 20-279.21(b)(2) (1993). This statute mandates liability insurance for every owner or operator of a motor vehicle registered in North Carolina. Specifically, the statute requires every policy of insurance issued in the state of North Carolina to

> insure the person named therein and any other person, as insured . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles . . . subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: twenty-five thousand dollars ($25,000) because of bodily injury or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident.

Id.

9. *See* N.C. GEN. STAT. § 20-279.21(b)(3) (1993). This section provides for UIM coverage. Specifically, it requires that, unless the insured rejects such coverage, no policy of automobile liability insurance shall be issued

> unless coverage is provided . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles. . . . The provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of up to the limits of the . . . policy.

Id.

10. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (1993). Under this section, UIM coverage is deemed to apply when the limit of liability in the tortfeasor's liability policy is less than that of the insured under his own policy. Under the provisions of that section:

> The provisions of subdivision (3) of this section shall apply to the coverage required by this subdivision. Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing

UM/UIM claim, the insurer is obligated to pay all bodily injury and property damages awarded to the claimant up to its limit of liability.[11] Insurers contend that they are responsible only for damages that are the direct result of bodily injuries and property damage. In the absence of an agreement to the contrary, they eschew responsibility for purely economic injuries incidental to the process of claim adjudication.[12] In response, tort plaintiffs argue that prejudgment interest is simply an additional element of damages that arises as a result of the accident and, pursuant to the statutory provisions of section 24-5(b), is therefore the obligation of the insurers.[13] The ultimate question for the courts has thus become to what extent section 24-5(b) prejudgment interest awards are included within the "damages" that insurers are required to cover under the Financial Responsibility Act of 1953.[14]

Although the North Carolina Supreme Court took a significant step toward answering this question in *Baxley v. Nationwide Mutual Insurance Co.*,[15] it failed to resolve the issue decisively.[16] In *Baxley*, the court held that under a UIM policy that obligated the insurer to pay all "damages" that the insured is "legally entitled to recover" from the tortfeasor, the insurer had assumed, up to its policy limits, responsibility for prejudgment interest.[17] The court reasoned that prejudgment interest, as compensation for economic injuries, is included within the term "damages" as that term was used in the contract.[18] However, the court failed to address whether, in the

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> coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. . . . In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

Id.

11. *See supra* notes 8-10.

12. *See infra* notes 93-94 and accompanying text.

13. *See infra* notes 81-82 and accompanying text.

14. *See, e.g.*, Baxley v. Nationwide Mut. Ins. Co., 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993) (addressing whether a UIM carrier is obligated to pay prejudgment interest within its policy limits); Sproles v. Greene, 329 N.C. 603, 611, 407 S.E.2d 497, 501 (1991) (addressing whether prejudgment interest is a "defense cost" within the meaning of the policy); Lowe v. Tarble, 313 N.C. 460, 463, 329 S.E.2d 648, 650 (1985) (addressing whether prejudgment interest is a "cost[ ] taxed against the insured" within the meaning of the policy language); Ensley v. Nationwide Mut. Ins. Co., 80 N.C. App. 512, 514, 342 S.E.2d 567, 569, *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986) (addressing whether a claim filed under a UM provision is "an action other than contract").

15. 334 N.C. 1, 430 S.E.2d 895 (1993).

16. *See infra* notes 141-42 and accompanying text.

17. *Baxley*, 334 N.C. at 6, 430 S.E.2d at 899 (citation omitted).

18. *Id.* at 8, 430 S.E.2d at 900.

absence of such a contractual provision, the Financial Responsibility Act of 1953 mandates payment of prejudgment interest.[19]

This Note surveys the historical debate surrounding prejudgment interest and examines how North Carolina courts have framed the relationship between section 24-5 and the Financial Responsibility Act of 1953.[20] Next, this Note analyzes the result reached in *Baxley* and determines that, although the decision has a strong public policy justification, it rests somewhat precariously on the applicable statutory language.[21] Finally, this Note points out that *Baxley* exposes a critical loophole in the Financial Responsibility Act: by failing to address explicitly the appropriate treatment of prejudgment interest, the Act allows insurers to limit their own liability to a greater degree than sound public policy otherwise might dictate.[22] The Note concludes that this result may unavoidably subvert the purpose of section 24-5(b).[23] Hence, *Baxley* presents the General Assembly with the opportunity, and arguably the obligation, to reevaluate the arguments concerning prejudgment interest and to resolve the conflict between the right of insurers to contractually limit their liability and the right of tort plaintiffs to be made whole.[24]

The *Baxley* case involved a personal injury action brought by Ms. Della Baxley against Ms. Anita Brown for damages arising out of an automobile accident. On January 7, 1987, Ms. Brown collided with a vehicle in which Ms. Baxley was a passenger.[25] At the time of the accident, Allstate Insurance Company provided liability insurance for Ms. Brown in the amount of $25,000.[26] In addition, Ms. Baxley's own automobile insurance policy with Nationwide Mutual Insurance Company provided for $100,000 in UIM coverage.[27] On August 22, 1987, Ms. Baxley filed a negligence

19. *Id.* at 6, 430 S.E.2d at 898-99.

20. *See infra* notes 65-126 and accompanying text.

21. *See infra* notes 127-40 and accompanying text.

22. *See infra* notes 141-57 and accompanying text.

23. *See infra* notes 141-54 and accompanying text.

24. *See infra* note 157 and accompanying text.

25. *Baxley*, 334 N.C. at 3, 430 S.E.2d at 897 (1993).

26. *Id.* It is interesting to note that the liability portion of Ms. Brown's policy contained a so-called "supplemental" payment provision:

> In addition to our limit of liability, we will pay on behalf of a covered person . . . (3) *Interest accruing after any suit we defend is instituted.* Our duty to pay interest ends when we pay our part of the verdict which does not exceed our limit of liability for this coverage.

Record at 48, Baxley v. Nationwide Mut. Ins. Co., 334 N.C. 1, 430 S.E.2d 895 (1993) (No. 538PA91) (emphasis added). Before appealing to the North Carolina Supreme Court, Ms. Baxley released Allstate from further liability. Consequently, whether this supplemental clause should have obligated Allstate to pay at least a portion of the total prejudgment interest in this case was not an issue on appeal. *Baxley*, 334 N.C. at 6, 430 S.E.2d at 898.

27. The UM/UIM portion of Ms. Baxley's policy stated: "We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured [or

action against Ms. Brown seeking $100,000 in damages for personal injuries she suffered in the accident.[28] Soon after the complaint was filed, Allstate tendered $25,000, representing the limit of its liability policy covering Ms. Brown, to the clerk of court and motioned for release from further obligation to defend Ms. Brown.[29] In response to that motion and to preserve its right of subrogation against Ms. Brown,[30] Nationwide then deposited its own $25,000 with the clerk of court.[31] On August 15, 1988, the trial court entered an order granting Allstate's motion for release, and Nationwide immediately hired counsel and assumed full responsibility for the defense of Ms. Brown.[32] The case was tried before a jury, and on September 14, 1988 the court entered a judgment in favor of Ms. Baxley for compensatory damages of $100,000 plus costs and prejudgment interest from the date the complaint was filed, excluding interest on the $25,000 Nationwide had already tendered.[33] Following the court's entry of judgment, Nationwide

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underinsured] motor vehicle because of (1) [b]odily injury sustained by a covered person and caused by an accident; and (2) [p]roperty damage caused by an accident." Record at 36, *Baxley* (No. 538PA91).

28. *Baxley*, 334 N.C. at 3, 430 S.E.2d at 897.

29. *Id.* This motion was made pursuant to N.C. GEN. STAT. § 20-279.21(b)(4) (1993), which states:

> [P]rovided that application is made to and approved by a presiding superior court judge, in any suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding.

30. N.C. GEN. STAT. § 20-279.21(b)(4) (1993) allows insurers to perfect a right of subrogation against the tortfeasor. The statute provides that

> [i]f an underinsured motorist insurer, following the approval of the [liability insurer's] application [for release], pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle and, provided that adequate notice of right of independent representation was given to the owner, operator, or maintainer, a finding of liability or the award of damages shall be res judicata between the underinsured motorist insurer and the owner, operator, or maintainer of the underinsured highway vehicle.

Id.

31. *Baxley*, 334 N.C. at 3-4, 430 S.E.2d at 897. On September 11, 1987, Nationwide also dispersed $10,000 to Ms. Baxley under a separate medical payments provision of her insurance policy. *Id.* Part C of Ms. Baxley's insurance policy with Nationwide entitled "Medical Payments Coverage" reads: "We will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury: 1. Caused by accident; and 2. Sustained by a covered person. We will pay only those expenses incurred within one year from the date of the accident." Record at 34, *Baxley* (No. 538PA91).

32. *Baxley*, 334 N.C. at 4, 430 S.E.2d at 897.

33. *Id.* at 4, 430 S.E.2d at 897. Under the prejudgment interest doctrine as it now exists in North Carolina, a party may stop the accrual of interest in either of two ways: by settling the claim out of court or by posting with the clerk of court an amount sufficient to satisfy the final judgment. *Id.* at 9, 430 S.E.2d at 900. In this case, by tendering $25,000 to the clerk of court to secure its right of subrogation, Nationwide halted the accrual of interest on that amount.

paid Ms. Baxley an additional $65,000[34] and, pursuant to its right of subrogation,[35] received the $25,000 that Allstate had deposited with the clerk of court.[36]

Upon Nationwide's refusal to tender payment for the prejudgment interest award, Ms. Baxley filed a declaratory judgment action seeking to determine whether Nationwide, as her UIM carrier, was liable for prejudgment interest up to the policy limit.[37] The Superior Court judge ruled that the obligation for costs and prejudgment interest rested on the primary carrier, in this case Allstate, and on the original defendant, in this case Ms. Brown, rather than on Nationwide.[38]

On appeal, the North Carolina Court of Appeals reversed the trial court's holding. Relying on *Ensley v. Nationwide Mutual Insurance Co.*,[39] the court ruled that "[t]he defendant assumed up to its policy limits the liability of the uninsured motorist for damages which the plaintiff is legally entitled to recover from the uninsured motorist."[40] Based on this holding, the court remanded the case to the trial court with instructions to apply the provisions of section 24-5(b)[41] to the $65,000 paid to Ms. Baxley by Nationwide on December 13, 1988.[42]

The North Carolina Supreme Court granted Nationwide's petition for discretionary review.[43] Writing for the majority,[44] Justice Frye carefully reiterated the court's prior holding that because section 24-5(b) is not included in the Financial Responsibility Act, the terms of the individual insurance policy govern the insurer's liability for interest above its policy limits.[45] However, because at least a portion of the interest in this case

34. *Id* at 4, 430 S.E.2d at 897. In addition to disclaiming liability for the prejudgment interest award, Nationwide claimed that the $10,000 it paid pursuant to Ms. Baxley's medical payments coverage should be credited against its UIM liability. *Id.* If such a credit were allowed, the $25,000 previously paid and this payment of $65,000 would represent full satisfaction of the $100,000 UIM policy. If this credit were not allowed, Nationwide would be deemed to have paid only $90,000 towards its UIM liability. For a discussion of the court's resolution of the medical payments credit issue, see *infra* note 54.

35. *See supra* note 30 and accompanying text.

36. *Baxley*, 334 N.C. at 4, 430 S.E.2d at 897.

37. *Id.*

38. *Id.* at 5, 430 S.E.2d at 897-98.

39. 80 N.C. App. 512, 515, 342 S.E.2d 567, 569, *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986). *See infra* notes 112-16 and accompanying text.

40. *Baxley*, 334 N.C. at 5, 430 S.E.2d. at 898.

41. *See supra* note 4.

42. *Baxley*, 334 N.C. at 5, 430 S.E.2d at 898.

43. *Id.* at 6, 430 S.E.2d at 898.

44. *Id.* at 3, 430 S.E.2d at 896. Justice Meyer filed a dissenting opinion. *Id.* at 14, 430 S.E.2d at 903 (Meyer, J., dissenting); *see also infra* notes 58-64 and accompanying text. Justice Parker did not participate in the resolution of this case. *Baxley*, 334 N.C. at 14, 420 S.E.2d at 903.

45. *Id.* at 6, 430 S.E.2d at 898 (citing Sproles v. Greene, 329 N.C. 603, 613, 407 S.E.2d 497, 503 (1991)).

would fall within the limits of the UIM policy,[46] this case could not be wholly disposed of by reference to those precedents.[47] Instead, the court was required to determine whether the language of the policy itself obligated Nationwide to pay prejudgment interest[48] or whether the Financial Responsibility Act requires such coverage despite the policy language.[49]

The applicable contractual language stated that Nationwide promised to pay, up to its UIM policy limit, "damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of: (1) [b]odily injury sustained by a covered person and caused by an accident; and (2) [p]roperty damage caused by an accident."[50] Adopting a broad interpretation of "damages,"[51] the court held that "the insured is legally entitled to recover the total amount of money that the

46. In her argument on appeal to the North Carolina Supreme Court, Ms. Baxley contended that "[t]he court of appeals correctly found that defendant, Nationwide Mutual Insurance Company, is obligated to pay prejudgment interest on the judgment in the underlying tort action up to its policy limits." Plaintiff-Appellee's New Brief at 4, *Baxley* (No. 538PA91). The notion that the interest at issue in this case fell within the $100,000 UIM limit was based on an argument that, even if allowed to claim the medical payments credit, Nationwide would be out of pocket only $75,000 ($65,000 paid pursuant to the trial court judgment plus $10,000 medical payments) since it recouped from Allstate the $25,000 it had earlier paid to Ms. Baxley to preserve its right of subrogation. Although apparently unquestioned by the North Carolina Supreme Court, this position appears to be in direct conflict with the language of the Financial Responsibility Act. Section 20-279.21(b) (4) governs UIM coverage and states: "[T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident." N.C. GEN. STAT. § 20-279.21(b)(4) (1993). Under this formulation, Nationwide's limit of liability on its UIM policy should have been the difference between the amount paid to Ms. Baxley by Allstate under Ms. Brown's liability policy ($25,000) and the limit of liability under Ms. Baxley's UIM policy ($100,000), or $75,000. Viewed in this light, the court incorrectly limited the scope of its analysis to liability within the policy limits. Had the court properly characterized *Baxley* as a case involving liability in excess of policy limits, it is likely that Nationwide would have prevailed based on the rules of Lowe v. Tarble, 313 N.C. 460, 329 S.E.2d 648 (1985) and Sproles v. Greene, 329 N.C. 603, 407 S.E.2d 497 (1991). *See infra* notes 108-11, 118-26 and accompanying text.

47. *Baxley*, 334 N.C. at 6, 430 S.E.2d at 989 ("This case is different in that the question raised by the parties is whether the UIM carrier, Nationwide, is obligated to pay prejudgment interest *up to* its policy limits.").

48. *Id.*

49. *Id.*

50. Record at 36, *Baxley* (No. 538PA91).

51. AMERICAN JURISPRUDENCE defines "damages" as "the sum of money which the law awards or imposes as a pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of either a breach of a contractual obligation or a tortious act." 22 AM. JUR. 2D. *Damages* § 1 (1988). As a subset of this overall classification, "compensatory damages" may be defined as

> damages in satisfaction of, or in recompense for, loss or injury sustained. They compensate a plaintiff for actual injury or loss resulting, for instance, from bodily or property damage. The term covers all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages.

Id § 23.

judgment says she is entitled to recover from the tortfeasor."[52] Consequently, because "Nationwide ha[d] promised to pay the insured all the 'damages' awarded to her, up to its policy limit"[53] and prejudgment interest was within the amount to which she was entitled under the terms of the judgment,[54] Ms. Baxley was entitled to payment of prejudgment interest under the terms of her UIM policy with Nationwide.[55] In dicta, the court also noted that

> [r]equiring the UIM carrier to pay prejudgment interest up to its policy limit is not a harsh result since the UIM carrier has had the opportunity to invest the money during the pendency of the suit. In addition, it is within the UIM carrier's power to stop the accrual of prejudgment interest by offering (or posting) its policy limit.[56]

Consequently, because Nationwide, as Ms. Baxley's UIM carrier, had assumed primary responsibility for the defense of Ms. Brown, the court held it accountable for "the amount of damage it caused plaintiff by delaying the payment due under its UIM coverage."[57]

In a dissenting opinion, Justice Meyer argued that the majority misinterpreted the language of Nationwide's policy. Rather than hold Nationwide liable for all "damages" the insured was legally entitled to recover, he would read the policy language literally and would hold that the UIM carrier was liable only for "damages suffered by reason of bodily injury and property damage."[58] He argued that purely economic injuries caused by factors unrelated to the accident itself should not be compensable under the UIM portion of Ms. Baxley's policy.[59] Justice Meyer also recognized that liability contracts, including the one at issue in this case, commonly include "supplemental payment provisions" that spell out other types of obligations, such as defense costs and interest, that the insurer will assume.[60] Because the contract at issue in *Baxley* contained such a provision in the liability

52. *Baxley*, 334 N.C. at 7, 430 S.E.2d at 899.

53. *Id.*

54. *Id.* The majority reversed the court of appeals with respect to the medical payments credit issue and held that Nationwide was not entitled to a credit. *Id.* at 12, 430 S.E.2d at 902. Because Ms. Baxley had paid separate premiums for the two types of coverage, and no provision in the contract gave Nationwide a right of subrogation or credit, the court rejected Nationwide's argument that recovery under both provisions unjustly enriched Ms. Baxley. *Id.* at 13-14, 430 S.E.2d at 902-03.

55. *Id.* at 9, 430 S.E.2d at 900.

56. *Id.*

57. *Id.*

58. *Id.* at 15, 430 S.E.2d at 904 (Meyer, J., dissenting).

59. *Id.* (Meyer, J., dissenting) (stating that "[i]nterest cannot be said to arise from bodily injury or property damage").

60. *Id.* (Meyer, J., dissenting). As an example of a supplemental payments provision, the liability portion of Ms. Baxley's policy with Nationwide included the following language:

portion of the policy, but not in the UM/UIM portion, he concluded that the contract obviously was not intended to cover such payments.[61] Finally, he agreed with the trial court's ruling that the obligation for prejudgment interest should properly fall upon the original defendant and liability carrier.[62] In his view, the defendant contracted for and paid premiums for liability coverage, defense costs, court costs, and interest on the judgment.[63] To hold that the plaintiff's UIM carrier must pay a portion of these costs would deprive the defendant of the benefit of her bargain with her liability carrier.[64]

The importance of the *Baxley* decision is best understood in light of the debate surrounding prejudgment interest and its role in tort remediation. Prejudgment interest is interest on the amount of the judgment from the time the plaintiff files the action[65] until the court enters judgment.[66] As such, it is a remedial device intended "to indemnify a claimant for the loss of the use of the money which presumably could have been earned had payment of damages not been delayed."[67]

> In addition to our limit of liability, we will pay on behalf of a covered person: . . . *Interest accruing after any suit we defend is instituted.* Our duty to pay interest ends when we pay our part of the judgment which does not exceed our limit of liability for this coverage.

Record at 22, *Baxley* (No. 538PA91) (emphasis added).

61. *Baxley*, 334 N.C. at 16, 430 S.E.2d at 904 (Meyer, J., dissenting).

62. *Id.* at 17, 430 S.E.2d at 905 (Meyer, J., dissenting).

63. *Id.* (Meyer, J., dissenting).

64. *Id.* (Meyer, J., dissenting). Justice Meyer also disagreed with the majority's resolution of the medical payments credit issue. Quoting the UM/UIM portion of the Nationwide policy, he argued that the medical payments paid by Nationwide fell within the following limit of liability: "Any amount otherwise payable for damages under this [UM/UIM] coverage shall be reduced by all sums: 1. Paid or payable because of the bodily injury . . . by or on behalf of persons or organizations who may be legally responsible." *Baxley*, 334 N.C. at 18, 430 S.E.2d at 905 (Meyer, J., dissenting) (quoting Part D of the Nationwide policy, Record at 37, *Baxley* (No. 538PA91)). Consequently, he would allow the $10,000 medical payments credit claimed by Nationwide. *Id.* (Meyer, J., dissenting).

65. N.C. GEN. STAT. § 24-5(b) (1991). It should be noted that this is not a universal formulation. *See* N.C. GEN. STAT. § 24-5(a) (1991) (providing that, in an action on a contract, the "amount awarded . . . bears interest from the date of breach"); ALASKA STAT. § 09.30.070 (Supp. 1993) (stating that interest shall accrue from the date of injury); COLO. REV. STAT. ANN. § 13-21-101 (West 1987) (same); OHIO REV. CODE ANN. § 1343.03(c) (1993) (same).

66. N.C. GEN. STAT. § 24-5 (1991). Prejudgment interest should be distinguished from post-judgment interest, which accrues from the date the court enters judgment until the judgment is satisfied. *See id.*

67. David J. Pierce, Note, *Insurer's Liability for Prejudgment Interest: A Modern Approach*, 17 U. RICH. L. REV. 617, 617 (1983); *see also* Deans v. Layton, 89 N.C. App. 358, 370, 366 S.E.2d 560, 568, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 276 (1988) ("In general, interest is the compensation allowed by law or fixed by the parties for the use, forbearance, or detention of money."); Thomas F. Londrigan, *The Case for Prejudgment Interest*, 72 ILL. B.J. 62, 64 (1983) ("[I]t is meant to place an injured party in the same position as if he had been compensated immediately after his injury for his loss.").

Prejudgment interest as a remedy for lost "use" of money is a modern phenomenon. At common law, interest in any form was viewed as usury and considered an abhorrence to the law, and was generally unacceptable as an element of damages.[68] Consequently, "most courts, in the absence of a statute to the contrary, would not award interest on unliquidated pecuniary claims, the amount of which could not be ascertained or computed, even in theory, without a trial."[69] In the early part of this century, however, legal scholars began to recognize the need to compensate plaintiffs for the use-value of their money. Judge Learned Hand represented the growing trend when he proclaimed:

> Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.[70]

As jurists and politicians gradually accepted this economic reality, judicial decisions and statutes began to relax the common law rule disfavoring prejudgment interest. Under a new corollary, "[i]nterest would be awarded on claims which, though not liquidated in an exact amount, were based on a formula by which the amount due could be ascertained."[71] How-

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68. Laycock v. Parker, 79 N.W. 327, 332 (Wis. 1899) (discussing historical views regarding interest payments).

69. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 165 (1973). The belief underlying this rule was that defendants should be liable for interest only if the circumstances make it reasonably possible to determine the amount owed so that, if the defendant chooses, he may satisfy the claim and halt the accrual of interest. *Id.*; *see also* Harris & Harris Const. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 126, 123 S.E.2d 590, 602 (1962) ("It may be stated as a general rule, that interest is not allowed on unliquidated damages or demands, for the reason that the person liable does not know what sum he owes and therefore can be in no default for not paying.") (quoting 15 AM. JUR. *Damages* § 161, 579-80 (1938)). *See generally* 22 AM. JUR. 2D *Damages* §§ 654-55, 658-59 (1988) (discussing treatment of unliquidated damage claims in absence of a statute granting prejudgment interest).

70. Proctor & Gamble Distrib. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924); *see also* Londrigan, *supra* note 67, at 62 ("To this date the quality of our justice has not been exchanged for a speedy result; however, the legal profession must recognize the economic axiom: Justice delayed is justice denied.").

71. *Proctor & Gamble*, 2 F.2d at 165; *see also* General Metals, Inc. v. Truitt Mfg. Co., 259 N.C. 709, 713, 131 S.E.2d 360, 363 (1963) ("When the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach."); Harris & Harris Constr. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 126-27, 123 S.E.2d 590, 602-03 (1962); Harper v. Atlantic Coast Line R.R. Co., 161 N.C. 451, 452, 77 S.E. 415, 416 (1913). In *Harper*, the court held that

> damages recovered for a tort do not as a matter of law bear interest until after judgment, but when the tort consists solely in the destruction of property, and not in personal injuries, this Court has held that the jury may in their discretion give interest on the value of the property destroyed from the date of its destruction, in addition to the actual value of the property.

ever, even with this liberalization, awards of prejudgment interest remained limited to contract actions.[72]

Recognizing the need for a similar remedy in tort actions, the North Carolina General Assembly amended section 24-5 in 1981 to allow for prejudgment interest in an "action other than contract."[73] The application of the statute in cases in which the claim is covered by liability insurance, however, has generated much debate.[74] Because many tortfeasors have liability insurance, the apportionment of liability for prejudgment interest has become a divisive issue between insurance companies and their insureds.[75]

Three schools of thought can be clearly delineated regarding this issue. The first of these is the "total compensation" theory, which holds that insurers should be held liable for prejudgment interest even in excess of their policy limits.[76] Under that theory, proponents argue that the economic justifications for awarding prejudgment interest[77] and the ability to limit the adverse effects of such liability by statute[78] outweigh the insurers' interests

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Id.; *see also* Lazenby v. Godwin, 60 N.C. App. 504, 509, 299 S.E.2d 288, 291 (1983) (denying prejudgment interest in a tort action in which the judgment was not covered by liability insurance on the ground that although "[p]rejudgment interest has . . . been granted under certain limited circumstances where the amount of a claim is obvious or easily ascertainable from the contract or insurance policy[,] . . . as a general rule, North Carolina courts do not recognize the granting of prejudgment interest on unliquidated damages") (citations omitted).

72. *See, e.g.*, N.C. GEN. STAT. § 24-5 (1980); *see also* Joel A. Williams, *Prejudgment Interest: An Element of Damages Not to be Overlooked*, 8 CUMB. L. REV. 521, 521-25 (1977) (discussing the liquidated/unliquidated and ascertainability theories of prejudgment interest).

73. Act of May 5, 1981, ch. 327, § 1, 1981 N.C. Sess. Laws 369 (current version codified at N.C. GEN. STAT. § 24-5(b) (1991)); *see also supra* note 4 and accompanying text.

74. *See infra* notes 108-26 and accompanying text.

75. A majority of states have enacted statutes that, in varying degrees, allow awards of prejudgment interest in tort actions. *See* ALASKA STAT. § 09.30.070 (Supp. 1993); CAL. CIV. CODE § 3291 (West Supp. 1994); COLO. REV. STAT. ANN. § 13-21-101 (West 1987); CONN. GEN. STAT. ANN. § 52-192a (West Supp. 1994); D.C. CODE ANN. § 109 (1981); HAW. REV. STAT. § 636-16 (1985); IDAHO CODE § 28-22-104 (Supp. 1993); IND. CODE ANN. § 34-4-37 (Burns Supp. 1993); IOWA CODE § 535.3 (Supp. 1994); LA. REV. STAT. ANN. § 13-4203 (West 1991); ME. REV. STAT. ANN. tit. 14, §'1602 (West Supp. 1993); MD. CODE ANN., CTS. & JUD. PROC. § 11-301 (1989); MASS. GEN. L. ch. 231, § 6B (1986); MICH. STAT. ANN. § 600.6013 (Callaghan Supp. 1993); MINN. STAT. ANN. § 549.09 (West Supp. 1994); MISS. CODE ANN. § 75-17-7 (1972); MO. ANN. STAT. § 408.040(2) (Vernon 1990); MONT. CODE ANN. § 27-1-210 (1993); NEV. REV. STAT. § 45-103.02 (1988); N.H. REV. STAT. ANN. § 524:1-b (1974); N.M. STAT. ANN. § 56-8-4(B) (Michie 1986); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney Supp. 1994) (allowing prejudgment interest from the date of decedent's death in wrongful death actions); N.C. GEN. STAT. § 24-5(b) (1991); OHIO REV. CODE ANN. § 1343.03(c) (Anderson 1993); OKLA. STAT. ANN. tit. 12, § 727(A) (2) (West 1988); R.I. GEN. LAWS § 9.21-10 (Supp. 1993); TENN. CODE ANN. § 47-14-123 (1988); UTAH CODE ANN. § 78-27-44 (1992); VA. CODE ANN. § 8.01-382 (Michie 1992); W. VA. CODE § 56-5-31 (Supp. 1993); WIS. STAT. ANN. § 807.01 (West Supp. 1993).

76. *See* Pierce, *supra* note 67, at 624.

77. *See infra* notes 81-91 and accompanying text.

78. *See infra* note 96 and accompanying text.

in contractual certainty.[79] After all, supporters claim, "[i]t hardly seems fair to allow the insurance company to litigate the entire case in an effort to save its policy coverage and then force the insured to pay the prejudgment interest on the excess verdict when he exercised no control over the litigation process."[80]

The most basic argument in favor of total compensation is that it is the only mechanism by which tort plaintiffs can be fully compensated for their injuries.[81] As one commentator stated: "Although the award for delay of time may be in the nature of interest, in reality, it is merely an extension of the compensatory damages *necessary to make the plaintiff whole.*"[82]

Along those same lines, proponents of prejudgment interest argue that because the insurer is in control of the litigation and can cease the accrual of interest at any time by settling the claim or posting its policy limit, it is unfair to allow the insurers to escape liability for the resulting economic harm.[83] Thus, permitting insurers to delay payment of claims while not paying for the use of the plaintiff's money during that time "overrides the espoused purpose of insurance, namely to prompt evaluation and payment of claims."[84]

In addition, it is argued that, without prejudgment interest requirements, insurers are able to reap large profits by investing those amounts. During the prejudgment process, while tort plaintiffs wait eagerly for their money, insurance companies set aside large reserve accounts that they may later use to satisfy a resulting judgment.[85] While the insurers are realizing substantial profits from the investment of these accounts, plaintiffs who must pay for medical expenses or repair property damage are forced to "borrow at commercial rates the same amount of money, which is being

79. ALAN I. WIDISS, UNINSURED & UNDERINSURED MOTORIST INSURANCE § 20.7, at 192 (2d ed. 1992). Widiss notes that

> [o]nce it is established that a claimant is entitled to compensation provided by an uninsured motorist insurance coverage, there is little, if any, reason to allow an insurer to derive economic benefit from forcing the insured to seek an adjudication of the claim. To allow insurers the benefit of the time value of an amount of insurance benefits—which an insured is subsequently determined to have been entitled to receive—to the date of payment following adjudication of a disputed claim is to encourage insurers to delay payments. . . . [I]t follows that the insurer should be liable for such interest even when the award or judgment itself is equal to the company's maximum coverage limits.

Id.

80. Pierce, *supra* note 67, at 627. For a brief critique of this theory, see ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS, § 6.15, 320 (2d ed. 1988).

81. *See* Sandler, *supra* note 3, at 598.

82. Londrigan, *supra* note 67, at 65.

83. *See* Sandler, *supra* note 3, at 596-97.

84. Londrigan, *supra* note 67, at 64.

85. *See* Sandler, *supra* note 3, at 598-99.

used by [their] creditors at no cost."[86] Theoretically, the insurers' investment income will be exactly equal to the prejudgment interest they are forced to pay to the injured parties,[87] and the net effect of prejudgment interest awards will be simply to level the playing field.[88] In support of this result, one commentator noted: "Justice requires that one ought not be able to use someone else's money for a considerable period of time without paying anything for its use. This is the very basis of the theory of restitution."[89]

Perhaps the most persuasive argument in favor of prejudgment interest is that forcing insurers to pay prejudgment interest will encourage early settlement of meritorious claims.[90] The desire to avoid prejudgment interest charges encourages insurers who might otherwise delay the trial to extract a more desirable settlement or earn investment profits during the interim to settle the case early.[91] Hence, prejudgment interest awards not only ensure full compensation for plaintiffs, but also lessen the congestion of court dockets.

The second school of thought reaches a conclusion opposite to that of the "total compensation" school. Under what might be called the "voluntary contract" school, insurers argue that prejudgment interest is not included within "damages" as that term appears in the Financial Responsibility Act, and consequently their liability for it should be governed solely by the language of their contracts.[92] Although the goal of tort law may be to make plaintiffs whole, insurers contend that they are not responsible for the accomplishment of that task. Instead, their only obligation to the injured party should be to pay the policy limit for which the insured contracted.[93]

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86. Londrigan, *supra* note 67, at 64.

87. Id. at 65 (quoting Kent W. Seifried, Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising in the Sixth Circuit*, 46 U. CIN. L. REV. 151, 164 n.15 (1977)).

88. *See* WIDISS, *supra* note 79, § 20.7 at 192; Londrigan, *supra* note 67, at 66.

89. Londrigan, *supra* note 67, at 64.

90. *See* Sandler, *supra* note 3, at 599.

91. *See* Hartford Accident & Indem. Co. v. United States Fire Ins. Co., 710 F. Supp. 164, 167-68 (E.D.N.C. 1989). The *Hartford* court held that

> N.C. [Gen. Stat.] § 24-5, under which the prejudgment interest was awarded, was designed to provide an incentive for an insurance carrier to resolve claims quickly rather than delay resolution in order to maximize return of investment on lost reserves. . . . [T]he policy behind N.C. [Gen. Stat.] § 24-5 is to prevent dilatory tactics in the settlement of viable claims. . . .

Id.; *see also* Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 450, 337 S.E.2d 158, 161 (1985) ("The legislature's purpose in amending [N.C. GEN. STAT. §] 24-5 was to provide an incentive for insurance companies to expeditiously litigate actions they are involved in.").

92. *See, e.g.*, Defendant-Appellant's New Brief at 8, *Baxley* (No. 538PA91).

93. Defendant-Appellant's Reply Brief at 8-9, *Baxley* (No. 538PA91).

One argument advanced by insurers to support their position is that they are not responsible for the delays of the judicial system. They argue that, under the circumstances, forced liability for prejudgment interest is an unfair penalty on insurers who do not contract for such a risk.[94]

Insurers also challenge the notion that adoption of a total compensation regime will lead to increased settlements. Rather than eliminating insurers' incentives to delay and encouraging early settlement, they argue that forcing insurers to bear the costs of prejudgment interest will merely shift the delay incentive to the plaintiff.[95] Secure in the knowledge that any delay will be compensated by later recovery of prejudgment interest, plaintiffs

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94. *See* Londrigan, *supra* note 67, at 66. Proponents of total compensation contend otherwise. Taking a closer look at the nature of tort claims and the result of prejudgment interest requirements, they contend that this argument is unfounded, noting that

> [w]hile only the defendant profits by delay, it does not follow that it is an unfair penalty to have defendant account for that profit. With prejudgment interest, neither the plaintiff nor defendant profits by delay; however, both are equally penalized by the continued cost of litigation if the case is not settled.

Id. Finding that something is a penalty presumes the premise that the payor was otherwise entitled to that amount. *Compare* BLACK'S LAW DICTIONARY 1133 (6th ed. 1990) (defining "penalty" as "a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done") *with* Londrigan, *supra* note 67, at 403 (defining "debt" as "[a] specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment"). In the case of tort compensation and insurance, the plaintiff is deemed, however artificially, to have been entitled to payment of the claim on the date the complaint was filed. *See, e.g.*, Pierce, *supra* note 67, at 617 ("Once a cause of action accrues, the injured party becomes entitled to be made whole."). Thus, it is the plaintiff, not the insurer, who is entitled to equitable ownership of the judgment principle during the process of adjudication, and it is she who should be entitled to the interest income on that amount. To take that income from the insurer and pass it on to the insured cannot properly be viewed as a penalty that deprives the insurer of its rightful property. *See* Londrigan, *supra* note 67, at 66.

95. Lawrence R. Smith, *The Case Against Prejudgment Interest*, 72 ILL. B.J. 63, 73 (1983); Londrigan, *supra* note 67, at 66; *see also* Pierce, *supra* note 67, at 623, noting that

> [h]olding the insurer liable for prejudgment interest in excess of the policy limits will put unfair pressure on the insurer to settle early. It is argued that such excess liability could force an insurance company to acquiesce to a plaintiff's demands at an early stage of the proceeding, regardless of any meritorious defenses it may have. It would do so rather than run the risk of paying a large amount of interest caused by court delays, should the plaintiff eventually recover.

Id. Commentators argue that prejudgment interest is unfair to insurers because, since both the claim and the amount of damages are in dispute, they cannot reasonably be expected to calculate the amount on which prejudgment interest will be accruing and therefore cannot make an appropriate decision concerning whether to settle the claim or proceed to trial. *See* Londrigan, *supra* note 67, at 65; Sandler, *supra* note 3, at 599. As one commentator replied, however:

> [the d]efendant's apparent dilemma—whether to pay the claim and avoid prejudgment interest, or to litigate the claim with the possibility of an interest award—is illusory. If defendant is found liable, he has not suffered the uncertain loss of interest damages. Theoretically, the money controlled by him, and found owing as damages, has produced during the period of litigation the exact amount due as prejudgment interest.

Londrigan, *supra* note 67, at 65.

would have the incentive to reject reasonable offers of settlement in hopes of obtaining a larger judgment at trial.

Although this argument is valid in theory, the insurers' position is weakened by the fact that simple statutory provisions can effectively alleviate this concern. For example, by providing that a plaintiff forfeits the right to receive prejudgment interest if he rejects a "reasonable" offer of settlement,[96] a plaintiff would face an all-or-nothing risk with respect to the interest value of his money during the pretrial process.

Finally, insurers maintain that the potential liability for prejudgment interest would increase the level of risk and instability in the industry.[97] When this concern is coupled with their inability to limit their liability by contract, insurance companies would be forced to recoup their costs by raising premiums.[98]

The public policy underlying the Financial Responsibility Act supports this argument. The goal of the Financial Responsibilty Act is to mandate that every owner or operator of a motor vehicle be insured for at least some minimum amount so that parties injured by judgment-proof defendants will be able to recoup at least a portion of their losses.[99] To accomplish this goal, the state necessarily must concern itself with setting statutory minimums on coverage and premium caps low enough that even low-income citizens can afford insurance. Hence, if a total or even partial compensation scheme would force insurers to raise their rates above that amount in order to remain profitable, the ability of the state to protect its citizens from injury and loss due to accidents with uninsured and underinsured motorists would be seriously compromised.

The third school of thought, which a majority of courts addressing the issue have adopted,[100] is the "limited liability" school.[101] Compromising

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96. *See, e.g.*, MICH. STAT. ANN. § 600.6013 (Callaghan Supp. 1993). That statute provides:

> (7) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered, the court shall order that interest shall not be allowed beyond the date the written offer of settlement which is made and rejected by the plaintiff, and is filed with the court. . . .
>
> (11) As used in this section:
>
> (a) "Bona fide, reasonable written offer of settlement means:
>
> (i) With respect to an offer of settlement made by a defendant against whom judgment is subsequently rendered, an offer of settlement that is not less than 90% of the amount actually received by the plaintiff in the action through judgment.

Id.

97. *See* Pierce, *supra* note 67, at 623.

98. *See* Smith, *supra* note 95, at 73.

99. *See infra* note 135 and accompanying text.

100. *See, e.g.*, Houselog v. Milwaukee Guardian Ins., 473 N.W.2d 52, 55 (Iowa 1991); Nunez v. Nationwide Mut. Ins. Co., 412 A.2d 1383, 1383 (Me. 1991); Allstate Ins. Co. v. Starke, 797 P.2d 14, 19 (Colo. 1990); Guin v. Ha, 591 P.2d 1281, 1285 (Alaska 1979); Brinkman v. Aid Ins. Co., 766 P.2d 1227, 1235 (Idaho 1988); Factory Mut. Ins. Co. v. Cooper, 262 A.2d 370, 373 (R.I.

between the insurers' rights to limit their liability contractually and the goal of total compensation, proponents of this theory argue that insurers should be held liable for prejudgment interest, but that their liability should not exceed their policy limits.[102]

In dealing with this issue, North Carolina has followed the majority rule[103] and moved toward limited liability. However, because of the questionable interrelationship between the Financial Responsibility Act and section 24-5(b), most of the cases in this area have turned on the court's interpretation of the particular policy language at issue. Not until *Baxley* did the North Carolina Supreme Court begin to articulate a rationale that might resolve the issue based on statutory authority.

Although the provisions of the Financial Responsibility Act are written into every policy of insurance and take precedence over any conflicting policy provisions,[104] it is well settled that any coverage above the statutory minimum is voluntary and governed solely by the policy language.[105] Thus, because the statute involving prejudgment interest is entirely separate from the code of insurance and is not a part of the Financial Responsibility Act, the inclusion of prejudgment interest appears to be optional on the part of insurance companies. As a result of the Financial Responsibility Act's apparent failure to specifically address the issue of liability for prejudgment interest[106]—the Act refers only to "damages" awarded as a result of personal injury or property damage—North Carolina courts have relied heavily

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1970); Walker v. Walker, 235 A.2d 520, 521-22 (N.H. 1967). *But see* Matich v. Modern Research Corp., 420 N.W.2d 67, 73-74 (Mich. 1988) (holding insurer liable for prejudgment interest in excess of the policy limits); Burton v. Forret, 498 So.2d 706, 712-13 (La. 1986) (same).

101. *See* Pierce, *supra* note 67, at 623-27.

102. *See id.*, at 620, 624.

103. *See supra* note 100 and accompanying text.

104. *See, e.g.*, Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 440-41, 238 S.E.2d 597, 603-04 (1977). In *Chantos*, the court stated:

> Under the Financial Responsibility Act, all insurance policies covering loss from liability growing out of the ownership, maintenance and use of an automobile are mandatory to the extent coverage is required by [N.C. Gen. Stat. §] 20-279.21. . . . The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail.

Id.; *accord* Moore v. Hartford Fire Ins. Co. Group, 270 N.C. 532, 542-43, 155 S.E.2d 128, 135 (1967).

105. N.C. GEN. STAT. § 20-279.21(g) (1993) ("Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage . . . and such excess or additional coverage shall not be subject to the provisions of this article."); Paul D. Coates, *Settling with the Tort-feasor and Preserving the UIM Action: A Defense Perspective, in* INSURANCE LAW 12 (N.C. Academy of Trial Lawyers continuing legal education presentation) (1993) ("In general, the obligation for interest under a liability policy will be governed by the terms of the policy.").

106. N.C. GEN. STAT. § 20-279.21(b) (2-4) (1993). *See supra* notes 8-10.

on broad interpretations of insurance policy language to accomplish the goals of section 24-5(b).[107]

The first case to have a major impact in this area was *Lowe v. Tarble*.[108] *Lowe* addressed the extent to which the insurance company would be liable for prejudgment interest beyond its policy limits.[109] In addition to its limit of liability, the policy provided that the company would

> (2) Pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon.[110]

The court held that prejudgment interest was a "cost taxed against the insured" and was therefore the obligation of the insurer under the terms of the contract.[111]

Next, the North Carolina Court of Appeals addressed a fact situation almost identical to *Baxley* in *Ensley v. Nationwide Mutual Insurance Co.*[112] In *Ensley*, the plaintiff had been struck by a hit-and-run driver and brought suit to recover damages for personal injuries under her UM policy.[113] The trial court awarded the plaintiff $16,500 in damages plus prejudgment interest and court costs.[114] On appeal, the defendant insurance company argued that the language of the contract, which did not provide coverage for costs or prejudgment interest, should control its liability to the plaintiff for prejudgment interest under the provisions for contract actions set forth in section 24-5(a).[115] The court rejected this argument and held that the

> [p]laintiff's right to recover against his . . . insurer under the uninsured motorist endorsement is derivative and conditional. Unless he is 'legally entitled to recover damages' . . . from the uninsured motorist[,] the contract upon which he sues precludes him from recovering against the defendant. . . . [Thus,] despite the contractual relation between plaintiff insured and defendant

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107. *See infra* notes 108-26 and accompanying text.

108. 313 N.C. 460, 329 S.E.2d 648 (1985).

109. On May 4, 1981, the defendant, Mr. Samuel Tarble, caused an automobile accident in which the plaintiff, Mr. Bobby Lowe, was injured. Following a jury trial, the trial court entered judgment in favor of the plaintiff for $85,000 plus $1000 damages for Mrs. Lowe's loss of consortium and prejudgment interest. Lowe v. Tarble, 312 N.C. 467, 468, 323 S.E.2d 19, 20 (1984) *aff'd on reh'g*, 313 N.C. 460, 328 S.E.2d 648 (1985).

110. *Lowe*, 313 N.C. at 463, 329 S.E.2d at 651.

111. *Id.* at 464, 329 S.E.2d at 651.

112. 80 N.C. App. 512, 342 S.E.2d 567, *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986).

113. *Id.* at 513, 342 S.E. 2d at 568.

114. *Id.*

115. *Ensley*, 80 N.C. App. at 513-514, 342 S.E.2d at 568. For the text of § 24-5(a), see *supra* note 4 and accompanying text.

> insurer, this action is actually one for the tort allegedly committed by the uninsured motorist.[116]

In 1991, the North Carolina Supreme Court again addressed the *Lowe* issue[117] of insurer liability beyond policy limits. In *Sproles v. Greene*,[118] two insurance policies provided coverage for the plaintiff's injuries, resulting in a total liability limit of $25,000 per person and $50,000 per accident, and UIM coverage of $100,000.[119] The total judgment in the case was $950,000 plus prejudgment interest on $750,000.[120] On July 30, 1987, the defendant's liability carrier paid the clerk of court the $25,000 limit of its policy as well as $2312.36 in interest.[121] The liability insurer then challenged the finding that it was liable for prejudgment interest on the entire judgment.[122] Under the terms of the policy, the liability insurer agreed to pay, in addition to its limit of liability, "all defense costs we incur."[123] Distinguishing *Lowe*, the court stated that

> [t]he promise to pay "all defense costs" in the Integon policy is quite different from the promise to pay "all costs taxed against the insured." . . . "Defense costs" refer to costs associated with the process of defending a claim such as attorney fees, deposition expenses, and court costs including such items as subpoena and witness fees.[124]

Most importantly, the court held that it could find no provision in the Financial Responsibility Act that would require a liability insurer to pay prejudgment interest in excess of its policy limits despite the fact that such interest may properly be taxed against the insured,[125] and concluded that the liability insurer was not liable for prejudgment interest beyond its policy limits.[126]

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116. *Ensley*, 80 N.C. App. at 515, 342 S.E.2d at 569.

117. 313 N.C. 460, 329 S.E.2d 648 (1985). *See supra* notes 108-111 and accompanying text.

118. 329 N.C. 603, 407 S.E.2d 497 (1991).

119. *Id.* at 606, 407 S.E.2d at 499. In *Sproles*, the defendant collided with the rear of a van in which Mrs. Sproles and two other passengers were riding. The collision caused the van to run off the highway and overturn several times. Ms. Sproles was totally and permanently disabled as a result of the accident. *Id.*

120. *Id.* The judgment against Mr. Greene represented $750,000 for the injuries Mrs. Sproles sustained and $200,000 in damages for the loss of consortium suffered by Mr. Sproles. *Id.*

121. *Id.*

122. *Id.* It is interesting to note that the liability insurer voluntarily paid prejudgment interest beyond its policy limits on the portion of the judgment attributable to its limit of liability. The interest it refused to pay represented that attributable to the remaining portion of the verdict which was equal to thirty times the insurer's liability limit. *Id.* at 607, 407 S.E.2d at 499.

123. *Id.* at 611, 407 S.E.2d at 501.

124. *Id.* at 611, 407 S.E.2d at 502.

125. *Id.* at 612, 407 S.E.2d at 503.

126. *Id.*

This decision provided the context for the *Baxley* dispute. *Baxley* differed from the North Carolina Supreme Court's previous decisions because the issue presented was not whether the insurer was obligated to pay prejudgment interest above its policy limits, but whether it was liable for the portion of interest that fell within its policy limits.[127]

On one hand, categorizing prejudgment interest as damages appears to be inconsistent with the court's prior holding in *Lowe* that prejudgment interest is part of the "costs taxed against the insured."[128] Yet *Baxley* is entirely consistent with the court's apparent willingness to adopt broad and flexible readings of policy language to attain the goal of total compensation wherever possible.[129]

In his dissent, Justice Meyer appeared to accept the majority's conclusion that prejudgment interest may properly be categorized as an element of compensatory damages in tort actions.[130] Rather than challenging this holding, he argued that even if prejudgment interest is an element of damages, it was not covered by Ms. Baxley's policy with Nationwide.[131] Justice Meyer's argument clearly comports with a literal reading of the statutory and policy language. Both the Financial Responsibility Act and the Nationwide policy provide coverage for "damages which a covered person is legally entitled to recover . . . because of: (1) Bodily injury . . . caused by an accident; and (2) Property damage caused by an accident."[132] According to Justice Meyer, prejudgment interest damages—which are designed to remedy economic injuries that arise not out of the accident and injury itself, but out of the inefficiency of the adjudicative process—"cannot be said to arise from bodily injury and property damage" as required by the statute.[133]

The majority was unwilling to confine itself to this narrow approach. Instead, the majority asserted that the "damages" the insured is " 'legally entitled to recover' from the tortfeasor as a result of bodily injury" include the total amount of money that the judgment says she is entitled to recover.[134] Although this approach best effectuates the combined purposes of

127. *Baxley*, 334 N.C. at 6, 430 S.E.2d at 898.

128. *See supra* notes 108-11 and accompanying text.

129. *See supra* notes 108-26 and accompanying text.

130. *Baxley*, 334 N.C. at 17, 430 S.E.2d at 904 (Meyer, J., dissenting).

131. *Id.* at 15, 430 S.E.2d at 903-4 (Meyer, J., dissenting) ("The majority concludes that Nationwide's obligation under its UIM coverage to pay 'damages' . . . includes prejudgment interest. I disagree. . . . Under the plain language of the UIM coverage provisions, Nationwide's obligation is limited to paying damages suffered by reason of bodily injury and property damage.").

132. *Id.* at 15, 430 S.E.2d at 904 (Meyer, J., dissenting); *see also supra* note 27.

133. *Baxley*, 334 N.C. at 15, 430 S.E.2d at 904 (Meyer, J., dissenting).

134. *Id.* at 7, 430 S.E.2d at 899.

section 24-5(b) and the Financial Responsibility Act,[135] even the most ardent supporters of prejudgment interest must concede the infirmity of its statutory foundation.

In the line of cases leading up to *Baxley*, the court has shown a marked tendency to interpret broadly the language of insurance contracts to arrive at its desired outcome.[136] As a result, however, the court has created inconsistent precedents: It has held that prejudgment interest can properly be considered as both a "cost"[137] (although not a "cost of defense"[138]), and as an element of "damages."[139] The court in *Baxley* attempted to dispel this inconsistency by stating that " 'the facts and issues in the present case are different from the facts in *Lowe* to a sufficient degree as to justify a contrary holding.' "[140] However, the court failed to discuss any significant factual differences to justify the distinction. In the absence of such an explanation, one is led to the conclusion that, in the years since *Lowe*, the court has agreed to view prejudgment interest as damages, properly awarded as compensation for tortious injuries. However, the court, possibly in an effort to preserve flexibility and limit the ability of insurers to avoid liability by artful drafting, has also refused to expressly overrule the *Lowe* holding.

In addition to confusing the costs/damages issue, the court's decision in *Baxley* left open a key question: While *Sproles* allows insurers to limit their liability for prejudgment interest above their policy limits,[141] does the Financial Responsibility Act mandate such coverage within the policy limits so that insurers cannot contract out of such liability? Or, alternatively, can insurers avoid this liability by carefully drafting contracts?[142]

Should the court continue on its current path, a number of factors indicate that the Financial Responsibility Act will be found to mandate prejudgment interest coverage within the policy limits. First, this result is consistent with the legislative intent underlying section 24-5(b) and the Financial Responsibility Act. As originally applied to tort claims, prejudg-

135. WIDDIS, *supra* note 79, § 31.1, at 3 ("The motor vehicle financial responsibility laws enacted by the states are designed to provide a prescribed level of minimum protection for those who may be injured in highway accidents as a consequence of the negligent operation of an insured vehicle.").

136. *See supra* notes 108-26 and accompanying text.

137. Lowe v. Tarble, 313 N.C. 460, 464, 329 S.E.2d 648, 651 (1985); *see also supra* notes 108-11 and accompanying text.

138. Sproles v. Greene, 329 N.C. 603, 611, 407 S.E.2d 497, 501 (1991); *see supra* notes 118-26 and accompanying text.

139. *Baxley*, 334 N.C. at 7, 430 S.E.2d at 899; *see supra* notes 51-57 and accompanying text.

140. *Id.* at 11 n.1, 430 S.E.2d at 901 n.1 (quoting Hartford Accident & Indem. Co. v. U.S. Fire Ins. Co., 710 F. Supp. 164, 167 (E.D.N.C. 1989), *aff'd*, 918 F.2d 955 (4th Cir. 1990)).

141. *See supra* notes 125-26 and accompanying text.

142. *Baxley*, 334 N.C. at 6, 430 S.E.2d at 899.

ment interest was allowed only when the claim was covered by liability insurance.[143] Moreover, its purpose was clearly to provide a more adequate level of compensation for injured plaintiffs.[144] To hold that the legislature did not intend recovery of prejudgment interest damages to fall within the statutory obligation of insurers would defeat the purposes of both mandatory liability insurance[145] and section 24-5(b),[146] because plaintiffs would continue to suffer economic losses occasioned by "judgment-proof" defendants. For example, if a tortfeasor was covered by a $25,000 liability policy and caused $10,000 in damages but was insolvent, the injured party could recover no more than the $10,000 he would have obtained without section 24-5(b).[147] Given that the purpose of mandatory liability insurance is to protect injured parties from financially irresponsible tortfeasors,[148] placing prejudgment interest outside the reach of plaintiffs rather than making it subject to the liability limit in the same manner as other damages would significantly hamper the effectiveness of the Financial Responsibility Act.

Second, one of the primary arguments in favor of awarding prejudgment interest to plaintiffs is that, because insurers control the litigation process, it is fair to impose the resulting costs upon them.[149] If insurers could contract around this liability, they would have a significant incentive to delay the judicial process.[150] By contrast, holding that insurers are liable for prejudgment interest within their policy limits would force insurers to weigh the comparative costs of settlement and trial and encourage early settlement of meritorious claims.[151] Dictum in *Baxley* provides explicit support for such a result. There the court reasoned that, in addition to the language of section 24-5(b) and the Nationwide policy,

> [r]equiring the UIM carrier to pay prejudgment interest up to its policy limit is not a harsh result since the UIM carrier has had the opportunity to invest the money during the pendency of the suit.

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143. *See supra* note 4 and accompanying text. The 1985 amendment that resulted in the current formulation of § 24-5 was explicitly aimed at making prejudgment interest available to plaintiffs regardless of the financial position of the defendant. Act of May 21, 1985, ch. 214, § 1, 1985 N.C. Sess. Laws 181 (codified at N.C. Gen. Stat. § 24-5(b) (1991)) ("An Act to clarify interest relating to judgments and provide for interest on noncontract judgments regardless of insurance coverage.").

144. *See supra* note 135 and accompanying text.

145. *See supra* note 135 and accompanying text.

146. *See supra* note 91 and accompanying text.

147. Presumably, a party who was injured by a solvent defendant would be able to recover the $10,000 from the tortfeasor's insurer in addition to recovering any prejudgment interest from the tortfeasor herself.

148. *See supra* note 135 and accompanying text.

149. *See supra* notes 83-84 and accompanying text.

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

151. *See supra* notes 90-91 and accompanying text.

> In addition, it is within the UIM carrier's power to stop the accrual of prejudgment interest by offering (or posting) its policy limit.[152]

Third, by equating prejudgment interest and damages in *Baxley*,[153] the North Carolina Supreme Court implied that, because the Financial Responsibility Act requires insurers to pay for all damages the insured is legally entitled to recover and prejudgment interest is an element of damages that the insured is legally entitled to recover, the insurer is liable for prejudgment interest.

Taking *Baxley* to its logical conclusion in this manner exposes a key loophole in the Financial Responsibility Act with respect to prejudgment interest. Even if it mandates coverage for prejudgment interest within insurance policy limits, because the Act does not mandate payment of prejudgment interest above policy limits, insurers who face claims at or above their policy limits will face none of the economic pressures that otherwise would be attributable to prejudgment interest.[154] Hence, the goals of early settlement—relieving crowded court dockets and insuring complete compensation for tort plaintiffs—would be lost in many cases.

Fourth, the insurers' argument that holding them liable for prejudgment interest will force them to raise rates is not, in itself, compelling. First, insurers would be encouraged to settle more claims at an early date rather than go to trial, thereby avoiding prejudgment interest on those claims as well as attorneys' fees and other litigation expenses.[155] Thus, an insurer should be able to estimate the average risk of its policies and calculate its premiums accordingly. Second, if it is the plaintiff rather than the defendant who forces the trial, insurers could avoid prejudgment interest costs by making a reasonable offer of settlement.[156] Finally, to the extent the loss of profits attributable to prejudgment interest presently being withheld from insureds necessitates an increase in rates, that increase would merely be a correction for past manipulation of the risk pool and would result in a more efficient insurance market. To illustrate, assume that both the rate of return on investments and the legal interest rate are identical at ten percent and the risk of loss per policy per year is $200 (1/500 chance of a $100,000 payout). Insurance Company "A" writes policies in a state that does not require payment of prejudgment interest. As a result, it can invest the risk component of its premiums during the year and keep any investment return. To achieve the $200 receipts necessary to cover its risk, it

152. *Baxley*, 334 N.C. at 9, 430 S.E.2d at 900.

153. *Id.* at 8, 430 S.E.2d at 900.

154. *See supra* notes 85-91 and accompanying text.

155. *See supra* notes 92-93.

156. *See supra* note 99 and accompanying text.

must charge its insured a total premium of $182 ($182 premium + $18 return on investment = $200 total risk). By contrast, Insurance Company "B" writes policies in a state that requires payment of prejudgment interest. In this situation, the insurer must pay any investment return to the claimant and cannot discount the risk of loss to its present value in arriving at a sufficient premium. Hence, to achieve the $200 gross income necessary to cover its risk, the insurance company must charge premiums of $200. In summary, to the extent that prejudgment interest results in a rate increase, it does so only because the present system subsidizes the actual risk with income from claimants' money. Under this analysis, insurers should be neutral from a profit perspective toward prejudgment interest.[157]

The decision in *Baxley* is thus important for two reasons. First, by holding that prejudgment interest is an element of compensatory damages, the decision places such interest well within the language of most insurance policies and, arguably, within the mandate of the Financial Responsibility Act. By doing so, *Baxley* opens the door for tort plaintiffs to receive a higher level of compensation for their injuries. More importantly, however, this decision illuminates the failure of the Financial Responsibility Act to deal adequately with the issue of prejudgment interest. Because of the loophole created by the coextensive application of the Financial Responsibility Act and section 24-5(b), *Baxley* should serve as a call for the General Assembly to reexamine the policy debate surrounding prejudgment interest. The Assembly should weigh the competing interests of total compensation, contractual certainty, and affordability and make clear the rules to be applied in automobile insurance cases. Without such a clarification, the law in this area is likely to continue as an ad hoc series of cases interpreting minor variations in contract language. As a result, insurance companies, cognizant of current holdings, will almost certainly decide the issue for themselves by drafting the language of their policies to exclude additional coverage for prejudgment interest. Consequently, tort plaintiffs unfortunate enough to be injured by financially distressed tortfeasors will continue to be inadequately compensated for their losses.

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157. On the other hand, it is crucial to remain mindful of the significant interest of insurers in controlling their liability contractually and the interest of the state in making sure that mandatory liability insurance remains widely affordable. *See supra* note 99 and accompanying text.